First Draft of Report #36, Cumulative Update to RCC Chapters 3, 7 and the Special Part

SUBMITTED FOR ADVISORY GROUP REVIEW
April 15, 2019

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

This Draft Report has two main parts: (1) draft statutory text for an enacted Title 22 (Title 22E) of the D.C. Code; and (2) commentary on the draft statutory text. The commentary corresponding to provisions in each Subtitle is separately paginated. The commentary explains the meaning of each provision and considers whether existing District law would be changed by the provision.

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

The deadlines for the Advisory Group's written comments on this First Draft of Report #36 - Cumulative Update to RCC Chapters 3, 7 and the Special Part are as follows:

- For statutory language and commentary on Subtitle I (General Part) provisions in Chapters 2 and 3 of the report,[1] May 13, 2019 (one month from the date of issue); and
- For statutory language and commentary on Subtitle I (General Part) provisions in Chapters 4 and 7 of the report, [2] and Subtitles II-V (Special Part), July 8, 2019 (twelve weeks from the date of issue).

Oral comments and written comments received after these dates may not be reflected in the next draft or final recommendations. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

[1] Written comments on RCC § 22E-214, Merger of Related Offenses, and provisions in RCC Chapter 3, Inchoate Liability, are due May 13. Other statutory language in the General Part, highlighted in yellow, is provided for reference only and is not part of this review.

[2] Written comments on RCC § 22E-4XX, Justification Defenses, and RCC § 22E-701, Generally Applicable Definitions, are due June 24. Other statutory language in the General Part, highlighted in yellow, is provided for reference only and is not part of this review.

CCRC Draft Title 22E
Table of Contents

Subtitle I. General Part.

Chapter 1. Preliminary Provisions.

§ 22E-101. Short Title and Effective Date.*
§ 22E-102. Rules of Interpretation.*
§ 22E-103. Interaction of Title 22E With Other District Laws.*
§ 22E-104. Applicability of the General Part.*

Chapter 2. Basic Requirements of Offense Liability.

§ 22E-201. Proof of Offense Elements Beyond a Reasonable Doubt.*
§ 22E-202. Conduct Requirement.*
§ 22E-203. Voluntariness Requirement.*
§ 22E-204. Causation Requirement.*
§ 22E-205. Culpable Mental State Requirement.*
§ 22E-206. Hierarchy of Culpable Mental States.*
§ 22E-207. Rules of Interpretation Applicable to Culpable Mental State Requirement.*
§ 22E-208. Principles of Liability Governing Accident, Mistake, and Ignorance.*
§ 22E-209. Principles of Liability Governing Intoxication.*
§ 22E-210. Accomplice Liability. {D.C. Code § 22-1805}
§ 22E-211. Liability for Causing Crime by an Innocent or Irresponsible Person.*
§ 22E-212. Exceptions to Legal Accountability.*
§ 22E-213. Withdrawal Defense to Legal Accountability.*
§ 22E-214. Merger of Related Offenses.*
§ 22E-215. De Minimis Defense.*

Chapter 3. Inchoate Liability.

§ 22E-301. Criminal Attempt. {D.C. Code § 22-1803}
§ 22E-302. Solicitation. {D.C. Code § 2-2107}
§ 22E-303. Criminal Conspiracy. {D.C. Code § 22-1805a}
§ 22E-304. Exceptions to General Inchoate Liability.*
§ 22E-305. Renunciation Defense to Attempt, Conspiracy, and Solicitation. *

Chapter 4. Justification Defenses.

[§ 22E-4XX. General Provisions Governing Justification Defenses.*]
[§ 22E-4XX. Choice of Evils.*]
[§ 22E-4XX. Execution of Public Duty.*]
[§ 22E-4XX. Law Enforcement Authority.*]
§ 22E-4XX. Special Responsibility for Care, Discipline, or Safety Defense.*
§ 22E-4XX. Effective Consent Defense.*
[§ 22E-4XX. Defense of Person.*]

* No corresponding statute in current D.C. Code. {…} Corresponding statute(s) in D.C. Code
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Provisions not under review in Report #36

[§ 22E-4XX. Defense of Property.*]

Chapter 5. Excuse Defenses.
[Reserved.]

Chapter 6. Offense Classes, Penalties, & Enhancements.
§ 22E-601. Offense Classifications.*
§ 22E-602. Authorized Dispositions.*
§ 22E-603. Authorized Terms of Imprisonment.*
§ 22E-604. Authorized Fines. {D.C. Code §§ 22-3571.01; 22-3571.02}
§ 22E-605. Limitations on Penalty Enhancements.*
§ 22E-606. Repeat Offender Penalty Enhancements. {D.C. Code §§ 22-1804; 22-1804a}
§ 22E-607. Hate Crime Penalty Enhancement. {D.C. Code §§ 22-3701; 22-3702; 22-3703}
§ 22E-608. Pretrial Release Penalty Enhancements. {D.C. Code § 23-1328}

Chapter 7. Definitions.
§ 22E-701. Generally Applicable Definitions {D.C. Code §§ 22-1801; 22-1802; 22-3201; et al.}

Chapter 8.
[Reserved.]

Chapter 9.
[Reserved.]

Subtitle II. Offenses Against Persons.

Chapter 10. Offenses Against Persons Subtitle Provisions.
[Reserved.]

Chapter 11. Homicide.
§ 22E-1101. Murder. {D.C. Code §§ 22-2101; 22-2102; 22-2103, 22-2104; 22-2104.01; 22-2106}
§ 22E-1102. Manslaughter. {D.C. Code § 22-2105}
§ 22E-1103. Negligent Homicide. {D.C. Code § 50-2203.01}

Chapter 12. Robbery, Assault, and Threats.
§ 22E-1201. Robbery. {D.C. Code §§ 22-2801, 22-2802, 22-2803}
§ 22E-1202. Assault. {D.C. Code §§ 22-401 – 22-405; 22-406}
§ 22E-1203. Menacing. {D.C. Code §§ 22-402; 22-404}
§ 22E-1204. Criminal Threats. {D.C. Code §§ 22-407; 22-1810}
§ 22E-1205. Offensive Physical Contact. {D.C. Code § 22-404}
§ 22E-1206. Stalking. {D.C. Code §§ 22-3131; 22-3132; 22-3133; 22-3134; 22-3135}

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Chapter 13. Sexual Assault and Related Provisions.

§ 22E-1301. Sexual Assault. {D.C. Code §§ 22-3002; 22-3003; 22-3004; 22-3005; 22-3007; 22-3018; 22-3019; 22-3020}

§ 22E-1302. Sexual Abuse of a Minor. {D.C. Code §§ 22-3008; 22-3009; 22-3009.01; 22-3009.02; 22-3009.03; 22-3009.04; 22-3011; 22-3012; 22-3018; 22-3019; 22-3020}

§ 22E-1303. Sexual Exploitation of an Adult. {D.C. Code §§ 22-3013; 22-3014; 22-3015; 22-3016; 22-3017; 22-3018; 22-3019; 22-3020}

§ 22E-1304. Sexually Suggestive Conduct with a Minor. {D.C. Code §§ 22-3010.01; 22-3012; 22-3018; 22-3019; 22-3020}

§ 22E-1305. Enticing a Minor Into Sexual Conduct. {D.C. Code §§ 22-3010; 22-3012; 22-3018; 22-3019; 22-3020}

§ 22E-1306. Arranging for Sexual Conduct with a Minor. {D.C. Code §§ 22-3010.02; 22-3018; 22-3019; 22-3020}

§ 22E-1307. Nonconsensual Sexual Conduct. {D.C. Code §§ 22-3006; 22-3007; 22-3018; 22-3019; 22-3020}

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

§ 22E-1309. Duty to Report a Sex Crime Involving a Person Under 16 Years of Age. [D.C. Code §§ 22-3020.51; 22-3020.52; 22-3020.53; 22-3020.54; 22-3020.55]

§ 22E-1310. Civil Infraction for Failure to Report a Sex Crime Involving a Person Under 16 Years of Age. [D.C. Code §§ 22-3020.51; 22-3020.52; 22-3020.53; 22-3020.54; 22-3020.55]

§ 22E-1311. Admission of Evidence in Sexual Assault and Related Cases. [D.C. Code §§ 22-3021; 22-3022; 22-3023; 22-3024].

Chapter 14. Kidnapping, Criminal Restraint, and Blackmail.

§ 22E-1401. Kidnapping. {D.C. Code § 22-2001}

§ 22E-1402. Criminal Restraint. {D.C. Code § 22-2001}

[§ 22-1403. Blackmail. {D.C. Code § 22-3252}]

Chapter 15. Abuse and Neglect of Vulnerable Persons.

§ 22E-1501. Criminal Abuse of a Minor. {D.C. Code §§ 22-1101; 22-1102}

§ 22E-1502. Criminal Neglect of a Minor. {D.C. Code §§ 22-1101; 22-1102}

§ 22E-1503. Criminal Abuse of a Vulnerable Adult or Elderly Person. {D.C. Code §§ 22-933; 22-934; 22-935; 22-936}

§ 22E-1504. Criminal Neglect of a Vulnerable Adult or Elderly Person. {D.C. Code §§ 22-933; 22-934; 22-935; 22-936}

Chapter 16. Human Trafficking.

§ 22E-1601. Forced Labor or Services. {D.C. Code §§ 22-1832; 22-1837}

§ 22E-1602. Forced Commercial Sex. {D.C. Code § 22-1833}

§ 22E-1603. Trafficking in Labor or Services. {D.C. Code §§ 22-1833; 22-1837}

§ 22E-1604. Trafficking in Commercial Sex. {D.C. Code §§ 22-1833; 22-1837}

* No corresponding statute in current D.C. Code. {…} Corresponding statute(s) in D.C. Code

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Provisions not under review in Report #36

§ 22E-1605. Sex Trafficking of Minors. {D.C. Code §§ 22-1834; 22-1837}
§ 22E-1606. Benefitting from Human Trafficking. {D.C. Code §§ 22-1836, 22-1837}
§ 22E-1607. Misuse of Documents in Furtherance of Human Trafficking. {D.C. Code §§ 22-1835; 22-1837}
§ 22E-1608. Commercial Sex with a Trafficked Person.*
§ 22E-1609. Forfeiture. {D.C. Code § 22-1838}
§ 22E-1610. Reputation or Opinion Evidence. {D.C. Code § 22-1839}
§ 22E-1611. Civil Action. {D.C. Code § 22-1840}
§ 22E-1612. Limitation on Liabilities and Sentencing for RCC Chapter 16 Offenses.*

Chapter 17. Terrorism.
[§ 22E-1701. Acts of Terrorism. {D.C. Code §§ 22-3151; 22-3152; 22-3153; 22-3156}]
[§ 22E-1702. Manufacture or Possession of a Weapon of Mass Destruction. {D.C. Code §§ 22-3154; 22-3152; 22-3156}]
[§ 22E-1703. Use, Dissemination, or Detonation of a Weapon of Mass Destruction. {D.C. Code §§ 22-3155; 22-3152; 22-3156}]

Chapter 18. Invasions of Privacy.
[§ 22E-1801. Nonconsensual Pornography {D.C. Code §§ 22-3051; 22-3052; 22-3053; 22-3054; 22-3055; 22-3056; 22-3057}]
[§ 22E-1802. Sexual Performance Using Minors. {D.C. Code §§ 22-3101; 22-3102; 22-3103; 22-3104}]
[§ 22E-1803. Voyeurism. {D.C. Code § 22-3531}]
[§ 22E-1804. Electronic Monitoring.]

Chapter 19.
[Reserved.]

Subtitle III. Property Offenses.

Chapter 20. Property Offense Subtitle Provisions.
§ 22E-2001. Aggregation to Determine Property Offense Grades. {D.C. Code § 22-3202}
§ 22E-2002. Definition of Person for Property Offenses. {D.C. Code § 22-3201(2A)}
[§ 22E-20XX. Jurisdiction. {D.C. Code §§ 22-1808; 22-3204}]

Chapter 21. Theft.
§ 22E-2101. Theft. {D.C. Code §§ 22-601; 22-3211; 22-3212}
§ 22E-2102. Unauthorized Use of Property. {D.C. Code § 22-3216}
§ 22E-2103. Unauthorized Use of a Motor Vehicle. {D.C. Code § 22-3215}
§ 22E-2104. Shoplifting. {D.C. Code § 22-3213}
§ 22E-2105. Unlawful Creation or Possession of a Recording. {D.C. Code § 22-3214}
§ 22E-2106. Unlawful Operation of a Recording Device in a Motion Picture Theater. {D.C. Code § 22-3214.02}

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Provisions not under review in Report #36

Chapter 22. Fraud.
§ 22E-2201. Fraud. {D.C. Code §§ 22-3221; 22-3222}
§ 22E-2202. Payment Card Fraud. {D.C. Code §§ 22-3223; 22-3224.01}
§ 22E-2203. Check Fraud. {D.C. Code § 22-1510}
§ 22E-2204. Forgery. {D.C. Code §§ 22-3241; 22-3242}
§ 22E-2205. Identity Theft. {D.C. Code §§ 22-3227.02; 22-3227.03}
§ 22E-2206. Identity Theft Civil Provisions. {D.C. Code §§ 22-3227.04; 22-3227.05; 22-3227.06; 22-3227.07; 22-3227.08}
§ 22E-2207. Unlawful Labeling of a Recording. {D.C. Code § 22-3213.01}
§ 22E-2208. Financial Exploitation of a Vulnerable Adult. {D.C. Code § 22-933.01}
§ 22E-2209. Financial Exploitation of a Vulnerable Adult Civil Provisions. {D.C. Code §§ 22-937 – 22-938}
[§ 22E-2209. Trademark Counterfeiting. {D.C. Code §§ 22-901 – 902}]
[§ 22E-2210. Forging or Imitating Brands or Packaging of Goods. {D.C. Code § 22-1502}]
[§ 22E-2211. Fraudulent Advertising. {D.C. Code §§ 22-1511 – 22-1513}]
[§ 22E-2212. Fraudulent Registration. {D.C. Code § 22-3224}]

Chapter 23. Extortion.
§ 22E-2301. Extortion. {D.C. Code § 22-3251}

Chapter 24. Stolen Property.
§ 22E-2401. Possession of Stolen Property. {D.C. Code § 22-3232}
§ 22E-2402. Trafficking of Stolen Property. {D.C. Code § 22-3231}
§ 22E-2403. Alteration of Motor Vehicle Identification Number. {D.C. Code § 22-3233}
§ 22E-2404. Alteration of Bicycle Identification Number. {D.C. Code § 22-3234}

Chapter 25. Property Damage.
§ 22E-2501. Arson. {D.C. Code § 22-301; 22-302}
§ 22E-2502. Reckless Burning. {D.C. Code § 22-301; 22-302}
§ 22E-2503. Criminal Damage to Property. {D.C. Code §§22-303; 22-3305; 22-3306; 22-3307; 22-3310}
§ 22E-2504. Criminal Graffiti. {D.C. Code §§ 22-3312.01; 22-3312.04; 2-3312.05}

Chapter 26. Trespass.
§ 22E-2601. Trespass. {D.C. Code §§ 22-3302; 22-1341}

Chapter 27. Burglary.
§ 22E-2701. Burglary. {D.C. Code § 22-801}
§ 22E-2702. Possession of Tools to Commit Property Crime. {D.C. Code § 22-2501}

Chapter 28.
[Reserved.]

* No corresponding statute in current D.C. Code. {…} Corresponding statute(s) in D.C. Code
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Provisions not under review in Report #36

Chapter 29.
[Reserved.]

Subtitle IV. Offenses Against Government Operation.

Chapter 30. Offenses Against Government Operation Subtitle Provisions.
[§ 22E-30XX. Reserved.]

Chapter 31. Bribery, Improper Influence, and Official Misconduct.
[§ 22E-31XX. Corrupt Influence. {D.C. Code § 22-704}]
[§ 22E-31XX. Bribery. {D.C. Code §§ 22-711 – 22-713}]

Chapter 32. Perjury and Other Official Falsification Offenses.
[§ 22E-32XX. Impersonation of another before court or officer. {D.C. Code § 22-1403}]
[§ 22E-32XX. Impersonation of public officer or minister. {D.C. Code § 22-1404}]
[§ 22E-32XX. Impersonation of District inspector. {D.C. Code § 22-1405}]
[§ 22E-32XX. Impersonation of police officer. {D.C. Code § 22-1406}]
[§ 22E-32XX. Misuse of official insignia. {D.C. Code § 22-1409}]
[§ 22E-32XX. Perjury. {D.C. Code § 22-2402}]
[§ 22E-32XX. Subornation of Perjury. {D.C. Code § 22-2403}]
[§ 22E-32XX. False Swearing. {D.C. Code § 22-2404}]
[§ 22E-32XX. False Statements. {D.C. Code § 22-2405}]

Chapter 33. Offenses Involving Obstruction of Governmental Operations.
[§ 22E-32XX. Tampering with Physical Evidence. {D.C. Code § 22-723}]
[§ 22E-32XX. Obstruction of Justice. {D.C. Code §§ 22-721 – 22-722}]
[§ 22E-32XX. False alarms and false reports; hoax weapons. {D.C. Code § 22-1319}]
[§ 22E-32XX. Fraudulent interference or collusion in jury selection. {D.C. Code § 22-1514}]
[§ 22E-32XX. Accessories after the fact. {D.C. Code § 22-1806}]
[§ 22E-32XX. Obstructing, preventing, or interfering with reports to or requests for assistance from law enforcement agencies, medical providers, or child welfare agencies. {D.C. Code § 22-1931}]

Chapter 34. Government Custody.
§ 22E-3401. Escape from Institution or Officer. {D.C. Code §§ 22-2601; 10-509.01a}
§ 22E-3402. Tampering with a Detection Device. {D.C. Code § 22-1211}
§ 22E-3403. Correctional Facility Contraband. {D.C. Code §§ 22-2603.01 – 22-2603.04}
[§ 22E-3404. Resisting Arrest. {D.C. Code § 22-405.01}]
[§ 22E-34XX. Fleeing or Eluding. {D.C. Code §§ 50-2201.05b; 50-301.34}]

Chapter 35. Misuse of District of Columbia Designation.

* No corresponding statute in current D.C. Code. {…} Corresponding statute(s) in D.C. Code
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Provisions not under review in Report #36

[§ 22E-35XX. Misuse of District of Columbia Designation for Private Gain. {D.C. Code §§ 22-3401; 22-3402; 22-3403}]

Chapter 36.
[Reserved.]

Chapter 37.
[Reserved.]

Chapter 38.
[Reserved.]

Chapter 39.
[Reserved.]

Subtitle V. Public Order and Safety Offenses.

Chapter 40. Public Order and Safety Offenses Subtitle Provisions.
[§ 22E-40XX. Reserved.]

Chapter 41. Weapon Possession.
[§ 22E-41XX. While armed enhancement. {D.C. Code §22-4502}]
[§ 22E-41XX. Gun free zones enhancement. {D.C. Code §22-4502.01}]
[§ 22E-41XX. Unlawful Possession of a Firearm. {D.C. Code §22-4503}]
[§ 22E-41XX. Unlawful Discharge of a Firearm. {D.C. Code §22-4503.01}]
[§ 22E-41XX. Prohibition of Firearms from Public or Private Property. {D.C. Code §22-4503.02}]
[§ 22E-41XX. Carrying Concealed Weapons; Possession of Firearm During Crime of Violence or Dangerous Crime. {D.C. Code §22-4504}]
[§ 22E-41XX. Lack of Authority to Carry Firearm in Certain Places for Certain Purposes. {D.C. Code §22-4504.01}]
[§ 22E-41XX. Unlawful Transportation of a Firearm. {D.C. Code §22-4504.02}
[§ 22E-41XX. Exceptions to 22-4504. {D.C. Code §22-4505}]
[§ 22E-41XX. Issue of a License to Carry a Pistol. {D.C. Code §22-4506}]
[§ 22E-41XX. Certain Sales of Pistols Prohibited. {D.C. Code §22-4507}]
[§ 22E-41XX. Transfers of Firearms Regulated. {D.C. Code §22-4508}]
[§ 22E-41XX. Dealers of Weapons to be Licensed. {D.C. Code §22-4509}]
[§ 22E-41XX. Licenses of Weapons Dealers. {D.C. Code §22-4510}]
[§ 22E-41XX. False Information in Purchase of Weapons. {D.C. Code §22-4511}]
[§ 22E-41XX. Alteration of Identifying Marks of Weapons. {D.C. Code §22-4512}]
[§ 22E-41XX. [Weapon Offense] Exceptions. {D.C. Code §22-4513}]
[§ 22E-41XX. Possession of a Prohibited Weapon. {D.C. Code §22-4514}]
[§ 22E-41XX. [Weapon Offense] Penalties. {D.C. Code §22-4515}]
[§ 22E-41XX. Manufacture, Transfer, Possession, or Use of an Explosive. {D.C. Code §22-4515a}]

[§ 22E-41XX. Severability. {D.C. Code §22-4516}]
[§ 22E-41XX. Dangerous articles, etc. {D.C. Code §22-4517}]

Chapter 42. Breaches of Peace.

§ 22E-4201. Disorderly Conduct. {D.C. Code §§ 22-1301; 22-1321}
§ 22E-4202. Public Nuisance. {D.C. Code § 22-1321}
§ 22E-4203. Blocking a Public Way. {D.C. Code §§ 22-1307; 22-1323}
§ 22E-4204. Unlawful Demonstration. {D.C. Code § 22-1307.}
[§ 22E-42XX. Throwing Stones or Other Missiles. {D.C. Code § 22-1309}]
[§ 22E-42XX. Disorderly Conduct in Public Buildings or Grounds; Injury to or Destruction of United States Property. {D.C. Code § 22-3311}]
[§ 22E-42XX. Kindling Bonfires. {D.C. Code § 22-1313}]
[§ 22E-42XX. Protest Targeting a Residence. { D.C. Code § 22-2751}]
[§ 22E-42XX. Interference with Access to a Medical Facility. {D.C. Code §§ 22-1314.01; 22-1314.02}]
[§ 22E-42XX. Panhandling. {D.C. Code §§ 22-2301; 22-2302; 22-2303; 22-2304; 22-2305; 22-2306}]
[§ 22E-42XX. Defacing or Burning Cross or Religious Symbol; Display of Certain Emblems. {D.C. Code §§ 22-3312.02; 22-3312.04}]
[§ 22E-42XX. Wearing hoods or masks. {D.C. Code §§ 22-3312.03; 22-3312.02}]

Chapter 43. Group Misconduct.

§ 22E-4301. Rioting. {D.C. Code § 22-1322}
§ 22E-4302. Failure to Disperse.*
[§ 22E-43XX. Criminal Gangs. {D.C. Code § 22-951}]

Chapter 44. Public Indecency.

[§ 22E-44XX. Lewd, indecent, or obscene acts. {D.C. Code § 22-1312}]
[§ 22E-44XX. Certain obscene activities and conduct declared unlawful; definitions; penalties; affirmative defenses; exception. {D.C. Code § 22-2201}]

Chapter 45. Cruelty to Animals.

[§ 22E-45XX. Protection of Police Animals. {D.C. Code § 22-861}]
[§ 22E-45XX. Cruelty to Animals. {D.C. Code §§ 22-1001 – 22-1013}]
[§ 22E-45XX. Urging Dogs to Fight or Create Disorder. {D.C. Code § 22-1310}]
[§ 22E-45XX. Allowing Dogs to Go at Large. {D.C. Code § 22-1311}]

Chapter 46. Offenses Against the Family.

[§ 22E-46XX. Bigamy. {D.C. Code § 22-501}]
[§ 22E-46XX. Contributing to the Delinquency of a Minor. {D.C. Code § 22-811}]
[§ 22E-46XX. Incest. {D.C. Code § 22-1901}]

Chapter 47. Gambling.

§ 22E-47XX. Promotion, sale, or possession of lottery tickets. {D.C. Code § 22-1701}]
§ 22E-47XX. Possession of lottery or policy tickets. {D.C. Code § 22-1702}]
§ 22E-47XX. Permitting sale of lottery tickets on premises. {D.C. Code § 22-1703}]

* No corresponding statute in current D.C. Code. {…} Corresponding statute(s) in D.C. Code
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Provisions not under review in Report #36

§ 22E-47XX. Gaming; setting up gaming table; inducing play. {D.C. Code § 22-1704}]
§ 22E-47XX. Gambling premises; definition; prohibition against maintaining; forfeiture; liens; deposit of moneys in Treasury; penalty; subsequent offenses. {D.C. Code § 22-1705}]
§ 22E-47XX. Three-card monte and confidence games. {D.C. Code § 22-1706}]
§ 22E-47XX. "Gaming table" defined. {D.C. Code § 22-1707}]
[§ 22E-47XX. Gambling pools and bookmaking; athletic contest defined. {D.C. Code § 22-1708}]
[§ 22E-47XX. Corrupt influence in connection with athletic contests. {D.C. Code § 22-1713}]
[§ 22E-47XX. Immunity of witnesses; record. {D.C. Code § 22-1714}]
[§ 22E-47XX. Statement of purpose. {D.C. Code § 22-1716}]
[§ 22E-47XX. Permissible gambling activities. {D.C. Code § 22-1717}]
[§ 22E-47XX. Advertising and promotion; sale and possession of lottery and numbers tickets and slips. {D.C. Code § 22-1718}]

Chapter 48. Prostitution and Related Offenses.

[§ 22E-48XX. Engaging in prostitution. {D.C. Code §§ 22-2701; 22-2701.01; 22-2703}]
[§ 22E-48XX. Soliciting prostitution. {D.C. Code §§ 22-2701; 22-2701.01; 22-2703}]
[§ 22E-48XX. Abducting or enticing child from his or her home for purposes of prostitution; harboring such child. {D.C. Code § 22-2704}]
[§ 22E-48XX. Pandering; inducing or compelling an individual to engage in prostitution. {D.C. Code § 22-2705}]
[§ 22E-48XX. Procuring; receiving money or other valuable thing for arranging assignation. {D.C. Code § 22-2707}]
[§ 22E-48XX. Procuring for house of prostitution. {D.C. Code § 22-2710}]
[§ 22E-48XX. Procuring for third persons. {D.C. Code § 22-2711}]
[§ 22E-48XX. Operating house of prostitution. {D.C. Code § 22-2712}]
[§ 22E-48XX. Premises occupied for lewdness, assignation, or prostitution declared nuisance. {D.C. Code § 22-2713}]
[§ 22E-48XX. Abatement of nuisance under § 22-2713 by injunction—Temporary injunction. {D.C. Code § 22-2714}]
[§ 22E-48XX. Abatement of nuisance under § 22-2713 by injunction—Trial; dismissal of complaint; prosecution; costs. {D.C. Code § 22-2715}]
[§ 22E-48XX. Violation of injunction granted under § 22-2714. {D.C. Code § 22-2716}]
[§ 22E-48XX. Order of abatement; sale of property; entry of closed premises punishable as contempt. {D.C. Code § 22-2717}]
[§ 22E-48XX. Disposition of proceeds of sale. {D.C. Code § 22-2718}]
[§ 22E-48XX. Bond for abatement; order for delivery of premises; effect of release. {D.C. Code § 22-2719}]
[§ 22E-48XX. Tax for maintaining such nuisance. {D.C. Code § 22-2720}]
[§ 22E-48XX. Keeping bawdy or disorderly houses. {D.C. Code § 22-2722}]
[§ 22E-48XX. Property subject to seizure and forfeiture. {D.C. Code § 22-2723}]
[§ 22E-48XX. Impoundment. {D.C. Code § 22-2724}]

Chapter 49. Environmental Offenses.
[§ 22E-49XX. Malicious Pollution of Water {D.C. Code § 22-3318}]
[§ 22E-49XX. Throwing or depositing matter in Potomac River. {D.C. Code § 22-4402}]
[§ 22E-49XX. Deposits of deleterious matter in Rock Creek or Potomac River. {D.C. Code §§ 22-4403; 22-4404}]

Subtitle VI. Other Offenses.

Chapter 50.
[Reserved.]

D.C. Code Statutes Outside Title 22 Recommended for Revision

[§ 7-2502.01. Certain Sales of Pistols Prohibited.]
[§ 7-2502.13. Possession of Self-Defense Sprays.]
[§ 7-2506.01. Persons Permitted to Possess Ammunition.]
[§ 16-1024. Parental Kidnapping.]
[§ 23-585. Violation of Condition of Release on Citation.]
[§ 23-1327. Failure to Appear.]
[§ 23-1329. Violation of Condition of Release.]
[§ 25-1001. Possession of Open Container of Alcohol.]
[§ 48-904.01. [Controlled Substances] Prohibited Acts A.]
[§ 48-904.02. [Controlled Substances] Prohibited Acts B.]
[§ 48-904.03. [Controlled Substances] Prohibited Acts C.]
[§ 48-904.03a. [Controlled Substances] Prohibited Acts D.]
[§ 48-904.04. [Controlled Substances] Penalties Under Other Laws.]
[§ 48-904.05. [Controlled Substances] Effect of Acquittal or Conviction Under Federal Law.]
[§ 48-904.06. [Controlled Substances] Distribution to Minors.]
[§ 48-904.07. [Controlled Substances] Enlistment of Minors to Distribute.]
[§ 48-904.07a. [Controlled Substances] Drug Free Zones.]
[§ 48-904.08. [Controlled Substances] Second or Subsequent Offenses.]
[§ 48-904.09. [Controlled Substances] Attempt; Conspiracy.]
[§ 48-904.10. [Controlled Substances] Possession of Drug Paraphernalia.]
[§ 48-911.01. [Controlled Substances] Consumption of Marijuana in Public Space Prohibited; Impairment Prohibited.]
[§ 48-1103. [Controlled Substances] Prohibited Acts [Paraphernalia]]

* 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

D.C. Code Statutes Recommended for Repeal

§ 5-115.03.	Neglect to Make Arrest for Offense Committed in Presence.
§ 22-1308.	Playing Games in Streets.
§ 22-1317.	Flying fire balloons or parachutes.
§ 22-1318.	Driving or riding on footways in public grounds.
§ 22-1402.	Recordation of deed, contract, or conveyance with intent to extort money.
§ 22-1807.	Punishment for offenses not covered by provisions of Code.
§ 22-1809.	Prosecutions.
§ 22-2725.	Anti-Prostitution Vehicle Impoundment Proceeds Fund.
§ 22-3301.	Forcible Entry and Detainer.
§ 22-3303.	Grave Robbery; Burying or Selling Dead Bodies.
§ 22-3309.	Destroying Boundary Markers.
§ 22-3313.	Destroying or Defacing Building Material for Streets.
§ 22-3314.	Destroying Cemetery Railing or Tomb.
§ 22-3319.	Placing Obstructions on or Displacement of Railway Tracks.
§ 22-3320.	Obstructing Public Road; Removing Milestones.
§ 22-3321.	Obstructing Public Highway.
§ 22-3322.	Fines Under 22-3321 to be Collected in Name of United States.
§ 22-3602.	Enhanced penalty for committing certain dangerous and violent crimes against a citizen patrol member.

D.C. Code Statutes Recommended for Relocation Out of D.C. Code Title 22

§ 22-1841. [Human Trafficking] Data collection and dissemination.
§ 22-1842. [Human Trafficking] Training program.
§ 22-1843. Public posting of human trafficking hotline.
§§ 22-3218.01 – 22-3218.04. Theft of Utility Service.
§§ 22-3225.01 – 22-3225.15. Insurance Fraud.
§§ 22-3226.01 – 22-3226.15. Telephone Fraud.
§§ 22-3704. [Bias-Related Crime] Civil Action.
§ 22-3803. [Sexual Psychopaths] Definitions.
§ 22-3804. [Sexual Psychopaths] Filing of statement.
§ 22-3805. [Sexual Psychopaths] Right to counsel.
§ 22-3806. [Sexual Psychopaths] Examination by psychiatrists.
§ 22-3807. [Sexual Psychopaths] When hearing is required.
§ 22-3808. [Sexual Psychopaths] Hearing; commitment.
§ 22-3809. [Sexual Psychopaths] Parole; discharge.
§ 22-3810. [Sexual Psychopaths] Stay of criminal proceedings.
§ 22-3811. [Sexual Psychopaths] Criminal law unchanged.
§ 22-3901. [HIV Testing of Certain Criminal Offenders] Definitions.
§ 22-3902. [HIV Testing of Certain Criminal Offenders] Testing and counselling.
§ 22-3903. [HIV Testing of Certain Criminal Offenders] Rules.
Title 22 Chapter 40. Sex Offender Registration.
Title 22 Chapter 41a. DNA Testing And Post-Conviction Relief For Innocent Persons.
Title 22 Chapter 41b. DNA Sample Collection.
Title 22 Chapter 42. National Institute Of Justice Appropriations.
Title 22 Chapter 42a. Criminal Justice Coordinating Council.
Title 22 Chapter 42b. Homicide Elimination.

* 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

Subtitle I. General Part.

Chapter 1. Preliminary Provisions.

RCC § 22E-101. Short Title and Effective Date.

(a) *Short title.* This title may be cited as the "Revised Criminal Code."
(b) *Effective date.* This title takes effect at 12:01 am on [A DATE AT LEAST ONE YEAR FROM ENACTMENT].
(c) *Prior offenses.* Offenses committed prior to the effective date of the Revised Criminal Code are subject to laws in effect at that time. For purposes of this subsection, an offense is "committed prior to the effective date" if any one of the elements of the offense was satisfied prior to the effective date.

RCC § 22E-102. Rules of Interpretation.

(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.
(b) *Rule of Lenity*. If two or more reasonable interpretations of a statutory provision remain after examination of that provision's plain meaning, structure, purpose, and history, then the interpretation that is most favorable to the defendant applies.
(c) *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 statutory language.

RCC § 22E-103. Interaction of Title 22E With Other District Laws.

(a) *General Interaction of Title 22E with Provisions in Other Laws*. Unless otherwise provided by law, a provision in this title applies to this title alone.
(b) *Interaction of Title 22E with Civil Provisions in Other Laws*. 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.

RCC § 22E-104. Applicability of the General Part.

Unless otherwise provided by law, provisions in subtitle I of Title 22E apply to all other provisions of Title 22E.

Chapter 2. Basic Requirements of Offense Liability.

RCC § 22E-201. Proof of Offense Elements Beyond a Reasonable Doubt.

(a) *Proof of Offense Elements Beyond a Reasonable Doubt.* No person may be convicted of an offense unless the government proves each offense element beyond a reasonable doubt.
(b) *Offense Element Defined.* "Offense element" includes the objective elements and culpability requirement necessary to establish liability for an offense.
(c) *Objective Element Defined.* "Objective element" means any conduct element, result element, or circumstance element. For purposes of this Title"
    (1) "Conduct element" means any act or omission that is required to establish liability for an offense.
    (2) "Result element" means any consequence caused by a person's act or omission that is required to establish liability for an offense.
    (3) "Circumstance element" means any characteristic or condition relating to either a conduct element or result element that is required to establish liability for an offense.
(d) *Culpability Requirement Defined.* "Culpability requirement" includes:
    (1) The voluntariness requirement, as provided in RCC § 22E-203(a);
    (2) The culpable mental state requirement, as provided in RCC § 22E-205(a); and
    (3) Any other aspect of culpability specifically required by an offense.
(e) *Other Definitions.*
    (1) "Act" has the meaning specified in RCC § 22E-201(b).
    (2) "Omission" has the meaning specified in RCC § 22E-201(c).

RCC § 22E-202. Conduct Requirement.

(a) *Conduct Requirement.* No person may be convicted of an offense unless the person's liability is based on an act or omission.
(b) *Act Defined.* "Act" means a bodily movement.
(c) *Omission Defined.* "Omission" means a failure to act when:
    (1) A person is under a legal duty to act; and
    (2) The person is either aware that the legal duty to act exists or, if the person lacks such awareness, the person is culpably unaware that the legal duty to act exists.
(d) *Existence of Legal Duty.* For purposes of this Title, a legal duty to act exists when:
    (1) The failure to act is expressly made sufficient by the law defining the offense; or
    (2) A duty to perform the omitted act is otherwise imposed by law.

RCC § 22E-203. Voluntariness Requirement.

(a) *Voluntariness Requirement.* No person may be convicted of an offense unless the person voluntarily commits the conduct element necessary to establish liability for the offense.

(b) *Scope of Voluntariness Requirement.*

(1) Voluntariness of Act. When a person's act provides the basis for liability, a person voluntarily commits the conduct element of an offense when the act is:

(A) The product of conscious effort or determination; or

(B) Otherwise subject to the person's control.

(2) Voluntariness of Omission. When a person's omission provides the basis for liability, a person voluntarily commits the conduct element of an offense when:

(A) The person has the physical capacity to perform the required legal duty; or

(B) The failure to act is otherwise subject to the person's control.

(c) *Other Definitions.*

(1) "Conduct element" has the meaning specified in RCC § 22E-201(c)(1).

(2) "Act" has the meaning specified in RCC § 22E-201(b).

(3) "Omission" has the meaning specified in RCC § 22E-201(c).

RCC § 22E-204. Causation Requirement.

(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 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.

(d) *Other Definitions*. "Result element" has the meaning specified in RCC § 22E-201(c)(2).

RCC § 22E-205. Culpable Mental State Requirement.

(a) *Culpable Mental State Requirement.* No person may be convicted of an offense unless the person acts with a culpable mental state as to every result element and circumstance element required by that offense, with the exception of any result element or circumstance element for which that person is strictly liable under RCC § 22E-207(b).

(b) *Culpable Mental State Defined.* "Culpable mental state" means:

(1) Purpose, knowledge, intent, recklessness, negligence, or a comparable mental state specified in this Title; and

(2) The object of the phrases "with intent" and "with the purpose."

(c) *Strictly Liability Defined.* "Strictly liable" and "strict liability" means liability as to a result element or circumstance element in the absence of a culpable mental state.

(d) *Other Definitions.*

(1) "Result element" has the meaning specified in RCC § 22E- 201(c)(2).
(2) "Circumstance element" has the meaning specified in RCC § 22E-201(c)(3).
(3) "Purpose" has the meaning specified in RCC § 22E-206(a).
(4) "Knowledge" has the meaning specified in RCC § 22E-206(b).
(5) "Intent" has the meaning specified in RCC § 22E-206(c).
(6) "Recklessness" has the meaning specified in RCC § 22E-206(d).
(7) "Negligence" has the meaning specified in RCC § 22E-206(e).

RCC § 22E-206. Definitions and Hierarchy of Culpable Mental States.

(a) *Purposely Defined.* A person acts purposely:

(1) As to a result element, when that person consciously desires to cause the result; and
(2) As to a circumstance element, when that person consciously desires that the circumstance exists.

(b) *Knowingly Defined.* A person acts knowingly:

(1) As to a result element, when that person is aware that conduct is practically certain to cause the result; and
(2) As to a circumstance element, when that person is practically certain that the circumstance exists.

(c) *Intentionally Defined.* A person acts intentionally:

(1) As to a result element, when that person believes that conduct is practically certain to cause the result; and
(2) As to a circumstance element, when that person believes it is practically certain that the circumstance exists.

(d) *Recklessly Defined.* A person acts recklessly:

(1) As to a result element, when:
(A) That person consciously disregards a substantial risk that conduct will cause the result; and
(B) The risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, the person's conscious disregard of that risk is clearly blameworthy; and
(2) As to a circumstance element, when:
(A) That person consciously disregards a substantial risk that the circumstance exists; and
(B) The risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, the person's conscious disregard of that risk is clearly blameworthy.

(e) *Negligently Defined.* A person acts negligently:
(1) As to a result element, when:
(A) That person should be aware of a substantial risk that conduct will cause the result; and
(B) The risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, the person's failure to perceive that risk is clearly blameworthy; and
(2) As to a circumstance element, when:
(A) That person should be aware of a substantial risk that the circumstance exists; and
(B) The risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, the person's failure to perceive that risk is clearly blameworthy.
(f) *Hierarchical Relationship of Culpable Mental States.*
(1) Proof of Negligence. When the law requires negligence as to a result element or circumstance element, the requirement is also satisfied by proof of recklessness, intent, knowledge, or purpose.
(2) Proof of Recklessness. When the law requires recklessness as to a result element or circumstance element, the requirement is also satisfied by proof of intent, knowledge, or purpose.
(3) Proof of Knowledge or Intent. When the law requires knowledge or intent as to a result element or circumstance element, the requirement is also satisfied by proof of purpose.
(g) *Same Definitions for Other Parts of Speech.* The words defined in this section have the same meaning when used in other parts of speech.
(h) *Other Definitions.*
(1) "Result element" has the meaning specified in RCC § 22E- 201(c)(2).
(2) "Circumstance element" has the meaning specified in RCC § 22E-201(c)(3).

RCC § 22E-207. Rules of Interpretation Applicable to Culpable Mental States.

(a) *Distribution of Specified Culpable Mental States.* Any culpable mental state specified in an offense applies to all subsequent result elements and circumstance elements until another culpable mental state is specified, with the exception of any result element or circumstance element for which the person is strictly liable under RCC § 22E-207(b).
(b) *Identification of Elements Subject to Strict Liability.* A person is strictly liable for any result element or circumstance element in an offense:
(1) That is modified by the phrase "in fact"; or
(2) When another statutory provision explicitly indicates strict liability applies to that result element or circumstance element.
(c) *Determination of When Recklessness Is Implied.* A culpable mental state of "recklessly" applies to any result element or circumstance element not otherwise

subject to a culpable mental state under RCC § 22E-207(a), or subject to strict liability under RCC § 22E-207(b).

(d) *Definitions.*

(1) "Culpable mental state" has the meaning specified in RCC § 22E- 205(b).
(2) "Result elements" has the meaning specified in RCC § 22E- 201(c)(2).
(3) "Circumstance elements" has the meaning specified in RCC § 22E-201(c)(3).
(4) "Strictly liable" has the meaning specified in RCC § 22E-205(c).
(5) "Recklessly" has the meaning given in RCC § 22E-206(d).

RCC § 22E-208. Principles of Liability Governing Accident, Mistake, and Ignorance.

(a) *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 element or circumstance element required by that offense.

(b) *Correspondence Between Mistake and Culpable Mental State Requirements.* For purposes of determining when a particular mistake as to a matter of fact or law negates the existence of a culpable mental state applicable to a circumstance element:

(1) Purpose. Any mistake as to a circumstance element negates the existence of the purpose applicable to that element.
(2) Knowledge or Intent. Any mistake as to a circumstance element negates the existence of the knowledge or intent applicable to that element.
(3) Recklessness. A reasonable mistake as to a circumstance element negates the recklessness applicable to that element. An unreasonable mistake as to a circumstance element negates the existence of the recklessness applicable to that element if the person did not recklessly make that mistake.
(4) Negligence. A reasonable mistake as to a circumstance element negates the existence of the negligence applicable to that element. An unreasonable mistake as to a circumstance element negates the existence of the negligence applicable to that element if the person did not negligently make that mistake.

(c) *Mistake or Ignorance as to Criminality.* A person may be held liable for an offense although he or she is mistaken or ignorant as to the illegality of his or her conduct unless:

(1)

(A) The offense or some other provision in the Code expressly requires proof of a culpable mental state as to:
(i) Whether conduct constitutes that offense; or
(ii) The existence, meaning, or application of the law defining an offense; and
(B) The person's mistake or ignorance negates that culpable mental state; or

(2) The person's mistake or ignorance satisfies the requirements for a general excuse defense.

(d) *Imputation of Knowledge for Deliberate Ignorance.* When a culpable mental state of knowledge applies to a circumstance element, the required culpable mental state is established if:

(1) The person is reckless as to whether the circumstance exists; and

(2) The person avoids confirming or fails to investigate whether the circumstance exists with the purpose of avoiding criminal liability.

(e) *Definitions.*

(1) "Culpable mental state" has the meaning specified in RCC § 22E- 205(b).

(2) "Result element" has the meaning specified in RCC § 22E- 201(c)(2).

(3) "Circumstance element" has the meaning specified in RCC § 22E-201(c)(3).

(4) "Purpose" has the meaning specified in RCC § 22E-206(a).

(5) "Knowledge" has the meaning specified in RCC § 22E-206(b).

(6) "Intent" has the meaning specified in RCC § 22E-206(c).

(7) "Recklessness" has the meaning specified in RCC § 22E-206(d).

(8) "Negligence" has the meaning specified in RCC § 22E-206(e).

RCC § 22E-209. Principles of Liability Governing Intoxication.

(a) *Relevance of Intoxication to Liability.* A person is not liable for an offense when that person's intoxication negates the existence of a culpable mental state applicable to a result element or circumstance element required by that offense.

(b) *Correspondence Between Intoxication and Culpable Mental State Requirements.* For purposes of determining when intoxication negates the existence of a culpable mental state applicable to a result element or circumstance element:

(1) Purpose. Intoxication negates the existence of purpose when, due to a person's intoxicated state, that person does not consciously desire to cause the result or that the circumstance exist.

(2) Knowledge or Intent. Intoxication negates the existence of knowledge or intent when, due to a person's intoxicated state, that person is not practically certain the result will occur or that the circumstance exists.

(3) Recklessness. Except as provided in subsection (c), intoxication negates the existence of recklessness when, due to a person's intoxicated state:

(A) That person is unaware of a substantial risk the result will occur or that the circumstance exists; or

(B) That person's disregard of the risk is not clearly blameworthy under RCC §§ 206(d)(1)(B) or (2)(B).

(4) Negligence. Intoxication negates the existence of negligence when, due to a person's intoxicated state, that person's failure to perceive a substantial risk the result will occur or that the circumstance exists is not clearly blameworthy under RCC §§ 206(e)(1)(B) or (2)(B).

(c) *Imputation of Recklessness for Self-Induced Intoxication.* When a culpable mental state of recklessness applies to a result element or circumstance element, the required culpable mental state is established if:

(1) A person, due to his or her intoxicated state, is unaware of a substantial risk as to the result or circumstance that the person would have been aware of had he or she been sober;
(2) The person's intoxicated state is self-induced; and
(3) The person acts negligently as to that result or circumstance.

(d) *Definitions of Intoxication and Self-Induced Intoxication.*
(1) "Intoxication" means a disturbance of mental or physical capacities resulting from the introduction of substances into the body.
(2) "Self-induced intoxication" means intoxication caused by substances:
(A) A person knowingly introduces into his or her body;
(B) The tendency of which to cause intoxication the person is aware of or should be aware of; and
(C) That have not been introduced pursuant to medical advice or under circumstances that would afford a general defense to a charge of crime.

(e) *Other Definitions.*
(1) "Culpable mental state" has the meaning specified in RCC § 22E-205(b).
(2) "Result element" has the meaning specified in RCC § 22E- 201(c)(2).
(3) "Circumstance element" has the meaning specified in RCC § 22E-201(c)(3).
(4) "Purpose" has the meaning specified in RCC § 22E-206(a).
(5) "Knowledge" has the meaning specified in RCC § 22E-206(b).
(6) "Intent" has the meaning specified in RCC § 22E-206(c).
(7) "Recklessness" has the meaning specified in RCC § 22E-206(d).
(8) "Negligence" has the meaning specified in RCC § 22E-206(e).

RCC § 22E-210. Accomplice Liability.

(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.

(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, a person must intend for any circumstance elements required by that offense to exist.

(c) *Grading Distinctions Based on Culpability as to Result Elements.* An accomplice in the commission of an offense that is graded by distinctions in culpability as to result elements 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.

(e) *Definitions.*

(1) "Culpability" has the meaning specified in RCC § 22E-201(d).
(2) "Purposely" has the meaning specified in RCC § 22E-206(a).
(3) "Intend" has the meaning specified in RCC § 22E-206(c).
(4) "Circumstance elements" has the meaning specified in RCC § 22E-201(c)(3).
(5) "Result elements" has the meaning specified in RCC § 22E- 201(c)(2).

RCC § 22E-211. Liability for Causing Crime by an Innocent or Irresponsible Person.

(a) *Causing Crime by an Innocent or Irresponsible Person.* A person is legally accountable for the conduct of another when, acting with the culpability required by an offense, the person causes an innocent or irresponsible person to engage in conduct constituting an offense.

(b) *Innocent or Irresponsible Person Defined.* An "innocent or irresponsible person" within the meaning of subsection (a) includes a person who, having engaged in conduct constituting an offense:

(1) Lacks the culpable mental state requirement for that offense; or
(2) Acts under conditions that establish an excuse defense, such as insanity, immaturity, duress, or a reasonable mistake as to a justification.

(c) *Liability Based on Legal Accountability.* A person is guilty of an offense if it is committed by the conduct of another person for which he or she is legally accountable under subsection (a).

(d) *Other Definitions.*

(1) "Culpability" has the meaning specified in RCC § 22E-201(d).
(2) "Causes" has the meaning specified in RCC § 22E-204(a).
(3) "Culpable mental state" has the meaning specified in RCC § 22E-205(b).

RCC § 22E-212. Exceptions to Legal Accountability.

(a) *Exceptions to General Principles of Legal Accountability.* A person is not legally accountable for the conduct of another under RCC § 22E-210 or RCC § 22E-211 when:

(1) The person is a victim of the offense; or
(2) The person's conduct is inevitably incident to commission of the 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-213. Withdrawal Defense to Legal Accountability.

(a) *Withdrawal Defense.* 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.

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

RCC § 22E-214. Merger of Related Offenses.

(a) *Merger of Multiple Related Offenses.* Multiple 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 Inapplicable Where Legislative Intent Is Clear.* The merger rules set forth in subsection (a) are inapplicable whenever the legislature clearly 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 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.

(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 decided.

RCC § 22E-215. De Minimis Defense.

(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) 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.

Chapter 3. Inchoate Liability.

RCC § 22E-301. Criminal Attempt.

(a) *Definition of Attempt.* A person is guilty of an attempt to commit an offense when:
  (1) Planning to engage in conduct constituting that offense;
  (2) With the culpability required by that offense;
  (3) The person engages in conduct that:
    (A)
      (i) Comes dangerously close to completing that offense; or
      (ii) Would have come dangerously close to completing that offense if the situation was as the person perceived it; and
    (B) Is reasonably adapted to completion 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 course of conduct

(d) *Penalties for Attempt.*
  (1) An attempt 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), 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. Criminal 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 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) Intend to cause any result element required by that offense; and
(2) Intend for any circumstance element 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 provided that the defendant does everything he or she plans to do to transmit the message to the intended recipient.

(d) *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 engages in an overt act in furtherance of the conspiracy.

(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:
(1) Intend to cause any result elements required by that offense; and
(2) Intend for any circumstance elements required by that offense to exist.

(c) *Penalties for Conspiracy.*
(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).
(2) Notwithstanding paragraph (c)(1), conspiracies to commit the following offenses may be punished accordingly: [RESERVED: List of exceptions and accompanying penalties.]

(d) *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 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 even if performed outside the District of Columbia.

(e) *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 if performed within the District of Columbia; and

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

(f) *Legality of Conduct in Other Jurisdiction Irrelevant.* Under circumstances where paragraphs (d)(1) and (d)(2) can be established, it is 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.

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 General Inchoate Liability.

(a) *Renunciation Defense.* It is an affirmative defense to a prosecution for criminal attempt, criminal solicitation, and criminal conspiracy that:

(1) The defendant engaged in reasonable efforts 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.* 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 this affirmative defense by a preponderance of the evidence.

Chapter 4. Justification Defenses.

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

(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

(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 RCC § 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 RCC § 22E-701. The term "incapacitated individual" has the meaning specified in D.C. Code § 21-2011.

RCC § 22E-40X. Effective Consent Defense.

(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 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 RCC § 22E-701.

Chapter 6. Offense Classes, Penalties, & Enhancements.

RCC § 22E-601. Offense Classifications.

(a) *Offense Classifications.* Each offense in this title is classified as a:
(1) Class 1 felony;
(2) Class 2 felony;
(3) Class 3 felony;
(4) Class 4 felony;
(5) Class 5 felony;
(6) Class 6 felony;
(7) Class 7 felony;
(8) Class 8 felony;
(9) Class A misdemeanor;
(10) Class B misdemeanor;
(11) Class C misdemeanor;
(12) Class D misdemeanor; or a
(13) Class E misdemeanor.

(b) *Definitions.* For purposes of this title:
(1) "Felony" means an offense with an authorized term of imprisonment that is more than one (1) year or, in other jurisdictions, death.
(2) "Misdemeanor" means an offense with an authorized term of imprisonment that is one (1) year or less.

RCC § 22E-602. Authorized Dispositions.

(a) *Authorized Dispositions.* Except as otherwise provided by statute, a court may sentence a defendant upon conviction to sanctions that include one or more of the following:
(1) Imprisonment as authorized in D.C. Code § 22E-603;
(2) Fines as authorized in D.C. Code § 22E-604;
(3) Probation as authorized in D.C. Code § 16-710;
(4) Restitution or reparation as authorized in D.C. Code § 16-711;
(5) Community service as authorized in D.C. Code § 16-712;
(6) Postrelease supervision as authorized in D.C. Code § 24-903; and
(7) Work release as authorized in D.C. Code § 24-241.01.

RCC § 22E-603. Authorized Terms of Imprisonment.

(a) *Authorized Terms of Imprisonment.* Except as otherwise provided by law, the maximum term of imprisonment authorized for an offense is:
(1) For a Class 1 felony, life without possibility of release;
(2) For a Class 2 felony, not more than forty-five (45) years;
(3) For a Class 3 felony, not more than thirty (30) years;
(4) For a Class 4 felony, not more than twenty (20) years;
(5) For a Class 5 felony, not more than fifteen (15) years;

(6) For a Class 6 felony, not more than ten (10) years;
(7) For a Class 7 felony, not more than five (5) years;
(8) For a Class 8 felony, not more than three (3) years;
(9) For a Class A misdemeanor, not more than one (1) year;
(10) For a Class B misdemeanor, not more than one hundred and eighty (180) days;
(11) For a Class C misdemeanor, not more than ninety (90) days;
(12) For a Class D misdemeanor, not more than thirty (30) days; and
(13) For a Class E misdemeanor, no imprisonment.

(b) *Attempts*. A court shall decrease the authorized terms of imprisonment for an attempt to commit an offense pursuant to § 22E-301.

(c) *Penalty Enhancements*. A court may increase the authorized terms of imprisonment for an offense with a penalty enhancement pursuant to § 22E-605.

RCC § 22E-604. Authorized Fines.

(a) *Authorized Fines*. Except as otherwise provided by law, the maximum fine for an offense is:
(1) For a Class 1 felony, not more than $500,000;
(2) For a Class 2 felony, not more than $250,000;
(3) For a Class 3 felony, not more than $75,000;
(4) For a Class 4 felony, not more than $50,000;
(5) For a Class 5 felony, not more than $37,500;
(6) For a Class 6 felony, not more than $25,000;
(7) For a Class 7 felony, not more than $12,500;
(8) For a Class 8 felony, not more than $6,000;
(9) For a Class A misdemeanor, not more than $2,500;
(10) For a Class B misdemeanor, not more than $1,000;
(11) For a Class C misdemeanor, not more than $500;
(12) For a Class D misdemeanor, not more than $250; and
(13) For a Class E misdemeanor, not more than $250.

(b) *Limits on Maximum Fine Penalties.* A court may not impose a fine that would impair the ability of the defendant to make restitution or deprive the defendant of sufficient means for reasonable living expenses and family obligations.

(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) 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.

(d) *Alternative Maximum Fine for Organizational Defendants*. Subject to the limits on maximum fine penalties in subsection (b) of this section, if an 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.

(e) *Attempts*. A court shall decrease the authorized fines for an attempt to commit an offense pursuant to RCC § 22E-301.

(f) *Penalty Enhancements*. A court may decrease the authorized fines for an offense pursuant to RCC § 22E-605.

(g) *Definitions*. For purposes of this section:

(1) "Organizational Defendant" means any person other than an individual human being. The term includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations.

(2) "Pecuniary loss" means actual harm that is monetary or readily measurable in money.

(3) "Pecuniary gain" means before-tax profit, including additional revenue or cost savings.

RCC § 22E-605. Limitations on Penalty Enhancements.

(a) *Penalty Enhancements Not applicable To Offenses with Equivalent Elements*. Notwithstanding any other provision of law, an offense is not subject to a penalty enhancement in this Chapter when that offense contains an element in one of its gradations which is equivalent to the penalty enhancement.

(b) *Charging of Penalty Enhancements.* A person is not subject to additional punishment for a penalty enhancement unless notice of the penalty enhancement is provided by an information or indictment.

(c) *Standard of Proof for Penalty Enhancements*. Except for the establishment of prior convictions as provided in D.C. Code § 23-111, a person is not subject to additional punishment for a penalty enhancement unless each objective element and culpable mental state of the penalty enhancement is proven beyond a reasonable doubt.

(d) *Multiple Penalty Enhancements Permitted in Charging and Proof*. Multiple penalty enhancements may be applied to an offense for purposes of charging and proof at trial. However, an offense with multiple penalty enhancements is subject to RCC § 22E-70[X].

RCC § 22E-606. Repeat Offender Penalty Enhancements.

(a) *Misdemeanor Repeat Offender Penalty Enhancement.* A misdemeanor repeat offender penalty enhancement applies to a misdemeanor when the defendant, in fact, has two or more prior convictions for District of Columbia offenses or offenses equivalent to current District of Columbia offenses.

(b) *Felony Repeat Offender Penalty Enhancement.* A felony repeat offender penalty enhancement applies to a felony when the offender, in fact, has two or more prior convictions for District of Columbia felonies or offenses equivalent to current District of Columbia felonies.

(c) *Crime of Violence Repeat Offender Penalty Enhancement.* A crime of violence repeat offender penalty enhancement applies to a crime of violence when the offender, in fact, has one or more prior convictions for a District of Columbia crime of violence or an offense equivalent to a current District of Columbia crime of violence.

(d) *Additional Procedural Requirements.* No person shall be subject to additional punishment for a repeat offender penalty enhancement in this section unless the requirements of D.C. Code § 23-111 are satisfied.

(e) *Penalties.*

(1) *Misdemeanor Repeat Offender.* A misdemeanor repeat offender penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].

(2) *Felony Repeat Offender.* A felony repeat offender penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].

(3) *Crime of Violence Repeat Offender.* A crime of violence repeat offender penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].

(f) *Definitions.*

(1) *Crime of Violence.* For purposes of this section, "crime of violence" has the meaning defined in RCC § 22E-[XXX].

(2) *Equivalent.* For purposes of this section, "equivalent" means a criminal offense with elements that would necessarily prove the elements of a District criminal offense.

(3) *Felony.* "Felony" has the meaning specified in RCC § 22E-601.

(4) *Misdemeanor.* "Misdemeanor" has the meaning specified in RCC § 22E-601.

(5) *Prior Convictions.* In this section, "prior convictions" means convictions by any court or courts of the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, provided that:

(i) 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;

(ii) A conviction for an offense with a sentence that was completed more than 10 years prior to the commission of the instant offense shall not be counted for determining repeat misdemeanor offender and repeat felony offender penalty enhancements;

(iii) An offense that was committed when the defendant was a minor shall not be counted for determining misdemeanor repeat offender or felony repeat offender penalty enhancements; and

(iv) A conviction for which a person has been pardoned shall not be counted as a conviction.

RCC § 22E-607. Hate Crime Penalty Enhancement.

(a) *Hate Crime Penalty Enhancement.* 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.

(b) *Penalty.* A hate crime penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].

(c) *Definitions.*

(1) *Definition of Gender Identity or Expression.* For purposes of this section, "Gender identity or expression" shall have the same meaning as provided in D.C. Code § 2-1401.02(12A).

(2) *Definition of Homelessness.* For purposes of this section, "Homelessness" means:

(A) The status or circumstance of an individual who lacks a fixed, regular, and adequate nighttime residence; or

(B) The status or circumstance of an individual who has a primary nighttime residence that is:

(C) A supervised publicly or privately operated shelter designed to provide temporary living accommodations, including welfare motels, hotels, congregate shelters, and transitional housing for the mentally ill;

(D) An institution that provides a temporary residence for individuals intended to be institutionalized; or

(E) A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

RCC § 22E-608. Pretrial Release Penalty Enhancements.

(a) *Misdemeanor Pretrial Release Penalty Enhancement.* A misdemeanor pretrial release penalty enhancement applies to a misdemeanor when the offender committed the misdemeanor while on release pursuant to D.C. Code § 23-1321 for another offense.

(b) *Felony Pretrial Release Penalty Enhancement.* A felony pretrial release penalty enhancement applies to a felony when the offender committed the felony while on release pursuant to D.C. Code § 23-1321 for another offense.

(c) *Crime of Violence Pretrial Release Penalty Enhancement.* A crime of violence pretrial release penalty enhancement applies to a crime of violence when the defendant committed the crime of violence while on release pursuant to D.C. Code § 23-1321 for another offense.

(d) *Penalty Enhancement Not Applicable Where Conduct Punished as Contempt or Violation of Condition of Release.* Notwithstanding any other provision of law, a penalty enhancement in this section does not apply to an offense when a person is convicted of contempt pursuant to D.C. Code § 11-741 or violation of a condition of release pursuant to D.C. Code § 23-1329 for the same conduct.

(e) *Penalties.*

(1) *Misdemeanor Pretrial Release Penalty Enhancement.* A misdemeanor pretrial release penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].

(2) *Felony Pretrial Release Penalty Enhancement.* A felony pretrial release penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].

(3) *Crime of Violence Pretrial Release Penalty Enhancement.* A crime of violence pretrial release penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].

(f) *Definitions.*

(1) *Crime of Violence.* For purposes of this section, "crime of violence" has the meaning defined in RCC § 22E-XXX.

(2) *Felony.* "Felony" has the meaning specified in RCC § 22E-601.

(3) *Misdemeanor.* "Misdemeanor" has the meaning specified in RCC § 22E-601.

Chapter 7. Definitions.

RCC § 22E-701. Generally Applicable Definitions.

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

"Act" has the meaning specified in RCC § 22E-202.

"Actor" means person accused of a criminal offense.

"Attorney General" means the Attorney General for the District of Columbia.

"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.

"Block," and other parts of speech, including "blocks" and "blocking," mean render impassable without unreasonable hazard to any person.

"Bodily injury" means physical pain, illness, or any impairment of physical condition.

"Building" means a structure affixed to land that is designed to contain one or more natural persons.

"Business yard" means securely fenced or walled land where goods are stored or merchandise is traded.

"Check" means any written instrument for payment of money by a financial institution.

"Circumstance element" has the meaning specified in RCC § 22E-201.

"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 law enforcement officer's uniform, medical staff clothing, or any other uniform.

"Class B contraband" means:
(A) Any controlled substance or marijuana;
(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.

"Close relative" means a parent, grandparent, sibling, child, grandchild, aunt, or uncle.

"Coercive threat" means a threat, express or implicit, that, unless the complainant complies, any person will do any of the following:
(A) Engage in conduct that, in fact, constitutes:
(1) An offense against persons as defined in subtitle II of Title 22E; or
(2) 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;
(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:
(1) Hatred, contempt, ridicule, or other significant injury to personal reputation; or
(2) 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.

"Comparable offense" means a crime committed against the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, with elements that would necessarily prove the elements of a corresponding District crime.

"Complainant" means person who is alleged to have been subjected to any criminal offense.

"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.

"Conduct element" has the meaning specified in RCC § 22E-201.

"Controlled substance" has the meaning specified in D.C. Code 48-901.02.

"Correctional facility" means 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.

"Court" means the Superior Court of the District of Columbia.

"Culpable mental state" has the meaning specified in RCC § 22E-205.

"Culpability requirement" has the meaning specified in RCC § 22E-201.

"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;
(C) A sword, razor, or a knife with a blade over 3 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.

"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.

"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.

"Deprive" means:

(A) 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 the owner; or

(B) Dispose of the property, or use or deal with the property so as to make it unlikely that the owner will recover it.

"Detection device" means any wearable equipment with electronic monitoring capability, global positioning system, or radio frequency identification technology.

"District official" has the same meaning as "public official" in D.C. Code § 1-1161.01(47).

"Domestic partner" has the meaning as provided in D.C. Code § 32-701(3).

"Domestic partnership" shall have the same meaning as provided in D.C. Code § 32-701(4).

"Dwelling" means a structure that is either designed for lodging or residing overnight at the time of the offense, or that is actually used for lodging or residing overnight. In multi-unit buildings, such as apartments or hotels, each individual unit is a dwelling.

"Effective consent" means consent other than consent induced by physical force, a coercive threat, or deception.

"Elderly person" means a person who is 65 years of age or older.

"Factual cause" has the meaning specified in RCC § 22E-204.

"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.

"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) Attorneys' fees.

"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.

"Healthcare provider" means a person referenced in D.C. Code § 16–2801.

"Health professional" means a person required to obtain a District license, registration, or certification per D.C. Code § 3–1205.01.

"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.

"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.

"Innocent or irresponsible person" has the meaning specified in RCC § 22E-211.

"In fact" has the meaning specified in RCC § 22E-207.

"Intentionally" and other parts of speech, including "intent," have the meaning specified in RCC § 22E-206.

"Intoxication" has the meaning specified in RCC § 22E-209.

"Knowingly," and other parts of speech, including "know," "known," "knows," "knowing," and "knowledge," have the meaning specified in RCC § 22E-206.

"Law enforcement officer" means:
(A) A sworn member, officer, reserve officer, or designated civilian employee 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 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 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; and
(H) Any federal, state, county, or municipal officer performing functions comparable to those performed by the officers described in subparagraphs (A), (B), (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.

"Legal cause" has the meaning specified in RCC § 22E-204.

"Meeting" has the meaning specified in D.C. Code § 2-574.

"Motor vehicle" means any automobile, all-terrain vehicle, self-propelled mobile home, motorcycle, truck, 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.

"Negligently" has the meaning specified in RCC § 22E-206.

"Objective element" has the meaning specified in RCC § 22E-201.

"Offense element" has the meaning specified in RCC § 22E-201.

"Omission" has the meaning specified in RCC § 22E-202.

"Open to the general public" means no payment or permission is required to enter.

"Owner" means a person holding an interest in property with which the actor is not privileged to interfere without consent.

"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.

"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.

"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.

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
(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.

"Physically following" means maintaining close proximity to a person as they move from one location to another.

"Physically monitoring" means being in close proximity to a person's residence, workplace, or school to detect the person's whereabouts or activities.

"Position of trust with or authority over" 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 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 t.me of the 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.

"Possess," and other parts of speech, including "possesses," "possessing," and "possession" means:
(A) Hold or carry on one's person; or
(B) Have the ability and desire to exercise control over.

"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.

"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.

"Property of another" means any property that a person has an interest in with which the actor is not privileged to interfere without consent, regardless of whether the actor also has an interest in that property. The term "property of another" does not include any property in the possession of the actor with which the other person has only a security interest.

"Protected person" means a person who is:
(A) Under 18 years of age, when, in fact, the actor is 18 years of age or older and at least 4 years older than the complainant;
(B) 65 years of age 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 his or her official duties;
(E) A public safety employee, while in the course of his or her official duties;
(F) A transportation worker, while in the course of his or her official duties; or
(G) A District official, while in the course of his or her official duties.

"Protection order" means an order issued pursuant to D.C. Code § 16-1005(c).

"Public body" has the meaning specified in D.C. Code § 2-574.

"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.

"Public safety employee" means:
(A) A District of Columbia firefighter, emergency medical technician/ paramedic, emergency medical technician/intermediate paramedic, or emergency medical technician;
(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 paragraph (A) and paragraph (B).

"Purposely," and other parts of speech, including "purpose," have the meaning specified in RCC § 22E-206.

"Recklessly," and other parts of speech, including "recklessness," have the meaning specified in RCC § 22E-206.

"Result element" has the meaning specified in RCC § 22E-201.

"Safety" means ongoing security from significant intrusions on one's bodily integrity or bodily movement.

"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.

"Self-induced intoxication" has the meaning specified in RCC § 22E-209.

"Serious bodily injury" means a 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.

"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.

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

"Sexual contact" means:

(A) Sexual act; or
(B) 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 the desire to sexually degrade, sexually arouse, or sexually gratify any person.

"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.

"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.

"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.

"Speech" means oral or written language, symbols, or gestures.

"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.

"Strict liability" or "Strictly liable" has the meaning specified in RCC § 22E-205.

"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; and

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

(D) A person who is 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).

"Value"

(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:

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

(2) 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

(3) 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].

"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.

"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.

Subtitle II. Offenses Against Persons.

Chapter 11. Homicide.

RCC § 22E-1101. Murder.

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

(b) *Second Degree*. A person commits second degree murder when that person:

(1) Recklessly, 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, by committing the lethal act in the course of and in furtherance of committing or attempting to commit one of the following offenses: first or second degree arson as defined in RCC § 22E-2501; first degree sexual abuse as defined in RCC § 22E-1303; first degree sexual abuse of a minor as defined in RCC § 22E-1304; first and second degree child abuse as defined in RCC § 22E-1501; first degree burglary as defined in RCC § 22E-2701 when committed while possessing a dangerous weapon on his or her person; first, second, third, or fourth degree robbery as defined in RCC § 22E-1501; or first or second degree kidnapping as defined in RCC § 22E-1401.

(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) 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) 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) *Enhanced Penalties*. The penalty classification for first degree murder and second degree murder may be increased in severity by one penalty class, in addition to any penalty enhancements applicable per Chapter 8 of this Title, when a person commits first degree murder or second degree murder and the person:

(A) Is reckless as to the fact that 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) *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 found guilty 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).

(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 actor's situation under the circumstances as the actor believed them to be;
(B) Acting with an unreasonable belief that the use of deadly force was necessary to prevent a person from unlawfully causing death or serious bodily injury; or
(C) Any other legally-recognized partial defense which substantially diminishes either the actor's culpability or the wrongfulness of the actor's conduct.
(2) *Burden of Proof for Mitigation Defense*. If any 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.* If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, the actor is not guilty of murder, but is guilty of voluntary manslaughter.

(g) *No Accomplice Liability for Felony Murder.* Notwithstanding RCC § 22E-210, no person shall be guilty as an accomplice to second degree murder under paragraph (b)(2).

(h) *Sentencing.*

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

(i) *Definitions.* The terms "knowingly," "negligently," "purposely," "recklessly," and have the meanings specified in RCC § 22E-206; the terms "actor," "law enforcement officer," "possess," "protected person," "public safety employee," and "District official," have the meanings specified in RCC § 22E-701; and the terms "intoxication" and "self-induced intoxication" have the meanings specified in RCC § 22E-209.

RCC § 22E-1102. Manslaughter.

(a) *Voluntary Manslaughter***.** A person commits voluntary manslaughter when that person:
  (1) Recklessly, with extreme indifference for human life, causes death of another person; or
  (2) Negligently causes the death of another person, other than an accomplice, by committing the lethal act in in the course of and in furtherance of committing or attempting to commit one of the following offenses: first or second degree arson as defined in RCC § 22E-2501; first degree sexual abuse as defined in RCC § 22E-1303; first degree sexual abuse of a minor as defined in RCC § 22E-1304; first and second degree child abuse as defined in RCC § 22E-1501; first degree burglary as defined in RCC § 22E-2701, when committed while possessing a dangerous weapon on his or her person; first, second, third, or fourth degree robbery as defined in RCC § 22E-1501; or first or second degree kidnapping as defined in RCC § 22E-1401.

(b) *Involuntary Manslaughter*. A person commits 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 (a)(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) Voluntary manslaughter is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) 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, in addition to any penalty enhancements applicable per Chapter 8 of this Title, 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 "negligently," "purposely," and "recklessly" have the meanings specified in RCC § 22E-206; the terms "District official," "law enforcement officer," "possess," "protected person," "public safety employee" have the meanings specified in RCC § 22E-701; and the terms "intoxication" and "self-induced intoxication" have the meanings specified in RCC § 22E-209.

RCC § 22E-1103. Negligent Homicide.

(a) *Offense.* 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.

Chapter 12. Robbery, Assault, and Threats.

RCC § 22E-1201. Robbery.

(a) *First Degree*. A person commits first degree robbery when that person:
  (1) Commits fifth degree robbery; and
  (2) In the course of doing so, to someone other than an accomplice:
    (A) Recklessly causes serious bodily injury by displaying or using what, in fact, is a dangerous weapon; or
    (B) Recklessly causes serious bodily to a protected person.

(b) *Second Degree*. A person commits second degree robbery when that person:
  (1) Commits fifth degree robbery and;
  (2) In the course of doing so, to someone other than an accomplice:
    (A) Recklessly causes serious bodily injury;
    (B) Recklessly causes significant bodily injury by displaying or using what, in fact, is a dangerous weapon.

(c) *Third Degree.* A person commits third degree robbery when that person:
  (1) Commits 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 a protected person; or
      (ii) Recklessly causes bodily injury by displaying or using what, in fact, is a dangerous weapon; 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.* A person commits fourth degree robbery when that person:
  (1) Commits 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; or
      (ii) Recklessly displays what, in fact, is a dangerous weapon or imitation dangerous weapon;
      (iii) Recklessly causes bodily injury to a protected person; or
    (B) In fact, the property that is the object of the offense is a motor vehicle.

(e) *Fifth Degree*. A person commits fifth degree robbery when that person:
  (1) Knowingly takes or exercises control over the property of another;
  (2) That the complainant possesses either on his or her person or within his or her immediate physical control;
  (3) With intent to deprive the complainant of the property; and
  (4) Knowingly does so by:
    (A) Causing bodily injury to the complainant or any person present other than an accomplice;

(B) 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) Using physical force that overpowers the complainant or any person present other than an accomplice.

(f) *Penalties.*

(1) 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 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 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 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 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 "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," "possesses," "protected person," "serious bodily injury," and "significant bodily injury" have the meanings specified in RCC § 22E-901.

RCC § 22E-1202. Assault.

(a) *First Degree.* A person commits first degree assault when that person:

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

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

(3) Recklessly, with extreme indifference to human life, causes serious bodily injury to the complainant by displaying or using an object that, in fact, is a dangerous weapon; or

(4) Recklessly, with extreme indifference to human life, causes serious bodily injury to the complainant:

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

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

(b) *Second Degree*. A person commits second degree assault when that person:

(1) Recklessly, with extreme indifference to human life, causes serious bodily injury to the complainant; or

(2) Recklessly causes significant bodily injury to the complainant by displaying or using an object that, in fact, is a dangerous weapon.

(c) *Third Degree.* A person commits third degree assault when that person:

(1) Recklessly causes significant bodily injury to the complainant:

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

(B) 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

(2) Recklessly causes bodily injury to the complainant by displaying or using an object that, in fact, is a dangerous weapon.

(d) *Fourth Degree.* A person commits fourth degree assault when that person recklessly causes significant bodily injury to the complainant.

(e) *Fifth Degree.* A person commits fifth degree assault when that person:

(1) Recklessly causes bodily injury to the complainant:

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

(B) 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

(2) Negligently causes bodily injury to the complainant by discharging an object that, in fact, is a firearm as defined in D.C. Code § 22-4501(2A).

(f) *Sixth Degree.* A person commits sixth degree assault when that person recklessly causes bodily injury to the complainant.

(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] 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) 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) 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) 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) 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) 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) 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 "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 "bodily injury," "complainant," ["court,"] "dangerous weapon," "District official," "law enforcement officer," "protected person," "public safety employee," "serious bodily injury," and "significant bodily injury" have the meanings specified in RCC § 22E-701; and the terms "intoxication" and "self-induced intoxication" have the meanings specified in RCC § 22E-209.

RCC § 22E-1203. Menacing.

(a) *First Degree.* Except as provided in subsection (c), an actor commits first degree menacing when that actor:
(1) Knowingly communicates to 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 by displaying or using a dangerous weapon or imitation dangerous weapon;
(3) With intent that the communication be perceived as a serious expression that the actor would cause the harm; and
(4) In fact, the communication would cause a reasonable person in the complainant's circumstances to believe that the harm would immediately occur.

(b) *Second Degree.* Except as provided in subsection (c), an actor commits second degree menacing when that actor:
(1) Knowingly communicates to 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) With intent that the communication be perceived as a serious expression that the actor would cause the harm; and
(3) In fact, the communication would cause a reasonable person in the complainant's circumstances to believe that the harm would immediately 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 menacing is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree menacing 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," "court," "complainant," "dangerous weapon," "imitation dangerous weapon," "property," "sexual act," and "sexual contact" have the meanings specified in RCC § 22E-701.

RCC § 22E-1204. Criminal Threats.

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

(1) Knowingly communicates to a complainant that, anytime in the future or if any condition is met, the actor will cause a criminal harm to any person involving a bodily injury, a sexual act, a sexual contact, or confinement;

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

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

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

(1) Knowingly communicates to a complainant that, anytime in the future or if any condition is met, the actor will cause a criminal harm to any natural person involving $250 or more in loss or damage to property;

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

(3) In fact, the communication would cause a reasonable person in the complainant's circumstances to believe that the harm would 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 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 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 "actor," "bodily injury," "complainant," "court," "property," "sexual act," and "sexual contact" have the meanings specified in RCC § 22E-701.

RCC § 22E-1205. Offensive Physical Contact.

(a) *First Degree.* A person commits first degree offensive physical contact when that person:
  (1) Knowingly causes the complainant to come in physical contact with bodily fluid or excrement;
  (2) With intent that the physical contact be offensive to the complainant;
  (3) In fact, a reasonable person in the situation of the complainant would regard it as offensive.

(b) *Second Degree.* A person commits second degree offensive physical contact when that person:
  (1) Knowingly causes physical contact with the complainant;
  (2) With intent that the physical contact be offensive to the complainant; and
  (3) In fact, a reasonable person in the situation of the 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] 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) *Penalties.*
  (1) 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 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," "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" have the meanings specified in RCC § 22E-701.

RCC § 22E-1206. Stalking.

(a) *Offense.* Except as provided in subsection (b), a person commits stalking when that person:
  (1) Purposely, on two or more separate occasions, engages in a course of conduct directed at a complainant that consists of any of the following:
    (A) Physically following or physically monitoring;
    (B) Communicating to the complainant, by use of a telephone, mail, delivery service, electronic message, in person, or any other means, after knowingly receiving notice from the complainant, directly or indirectly, to stop such communication; or
    (C) In fact, committing a criminal harm involving a trespass, threat, taking of property, or damage to property;
  (2) Either:
    (A) With intent to cause the complainant to:
      (i) Fear for the complainant's safety or the safety of another person; or
      (ii) Suffer significant emotional distress; or
    (B) Negligently causing the complainant to:
      (i) Fear for the complainant's safety or the safety of another person; or
      (ii) Suffer significant emotional distress.

(b) *Exclusions from Liability.*
  (1) Nothing in this section shall be construed to prohibit conduct protected by the U.S. Constitution, the First Amendment Assemblies Act of 2004 codified at § 5-331.01 et al., or the Open Meetings Act codified at D.C. Code § 2-575.
  (2) A person shall not be subject to prosecution under 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 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, professional investigator, attorney, process server, *pro se* litigant, or compliance investigator; and
    (B) Is acting within the reasonable scope of that role.

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

(d) [*Jury Trial*. A defendant charged with 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) Stalking is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

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

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

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

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

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

(f) *Definitions*.

(1) The terms "intent," "negligently," "purposely," and "recklessly" have the meaning 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.

Chapter 13. Sexual Assault and Related Provisions.

RCC § 22E-1301. Sexual Assault.

(a) *First Degree*. An actor commits 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, 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*. An actor commits 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 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*. An actor commits 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, 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*. An actor commits 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 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 actor's reasonable belief that the complainant gave effective consent to the 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; 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 at least 4 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 years older than the complainant.

(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-605 - 22E-608 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, 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 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 years older than the complainant;
  - (B) The actor was reckless as to the fact that the complainant was under 16 years of age and the actor was, in fact, at least 4 years older than the complainant;
  - (C) The actor was reckless 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 years older than the complainant;
  - (D) The actor was reckless 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 4 years older than the complainant;
  - (E) The actor was reckless as to the fact that the complainant was 65 years of age or older and the actor was, in fact, at least 10 years younger than the complainant; or
  - (F) The actor was reckless as to the fact that the complainant was a vulnerable adult.

(h) *Definitions*. The terms "intent," "knowingly," "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" have the meanings specified in RCC § 22E-701.

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

(a) *First Degree*. An actor commits 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 years older than the complainant.

(b) *Second Degree*. An actor commits 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 years older than the complainant.

(c) *Third Degree*. An actor commits 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 years older than the complainant.

(d) *Fourth Degree*. An actor commits fourth degree sexual abuse of a minor when that actor:
  (1) Knowingly 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 years older than the complainant.

(e) *Fifth Degree*. An actor commits fifth degree sexual abuse of a minor when that actor:
  (1) Knowingly 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 years older than the complainant.

(f) *Sixth Degree*. An actor commits sixth degree sexual abuse of a minor when that person:

(1) Knowingly 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 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 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 (b) and subsection (e) 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 (c) and subsection (f) that:
(i) The actor reasonably believed that the complainant was 18 years of age of 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" have the meanings specified in RCC § 22E-701.

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

(a) *First Degree*. An actor commits 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 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; or
        (II) Receives services or attends programming at the same secondary school; and
      (ii) The complainant is under the age of 20 years.
    (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, 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*. An actor commits 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 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; or
    (II) Receives services or attends programming at the same secondary school; and
  (ii) The complainant is under the age of 20 years.

(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, 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) *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; and the terms "actor," "complainant," "domestic partnership," "health professional," "healthcare provider," "sexual act," and "sexual contact," have the meanings specified in RCC § 22E-701.

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

(a) *Offense*. An actor commits sexually suggestive contact with a minor when that actor:
  (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 4 years older than the complainant; and:
    (A) The actor was reckless as to the fact that the complainant is under 16 years of age; or
    (B) The actor was reckless 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) *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," have the meanings specified in RCC § 22E-701.

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

(a) *Offense*. An actor commits 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 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:

(A) The actor:

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

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

(B) (B) The actor:

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

(ii) Knows that the actor is in a position of trust with or authority over the complainant; 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 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) *Penalty.* Subject to the general penalty enhancements in RCC §§ 22E-605 - 22E-608, 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" 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" have the meanings specified in RCC § 22E-701.

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

(a) *Offense.* An actor commits 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 4 years older than the complainant; and

(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 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) *Penalty*. Subject to the general penalty enhancements in RCC §§ 22E-605 - 22E-608, 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" 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" have the meanings specified in RCC § 22E-701.

RCC § 22E-1307. Nonconsensual Sexual Conduct.

(a) *First Degree*. An actor commits 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*. An actor commits 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 deception that induces the complainant to consent to the sexual act or sexual contact; however, an actor may be subject to prosecution under this section for 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; the terms "actor," "complainant," "deception," "effective consent," "sexual act," and "sexual contact" have the meanings specified in RCC § 22E-701.

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

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-1301(a), or third degree sexual assault, pursuant to RCC § 22E-1301(c).

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

(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.

(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.

(f) *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.

(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.

(a) *Reputation or Opinion Evidence of Complainant's Past Sexual Behavior Inadmissible.* Notwithstanding any other provision of law, in a criminal case under RCC Chapter 13, reputation or opinion evidence of the past sexual behavior of the complainant is not admissible.

(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.

Chapter 14. Kidnapping, Criminal Restraint, and Blackmail.

RCC § 22E-1401. Kidnapping.

(a) *Aggravated Kidnapping.* Except as specified in subsection (c), a person commits aggravated kidnapping when that person:
  (1) Knowingly and substantially confines or moves the complainant; and
  (2) Does so:
    (A) When the actor is, in fact, 18 years or older, reckless as to the fact that the complainant is under 12 years of age and that a person with legal authority over the complainant would not give effective consent to the confinement or movement; or
    (B) Without the effective consent of the complainant, and:
      (i) Reckless as to the fact that the complainant is a protected person;
      (ii) 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
      (iii) By knowingly displaying or using what is, in fact, a dangerous weapon or, in fact, an imitation dangerous weapon.
  (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;
    (E) Commit a sexual offense defined in Chapter 13 of this Title 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 defined in Chapter 13 of this Title; or
    (G) Permanently deprive a person with legal authority over the complainant of custody of the complainant.

(b) *Kidnapping.* Except as specified in subsection (c), a person commits kidnapping when that person:
  (1) Knowingly and substantially confines or moves the complainant;
  (2) Does so:
    (A) Without the effective consent of the complainant; or
    (B) With recklessness as to the fact that that the complainant is an incapacitated individual and that a person with legal authority over the complainant would not give effective consent to the confinement or movement; or
    (C) When the actor is, in fact, 18 years or older, was reckless as to the fact that the complainant is under 16 years of age, four years younger than the actor, and that a person with legal authority over

the complainant would not give effective consent to the confinement or movement.

(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;

(E) Commit a sexual offense defined in Chapter 13 of this Title 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 defined in Chapter 13 of this Title; or

(G) Permanently deprive a person with legal authority over the complainant of custody of the complainant.

(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.

(d) *Penalties*.

(1) 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 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 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 kidnapping or kidnapping 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 "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," "close relative," "consent," "deception," "effective consent," "person," and "relative" have the meanings specified in RCC § 22E-901; The term "incapacitated individual" has the meaning specified in D.C. Code § 21-2011.

RCC § 22E-1402. Criminal Restraint.

(a) *Aggravated Criminal Restraint.* Except as provided in subsection (c), an actor commits aggravated criminal restraint when that actor:

(1) Knowingly and substantially confines or moves the complainant; and

(2) Does so:

(A) When the actor is, in fact, 18 years or older, reckless as to the fact that the complainant is under 12 years of age and that a person with legal authority over the complainant would not give effective consent to the confinement or movement; or

(B) Without the effective consent of the complainant; and

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

(ii) 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

(iii) By knowingly displaying or using what is, in fact, a dangerous weapon or, in fact, an imitation dangerous weapon.

(b) *Criminal Restraint.* Except as specified in subsection (c), an actor commits criminal restraint when that actor:

(1) Knowingly and substantially confines or moves the complainant; and

(2) Does so:

(A) Without the effective consent of the complainant;

(B) With recklessness as to the fact that that the complainant is an incapacitated individual and that a person with legal authority over the complainant would not give effective consent to the confinement or movement; or

(C) When the actor is, in fact, 18 years or older, reckless as to the fact that the complainant is under 16 years of age, four years younger than the actor, and that a person with legal authority over the complainant would not give effective consent to the confinement or movement.

(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.*

(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," "purpose," 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," "close relative," "complainant," "dangerous weapon," "District official," "imitation dangerous weapon," "law enforcement officer," "person with legal authority over the complainant," "protected person," and "public safety employee" have the meanings specified in RCC § 22E-701. The term "incapacitated individual" has the meaning specified in D.C. Code § 21-2011.

Chapter 15. Abuse and Neglect of Vulnerable Persons.

RCC § 22E-1501. Criminal Abuse of a Minor.

(a) *First Degree*. A person commits first degree 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 the complainant; or
    (B) Recklessly causes serious bodily injury to the complainant.

(b) *Second Degree*. A person commits second degree 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) Causes serious mental injury to the complainant; or
    (B) Causes significant bodily injury to the complainant.

(c) *Third Degree*. A person commits third degree 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: 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 the complainant;
    (B) Purposely causes significant emotional distress by confining the complainant; or
    (C) Recklessly causes bodily injury to the complainant;

(d) *Penalties*.
  (1) First degree 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 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 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," and "recklessly" have the meanings specified in RCC § 22E-206; and the terms "bodily injury," "complainant," "serious bodily injury," "serious mental injury," "significant bodily injury," and "significant emotional distress" have the meanings specified in RCC § 22E-701.

RCC § 22E-1502. Criminal Neglect of a Minor.

(a) *First Degree*. Except as provided in subsection (d), a person commits first degree 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) Created, or failed to mitigate or remedy, a substantial risk that the complainant would experience serious bodily injury or death.

(b) *Second Degree*. Except as provided in subsection (d), a person commits second degree 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) Created, or failed to mitigate or remedy, a substantial risk that the complainant would experience:
    (A) Significant bodily injury; or
    (B) Serious mental injury.

(c) *Third Degree*. Except as provided in subsection (d), a person commits third degree 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 the complainant.

(d) *Exception to Liability for Newborn Safe Haven*. No person shall be guilty 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 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 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 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" have the meanings specified in RCC § 22E-206; and the terms "complainant," "serious bodily injury," "serious mental injury," and "significant bodily injury," have the meanings specified in RCC § 22E-701.

RCC § 22E-1503. Criminal Abuse of a Vulnerable Adult or Elderly Person.

(a) *First Degree*. A person commits 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; or
    (B) Recklessly causes serious bodily injury to the complainant.

(b) *Second Degree*. A person commits second 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) Causes serious mental injury to the complainant; or
    (B) Causes significant bodily injury to the complainant.

(c) *Third Degree.* A person commits 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: 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 the complainant;
    (B) Purposely causes significant emotional distress by confining the complainant; or
    (C) Recklessly causes bodily injury to the complainant.

(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 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 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 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.

(f) *Definitions.* The terms "purposely," "reckless," 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," "significant bodily injury," "significant emotional distress," and "vulnerable adult" have the meanings specified in RCC § 22E-701.

RCC § 22E-1504. Criminal Neglect of a Vulnerable Adult or Elderly Person.

(a) *First Degree*. A person commits 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) Created, or failed to mitigate or remedy, a substantial risk that the complainant would experience serious bodily injury or death.

(b) *Second Degree*. A person commits second degree 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 a vulnerable adult or elderly person;
(2) Created, or failed to mitigate or remedy, a substantial risk that the complainant would experience:
(A) Significant bodily injury; or
(B) Serious mental injury.

(c) *Third Degree*. A person commits third degree 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 a vulnerable adult or elderly person;
(2) 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 the complainant.

(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 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 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 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 "reckless has the meaning specified in RCC § 22E-206; and the terms "actor," "complainant," "effective consent," "elderly person," "serious bodily injury," "serious mental injury," "significant bodily injury," and "vulnerable adult," have the meanings specified in RCC § 22E-701.

Chapter 16. Human Trafficking.

RCC § 22E-1601. Forced Labor or Services.

(a) *Offense.* An actor commits forced labor or services when that actor:
  (1) Knowingly causes a person to engage in labor or services;
  (2) By means of a coercive threat or debt bondage.

(b) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22E-605 - 22E-608, 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, 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 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 more than 180 days.

(d) *Definitions*. The terms "knowingly," and "recklessly" have the meanings specified in RCC § 22E-206; the terms "coercive threat" "debt bondage" "labor," and "services," have the meanings specified in RCC § 22E-701.

(e) *Exclusions from Liability.* An actor 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 § 22E-1602. Forced Commercial Sex.

(a) *Offense.* An actor commits forced commercial sex when that actor:
  (1) Knowingly causes the complainant to engage in a commercial sex act with another person;
  (2) By means of a coercive threat or debt bondage.

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

(d) *Definitions*. The terms "knowingly," and "recklessly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC §22E-207; the terms "business," "coercive threat" "commercial sex act," and "debt bondage" have the meanings specified in RCC § 22E-701.

RCC § 22E-1603. Trafficking in Labor or Services.

(a) *Offense.* An actor commits trafficking in labor or services when that actor:
  (1) Knowingly recruits, entices, houses, transports, provides, obtains, or maintains by any means, a person;
  (2) With intent that, as a result, the person will be caused to provide labor or services by means of a coercive threat or debt bondage.

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

(d) *Definitions*. The terms "intent," "knowingly," and "recklessly" have the meanings specified in RCC § 22E-206; the terms "actor," "coercive threat" "commercial sex act," and "debt bondage" have the meanings specified in RCC § 22E-701.

RCC § 22E-1604. Trafficking in Commercial Sex.

(a) *Offense.* An actor commits trafficking in commercial sex when that actor:
  (1) Knowingly recruits, entices, houses, transports, provides, obtains, or maintains by any means, the complainant;
  (2) With intent that, as a result, the complainant will be caused to engage in a commercial sex act with another person by means of a coercive threat or debt bondage.

(b) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22E-605 - 22E-608 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.* Before applying any general penalty enhancements in RCC §§ 22E-605 – 22E-608, 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 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.

(d) *Definitions*. The terms "intent," "knowingly," and "recklessly," have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor" "coercive threat," "commercial sex act" and "debt bondage" have the meanings specified in RCC § 22E-701.

RCC § 22E-1605. Sex Trafficking of Minors.

(a) *Offense*. An actor commits sex trafficking of minors when that actor:
(1) Knowingly recruits, entices, houses, transports, provides, obtains, or maintains by any means the complainant;
(2) 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 complainant is under the age of 18.

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

(d) *Definitions.* The terms "intent," "knowingly," and "recklessly," have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," and "commercial sex act" have the meanings specified in RCC § 22E-701.

RCC § 22E-1606. Benefiting from Human Trafficking.

(a) *First Degree.* An actor commits first degree benefiting from human trafficking when that 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: constitutes forced commercial sex under RCC § 22E-1604, trafficking in commercial sex under RCC § 22E-1606, or sex trafficking of minors under RCC § 22E-1605.

(b) *Second Degree.* An actor commits second degree benefiting from human trafficking when that 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: constitutes forced labor or services under RCC § 22E-1603 or trafficking in labor or services under RCC § 22E-1605.

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

(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 § 22E-206; the terms "actor," and "property" have the meanings specified in RCC § 22E-701.

RCC § 22E-1607. Misuse of Documents in Furtherance of Human Trafficking.

(a) *Offense.* An actor commits misuse of documents in furtherance of human trafficking when that 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 restrict the person's liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex act by that person.

(b) *Penalty.* Subject to the general penalty enhancements in RCC §§ 22E-605 - 22E-608, 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 RCC § 22E-206; the terms "actor," "commercial sex act," "labor," "possess" and "service" have the meanings specified in RCC § 22E-701.

RCC § 22E-1608. Commercial Sex with a Trafficked Person.

(a) *First Degree.* An actor commits first degree commercial sex with a trafficked person when that actor:

(1) Knowingly engages in a commercial sex act;

(2) When a coercive threat or debt bondage by another person causes the 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.* An actor commits second degree commercial sex with a trafficked person when that actor:

(1) Knowingly engages in a commercial sex act;

(2) When either:

(A) A coercive threat or debt bondage by another person causes the complainant to submit to or engage in the commercial sex act; or

(B) The complainant was recruited, enticed, housed, transported, provided, obtained, or maintained for the purpose of causing the person to submit to or engage in the commercial sex act; and 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) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22E-605 - 22E-608:

(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.

(d) *Definitions*. The terms "knowingly," and "recklessly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E–206; the terms "actor," "coercive threat" "commercial sex act," "complainant," and "debt bondage" have the meanings specified in RCC § 22E-701.

RCC § 22E-1609. Forfeiture.

(a) In imposing sentence on any person convicted of a violation of this chapter, the court may order, in addition to any sentence imposed, that 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 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 § 22E-1610. Reputation or opinion evidence.

In a criminal case in which a person is accused of forced commercial sex, as prohibited by RCC § 22E-1602; trafficking in commercial sex, as prohibited by RCC § 22E-1604; sex trafficking of minors, as prohibited by RCC § 22E-1605; or benefitting from human trafficking, as prohibited by RCC § 22E-1606; 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 § 22E-1611. Civil action.

(a) An individual who is a victim of an offense prohibited by 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 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 § 22E-1612. Limitation on Liabilities and Sentencing for RCC Chapter 16 Offenses.

(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.

(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.

Subtitle III. Property Offenses.

Chapter 20. Property Offense Subtitle Provisions.

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.

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.

Chapter 21. Theft.

RCC § 22E-2101. Theft.

(a) *First Degree.* A person commits first 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;
- (3) With intent to deprive 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;
- (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;
- (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;
- (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;
- (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) *Penalties*.

(1) 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) 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) 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) 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) 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 terms "knowingly" and "intent" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "consent," "deprive," "motor vehicle," "owner," "property," "property of another," and "value" have the meanings specified in RCC § 22E-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 unauthorized use of property when that person:

(1) Knowingly takes, obtains, transfers, or exercises control over the property of another;

(2) Without the effective consent of 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 "knowingly" has the meaning specified in RCC § 22E-206; the terms "effective consent," "property," "property of another," and "owner" have the meanings specified in RCC § 22E-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 unauthorized use of a motor vehicle when that person:

(1) Knowingly operates a motor vehicle;

(2) Without the effective consent of an owner.

(b) *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.

(c) *Definitions.* The term "knowingly" has the meaning specified in RCC § 22E-206; and the terms "effective consent," "motor vehicle," and "owner" have the

meanings specified in RCC § 22E-701; and the term "person" has the meaning specified in RCC § 22E-2002.

RCC § 22E-2104. Shoplifting.

(a) *Offense*. A person commits shoplifting when that person:
  (1) Knowingly:
    (A) Conceals or holds or carries on one's person;
    (B) Removes, alters, or transfers the price tag, serial number, or other
      (i) 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:
    (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) *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 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.

(e) *Definitions.* The terms "knowingly" and "intent" have the meanings specified in RCC § 22E-206; the terms "property" and "property of another," have the meanings specified in RCC § 22E-701; and the term "person" has the meaning specified in RCC § 22E-2002.

RCC § 22E-2105. Unlawful Creation or Possession of a Recording.

(a) *First Degree.* A person commits first 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, 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.

(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) *Penalties*.

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

(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.

(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 RCC § 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.

(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;
  (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.

Chapter 22. Fraud.

RCC § 22E-2201. Fraud.

(a) *First Degree.* A person commits first 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 $250,000 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) *Penalties.*
(1) First degree 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 fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(3) Third degree fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(4) Fourth degree fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(5) Fifth degree fraud 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 "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) *First Degree.* A person commits first 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;
(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;
(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 $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;

(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 $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;
(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 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) *[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.]

(g) *Penalties*.

(1) 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) 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) 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) 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) 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.

(h) *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 meaning specified in RCC § 22E-701; and the term "person" has the meaning specified in RCC § 22E-2002.

RCC § 22E-2203. Check Fraud.

(a) *First Degree.* A person commits first degree check fraud when that person:
  (1) Knowingly obtains or 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, $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) *Penalties*.
  (1) 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 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," 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) *First Degree.* A person commits first degree forgery 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) Alters a written instrument without authorization, and the written instrument is reasonably adapted to deceive a person into believing it is genuine;

(B) Makes or completes a written instrument

(i) That appears to be:

(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

(ii) The written instrument is reasonably adapted to deceive a person into believing the written instrument is genuine; or

(C) 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);

(2) With intent to:

(A) Obtain property of another by deception; or

(B) Harm another person.

(d) *Penalties.*

(1) 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 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 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" 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) *First Degree.* A person commits 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 $250,000 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) Without that other person's effective consent; and
  (3) 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) [*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.]

(g) *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.

(h) Penalties.
  (1) 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) 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) 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) 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) 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.

(i) *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.

(j) *Definitions*. The terms "intent," and "knowingly" have the meanings specified in RCC § 22E-206; he term "in fact" has the meaning specified in RCC § 22E-207, and the terms "consent," "deception," "effective consent," "financial injury," "personal identifying information," "possess," "property," "property of another," and "value" have the meanings specified in RCC § 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 first degree unlawful labeling of a recording 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) 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) *Penalties*.
  (1) 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 is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(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.

(f) *Definitions*.
  (1) The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "audiovisual recording," "possess," and "sound recording" have the meanings specified in RCC § 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 commits first 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 $250,000 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) With consent of an owner obtained by undue influence;
(B) With recklessness as to the fact that the owner is a vulnerable adult or elderly person; and
(C) With intent to deprive an owner of the property; or
(2) Commits theft, extortion, forgery, fraud, or identity theft with recklessness that the complainant is a vulnerable adult or elderly person.

(f) *Penalties*.
(1) 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) 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) 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) 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) 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. .

(g) *Restitution.* In addition to the penalties set forth in subsection (g) of this section, a person shall make restitution, before the payment of any fines or civil penalties.

(h) *Definitions.*

(1) 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; the terms "coercion," "consent," "deprive," "elderly person," "financial injury," "owner," "property," "property of another," "value," and "vulnerable adult," have the meanings specified in RCC § 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 § 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 § 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 § 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 § 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.

Chapter 23. Extortion.

RCC § 22E-2301. Extortion.

(a) *First Degree.* A person commits first 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; and
- (4) With intent to deprive that owner of the property; and
- (5) 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) *Penalties*.
- (1) 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) 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) 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) 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) Fifth degree extortion 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," and "intent," have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "consent," "coercive threat," "deprive," "property," "property of another," and "value" have the meanings specified in RCC § 22E-701; and the term "person" has the meaning specified in RCC § 22E-2002.

Chapter 24. Stolen Property.

RCC § 22E-2401. Possession of Stolen Property.

(a) *First Degree.* A person commits first 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 $250,000 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) *Penalties*.
  (1) 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) 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) 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) 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) 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.

(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 "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) *First Degree.* A person commits first 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 $250,000 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) *Penalties*.
  (1) 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) 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) 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) 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) 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.

(g) *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 first 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;
(3) 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 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) *Penalties*.
(1) First degree 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 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," 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 alteration of a bicycle identification numbers when that person:
(1) Knowingly alters an identification number of a bicycle or bicycle part;
(2) With intent to conceal or misrepresent the identity of the bicycle or bicycle part.

(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.

(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.

Chapter 25. Property Damage.

RCC § 22E-2501. Arson.

(a) *First Degree.* A person commits first 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 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
  (4) 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 third degree arson, which the actor must prove by a preponderance of the evidence, that 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) *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.
  (2) 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) 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" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "dwelling," "building," and "serious bodily injury" have the meanings specified in RCC § 22E-701; and the term "person" has the meaning specified in RCC § 22E-2002.

RCC § 22E-2502. Reckless Burning.

(a) *Offense.* A person commits reckless burning when that person:
  (3) Knowingly starts a fire or causes an explosion;
  (4) With recklessness as to the fact that the fire or explosion damages or destroys a dwelling or building.

(b) *Affirmative Defense.* It is an affirmative defense to the commission of reckless burning, which the actor must prove by a preponderance of the evidence, that 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" have the meanings specified in RCC § 22E-206; the terms "actor," "building," and "dwelling" have the meanings specified in RCC § 22E-701; and the term "person" has the meaning specified in RCC § 22E-2002.

RCC § 22E-2503. Criminal Damage to Property.

(a) *First Degree.* A person commits first 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 $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 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) Knowing 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) Knowing 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) *Penalties*.
(1) 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) 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) 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) 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) 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; the terms "effective consent," "property," "property of another," and "owner" have the meanings specified in RCC § 22E-701; and the term "person" has the meaning specified in RCC § 22E-2002.

RCC § 22E-2504. Criminal Graffiti.

(a) *Offense.* A person commits criminal graffiti when that person:
(1) Knowingly places any inscription, writing, drawing, marking, or design on the property of another;
(2) Without the effective consent of 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.

(c) *Definitions.* The term "knowingly" has the meaning specified in RCC § 22E-206; the terms "effective consent," "owner," "property," and "property of another" have the meanings specified in RCC § 22E-701; and the term "person" has the meaning specified in RCC § 22E-2002.

Chapter 26. Trespass.

RCC § 22E-2601. Trespass.

(a) *First Degree*. Except as provided in subsection (d), a person commits first degree trespass when that person:
  (1) Knowingly enters or remains in a dwelling, or part thereof;
  (2) Without a privilege or license to do so under civil law.

(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 may, but is not required to, infer that a person lacks a privilege or license to enter or remain in or on a location 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 prior to or outside the location's points of entry, and that sign says "no trespassing" or similarly indicates that a person may not enter.

(f) *Jury Trial*.
  (1) 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) *Penalties.*

(1) 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 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.

(a) *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," and "motor vehicle" have the meanings specified in RCC § 22E-701; and the term "person" has the meaning specified in RCC § 22E-2002.

Chapter 27. Burglary.

RCC § 22E-2701. Burglary.

(a) *First Degree*. An actor commits first degree burglary when that actor:
  (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 a dwelling, or part thereof;
  (3) Without a privilege or license to do so under civil law;
  (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.

(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 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) *Penalties.*
  (1) 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 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 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" have the meanings specified in RCC § 22E-701.

RCC § 22E-2702. Possession of Tools to Commit Property Crime.

(a) *Offense.* A person commits possession of tools to commit property crime when that person:
  (1) Knowingly possesses a tool, or tools, 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 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 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.

Subtitle IV. Offenses Against Government Operation.

Chapter 34. Government Custody.

RCC § 22E-3401. Escape from a Correctional Facility or Officer.

(a) *First Degree*. A person commits first degree escape from a correctional facility 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 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, leaves the correctional facility or juvenile detention facility.

(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, 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 the 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) *Penalties*.
  (1) First 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.
  (2) Second 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.
  (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 or officer is

committed, the sentence for the offense shall run consecutive to the sentence that is being served at the time of the offense.

(f) *Definitions*.

(1) The term "knowingly" has the meaning specified in RCC § 22E-206; "in fact" has the meaning specified in RCC § 22E-207; and the terms "correctional facility," "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.

RCC § 22E-3402. Tampering with a Detection Device.

(a) *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) Committed to the Department of Youth Rehabilitation Services or 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) Interferes with the operation of the detection device or allows an unauthorized person to do so.

(b) *Penalty*. 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.

RCC § 22E-3403. Correctional Facility Contraband.

(a) *First Degree.* Except as provided in subsection (c), 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

(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.

(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 protected by the U.S. Constitution.

(2) A person shall not be subject to prosecution under this section when that person possesses:

(A) A portable electronic communication device, during the course of a legal visit;

(B) A controlled substance that is prescribed to that 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 committing 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 the Metropolitan Police Department or a law enforcement agency acting pursuant to D.C. Code § 10-509.01.

(e) *Penalties.*

(1) 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 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 RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 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.

Subtitle V. Public Order and Safety Offenses.

Chapter 42. Breaches of Peace.

RCC § 22E-4201. Disorderly Conduct.

(a) *Offense*. Except as provided in subsection (b), a person commits disorderly conduct when that person:
  (1) 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) Engages in any of the following conduct:
    (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.

(b) *Exclusions from Liability*.
  (1) Nothing in this section shall be construed to prohibit conduct protected by the U.S. Constitution, the First Amendment Assemblies Act of 2004 codified at 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.

RCC § 22E-4202. Public Nuisance.

(a) *Offense*. Except as provide in subsection (b), a person commits public nuisance when that person purposely causes significant interruption to:
  (1) A lawful 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) The orderly conduct of a meeting by a District or federal public body;
  (3) A 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) A person's lawful use of a public conveyance.

(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.

(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.

RCC § 22E-4203. Blocking a Public Way.

(a) *Offense*. Except as provided in subsection (b), a person commits blocking a public way when that person:
  (1) Knowingly blocks a street, 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; and
  (3) Continues or resumes such conduct after receiving a law enforcement officer's order that, in fact, is lawful, to stop such blocking.

(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.

(d) *Penalty.* 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.

RCC § 22E-4204. Unlawful Demonstration.

(a) *Offense*. Except as provided in subsection (b), a person commits 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 after receiving a law enforcement order to stop such demonstration.
(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.
(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) *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.

Chapter 43. Group Misconduct.

RCC § 22E-4301. Rioting.

(a) *Offense*. Except as provided in subsection (b), an actor commits rioting when that actor:
  (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.

(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) *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*. 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.

RCC § 22E-4302. Failure to Disperse.

(a) *Offense*. Except as provided in subsection (b), an actor commits failure to disperse when that actor:
  (1) 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.

(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) [*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.]

(d) *Penalty*. 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," and "property" have the meaning specified in RCC § 22E-701.

COMMENTARY
SUBTITLE I. GENERAL PART

RCC § 22E-214. Merger of Related Offenses.

Explanatory Notes. Section 214 sets forth a comprehensive framework for addressing issues of sentencing merger[1] that arise when a defendant has been convicted of two or more substantially related criminal offenses[2] arising from the same course of conduct.[3] This framework is comprised of general merger principles, which preclude the imposition of multiple liability for violation of overlapping criminal statutes that protect the same (or sufficiently similar) societal interests.[4] Barring the unjust and ineffective

[1] The issue of merger is "[o]ne of the more important and vexing legal issues" confronting sentencing courts. Tom Stacy,k *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 (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."). 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." William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 518-19 (2001); *see, e.g.*, Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 708 (2005) (observing that "Congress has adopted repetitive and overlapping statutes," such as "mostly superfluous offenses like 'carjacking' that deal with conduct addressed by existing provisions such as robbery and kidnapping."). If a defendant is charged with, and subsequently convicted of, two or more of these overlapping offenses based on a single course of conduct, the sentencing court will then be faced with deciding 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.")).

[2] 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.

[3] Section 214 addresses what are sometimes referred to as "multiple description claims" of merger, 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). In contrast, section 214 does not address what are sometimes referred "unit-of-prosecution claims" of merger, 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 2019).

[4] Legislation of this nature is appropriate because "[t]he 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." *Byrd v. United States*, 598 A.2d 386, 398 (D.C. 1991); *see, e.g.*, Model Penal Code § 1.07(1) (recommending legislative specification of "the situations in which conviction for more than one offense based on the same conduct is precluded"). Merger issues, while implicating the Fifth Amendment's prohibition against "twice [placing someone] in jeopardy of life or limb" for the "same offense," are ultimately a matter of legislative intent subject to the safeguards afforded by the constitutional

aggregation of convictions under these circumstances facilitates proportionate punishment.[5]

The prefatory clause of subsection (a) establishes that the general principles set forth in subsection (a) only address the merger of multiple convictions that "aris[e] from the same course of conduct."[6] It is under these circumstances that the imposition of multiple liability most clearly raises issues of proportionality.[7] In contrast, where the

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prohibition on cruel and unusual punishment and the due process requirement of fundamental fairness. *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."); MICHAEL S. MOORE, ACT AND CRIME 309 (1993) (discussing difference between a double jeopardy question and an Eighth Amendment question). The merger principles incorporated into section 214 provide an express codification of legislative intent, and have been drafted to *limit* multiple liability well *below* what the constitutional ceiling on excessive punishments might otherwise allow for. *See, e.g.,* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145 (2009) (observing that in non-capital cases the ceiling for constitutionally excessive punishments is extremely high); Youngjae Lee, *Why Proportionality Matters*, 160 U. PA. L. REV. 1835 (2012) (discussing relationship between proportionality and the Eighth Amendment).

[5] To be sure, the most direct way of avoiding the problem of disproportionate punishment that arises from overlapping criminal statutes is to avoid enacting such statutes in the first place. However, as a practical matter, drafting offenses that perfectly line up next to one another without any overlap (and avoiding gaps in coverage) is extremely difficult. *See, e.g., State v. Davis*, 68 N.J. 69, 77 (1975) (noting the "inevitable conflict between legislative attempts to stuff all kinds of anti-social conduct into the general language of a limited number of criminal offense categories, and the legislative desire not to be inordinately vague about what behavior is deemed 'criminal.'"). Therefore, while the offenses in the RCC's Special Part strive to achieve that goal to the extent possible, application of the general merger principles specified in this section remains essential to facilitating the overall proportionality of the RCC.

[6] Whether or not two offenses "aris[e] from the same course of conduct" is a mixed question of law and fact, which depends upon the factual predicate for both offenses as well as the unit of prosecution that the legislature intended to apply to each. *See, e.g., Hanna v. United States*, 666 A.2d 845, 852–53 (D.C. 1995); *Allen v. United States*, 580 A.2d 653, 657 (D.C. 1990).

As a general rule, two offenses arise from the same course of conduct when—at minimum—a single act or omission by the defendant satisfies the requirements of liability for each. For example, charges for homicide and assault, if based on the defendant's firing of a single shot at a single victim, arise from the same course of conduct. That said, the fact that multiple charges are based on a single act or omission does not necessarily mean they arise from the same conduct, such as, for example, where a defendant's single shot causes the death of V1 and bodily injury to V2, thereby satisfying the requirements of liability for murder against V1 and assault against V2.

Conversely, multiple charges may be based on a series of related acts or omissions yet still arise from the same course of conduct. For example, where X contracts with Y at 8:00am to assault V in Northwest D.C., and Y attempts to fulfill the contract that evening at 8:00pm by shooting V in the leg in Southeast D.C., but is frustrated by the police immediately prior to consummation, both X's solicitation and the subsequent attempted assault by Y—for which X is accountable as an accomplice, see RCC § 22E-210(a)—arise from the same course of conduct. *See infra* note 30 and accompanying text (discussing same course of conduct limitation in the context of merger of multiple inchoate crimes under RCC § 22E-214(a)(6)).

[7] For example, it would be disproportionate to impose convictions for both: (1) homicide and assault as it pertains to the death of a single victim perpetrated by a single bullet; (2) possession with intent to distribute PCP and distribution of PCP as it pertains to the sale of the same batch of drugs in a single transaction; or (3) theft and intentional damage of property as it pertains to the immediate destruction of a single piece of stolen property.

defendant's convictions arise from separate courses of conduct, the imposition of multiple liability is less likely to be unfairly duplicative.[8] The principles of merger set forth in subsection (a) are not intended to govern the latter situation.

The first of these principles, set forth in paragraph (a)(1), establishes that merger is required where "[o]ne 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."[9] This language effectively codifies the elements test originally set forth by the U.S. Supreme Court in *Blockburger v. United States*.[10] The elements test supports merger whenever

[8] For example, it would not be disproportionate to impose convictions for both: (1) homicide and assault as it pertains to a non-fatal shooting on one day and a fatal shooting on another day of the same victim; (2) possession with intent to distribute PCP and distribution of PCP as it pertains to the sale of different batches of drugs in different transactions occurring months apart; or (3) theft and intentional damage of property as it pertains to the destruction of different pieces of property stolen from the same actor years apart.

[9] *See, e.g.*, Model Penal Code §§ 1.07(1)(a), (4)(a) (barring 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"); ROBINSON, *supra* note 3, at 1 CRIM. L. DEF. § 68 ("Most jurisdictions bar conviction for both an offense and a lesser included offense arising from the same conduct. Indeed, this multiple offense limitation is generally accepted to be a constitutional requirement under the double jeopardy clause.") (collecting legal authorities).

[10] 284 U.S. 299, 301 (1932) ("[W]here 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, e.g.*, 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.").

It is important to note that the elements test has received significant criticism, particularly where it operates as the sole basis for conducting merger analyses. Four general problems have been highlighted. The first is a marked lack clarity and consistency, namely, the element test "is formally indeterminate, has no ready application to common crimes with alternative elements, and facilitates result-oriented manipulation of elements." Hoffheimer, *supra* note 10, 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."); *Texas v. Cobb*, 532 U.S. 162, 185-86 (2001) ("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.") (Breyer, Stevens, Souter, and Ginsburg, JJ., dissenting) (internal quotations and citations omitted).

The second problem is disproportionality in convictions, namely, 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." Stuntz, *supra* note 1, at 519-20; Douglas Husak, *Crimes Outside the Core*, 39 TULSA L. REV. 755, 770-71 (2004) ("from the intuitive perspective of a layperson, [in contrast to the elements test,] the defendant has committed a single crime").

The third problem, which follows directly from the second, is that of disproportionality in sentencing exposure. 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 offenses based on the same course of conduct will lead a defendant to face an overall level of sentencing exposure that is disproportionately severe. *See, e.g.*, Stacy, *supra* note 1, 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."); *Whitton v. State*, 479 P.2d 302, 306 (Alaska 1970)

the elements of one offense are a subset of the other offense.[11] In practice, two offenses share this kind of elemental relationship whenever it is impossible to commit one offense without also committing the other offense.[12]

Paragraph (a)(2) next addresses three particular kinds of variances, which, if constituting the sole distinctions between two or more offenses, support merger.[13] The first, codified by subparagraph (a)(2)(A), is where the offenses differ only in that one requires a less serious injury or risk of injury than is necessary to establish commission of the other offense.[14] The second, codified by subparagraph (a)(2)(B), is where the

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("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 . . . But as the separate violations multiply by legislative action, the likelihood increases that [under the elements test] a defendant will actually be punished several times for what is really and basically one criminal act.").

The fourth problem emphasizes the corrosive procedural dynamics that flow from the two proportionality problems just noted. 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 subjecting defendants to more severe punishments and providing defendants with "greater incentives to plead guilty." Husak, *supra* note 10, at 770-71; Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and A Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453, 453 (2009) ("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.").

Section 214 addresses these criticisms by incorporating a range of merger principles—including but also going beyond the elements test—which together constitute a more proportionate approach that is neither "too rigid" nor can be said to "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); Stacy, *supra* note 1, at 856 ("The Blockburger test, and even more so the same-elements test, reflexively stack the deck in favor of multiple [] punishments.").

[11] Compare, for example, a robbery offense defined as "intentionally causing bodily injury in the course of theft" and an assault offense defined as "intentionally causing bodily injury." The elements of the assault offense are a subset of the elements of the robbery offense.

[12] For example, one way to confirm that the elements of assault are a subset of the elements of robbery, as defined *supra* note 11, is to determine that it is impossible to commit robbery without also committing assault under the relevant statutory definitions. *See also Byrd v. United States*, 598 A.2d 386, 398 (D.C. 1991) (*en banc*) (While the *Blockburger* test, as codified by D.C. Code § 23-112, "uses the phrase 'proof of a fact,' the reference is to what the statutory 'offense' requires in the way of proof, not to the specific 'transaction,'" i.e., "[t]he word 'requires' can refer only to elements, not to whatever facts may be adduced at trial"); *but see* notes 37-41 and accompanying text (discussing unit of analysis issues, and the concomitant limited relevance of factual considerations, to merger under section 214).

[13] *See, e.g.*, Model Penal Code §§ 1.07(1)(a), (4)(c) (barring 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."); *id.* § 1.07(1)(d) (barring multiple liability 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."); ROBINSON, *supra* note 3, at 1 CRIM. L. DEF. § 68 (collecting authorities that employ comparable formulations).

[14] An example of two offenses that satisfy this principle are: (1) assault, defined as "intentionally causing bodily injury"; and (2) aggravated assault, defined as "intentionally causing serious bodily injury." *See, e.g.*, Model Penal Code § 1.07, cmt. at 133 (giving the example of an "offense consisting of an intentional infliction of bodily harm" and "the charge of intentional homicide").

offenses differ only in that one requires a lesser form of culpability than the other.[15] And the third, codified by subparagraph (a)(2)(C), is 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.[16] Where two offenses satisfy one or more of these principles, the imposition of multiple liability would be disproportionate.[17]

Paragraph (a)(3) establishes that merger is required where "[o]ne offense requires a finding of fact inconsistent with the requirements for commission of the other offense as a matter of law."[18] This principle applies when the facts required to prove offenses arising from the same course of conduct are legally "inconsistent with each other."[19]

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[15] An example of two offenses that satisfy this principle are: (1) murder, defined as "intentionally causing death"; and (2) reckless manslaughter, defined as "recklessly causing death." *See, e.g.*, Model Penal Code § 1.07, cmt. at 133 (giving the example of offenses that are "less serious types of homicides," and also observing that this principle would apply to "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").

This may go beyond the scope of the elements test codified in paragraph (a)(1). 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 the elements test:

> 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 elements test] 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 elements test], 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).

[16] An example of two offenses that satisfy this principle are: (1) robbery, defined as "recklessly causing bodily injury in the course of a theft"; and (2) carjacking, defined as "recklessly causing bodily injury in the course of a theft of an automobile." *See, e.g.*, Model Penal Code § 1.07, cmt. at 114 (giving the example of "a general statute prohibiting lewd conduct and [] a specific-statute prohibiting indecent exposure," and stating that, "[i]n the absence of an expressed intention to the contrary, it is fair to assume that the legislature did not intend that there be more than one conviction under these circumstances.").

[17] An example of two offenses that satisfy all three of these principles are: (1) aggravated carjacking defined as "intentionally causing serious bodily injury in the course of a theft of an automobile"; and (2) robbery, defined as "recklessly causing bodily injury in the course of a theft."

[18] *See, e.g.*, Model Penal Code § 1.07(1)(c) (barring multiple liability where "inconsistent findings of fact are required to establish the commission of the offenses"); ROBINSON, *supra* note 3, at 1 CRIM. L. DEF. § 68 (collecting authorities that employ comparable formulations); *see also* Model Penal Code § 1.07, cmt. at 112 n.32 (observing that this principle accords with longstanding common law and important constitutional considerations).

[19] *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*)). Compare, for example, a theft offense defined as "taking property of another with intent to permanently deprive" and an unlawful use offense defined as "taking property of another with intent to temporarily deprive." Because a finding that the defendant took property with the intent to *permanently* deprive logically precludes a finding the defendant took property with the intent to *temporarily* deprive, paragraph (a)(3) precludes the imposition of multiple liability for these two offenses. *See, e.g.*, Model Penal Code § 1.07, cmt. at 114 (giving the example of "robbery and receiving the stolen property, in which it was clear that the defendant had either robbed or received the goods but could not

Where the proof necessary to establish one offense necessarily precludes the existence of the proof necessary to establish another offense under any set of facts, the imposition of multiple liability would be disproportionate.[20]

Paragraph (a)(4) establishes that merger is required where "one offense reasonably accounts for the other offense given the harm or wrong, culpability, and penalty proscribed by each."[21] This principle applies whenever the gravamen of one

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have done both"). The same analysis would also preclude the imposition of multiple liability for a murder offense defined as "intentionally causing the death of another person *absent mitigating circumstances*" and a manslaughter offense defined as "intentionally causing the death of another person *in the presence of mitigating circumstances*."

[20] Precluding multiple liability based on inconsistent guilty verdicts is to be distinguished from, and is therefore not intended to displace, the legal system's well established "tolerat[ion]" of verdicts of *guilt* and *innocence* that are inconsistent with one another." *Evans v. United States*, 987 A.2d 1138, 1140–41 (D.C. 2010) ("[A] logical inconsistency between a guilty verdict and a verdict of acquittal does not impugn the validity of either verdict") (quoting *Yeager v. United States*, 557 U.S. 110, 112 (2009) (discussing *Dunn v. United States*, 284 U.S. 390 (1932))); *see, e.g., United States v. Powell*, 469 U.S. 57 (1984). For example, whereas paragraph (a)(3) would preclude multiple liability for theft and unlawful use, it would not in any way limit the ability of the fact finder to convict on theft but acquit on unlawful use, notwithstanding the fact that the elements of theft necessarily include the elements of unlawful use.

[21] This proportionality-based merger principle is loosely modeled on a comparable merger principle incorporated into a few other recent code reform projects. *See, e.g.*, Proposed Del. Crim. Code § 210(a)(2017) (barring multiple liability where "two offenses are based on the same conduct and . . . the harm or wrong of one offense is . . . entirely accounted for by the other offense."); Proposed Ill. Crim. Code § 254(1)(a) (2003) (same); Proposed Ky. Penal Code § 502.254(1)(a) (2003) (same). Of all the merger principles codified by section 214, it is the most directly responsive to the four main shortcomings of the elements test discussed *supra* note 10. *See, e.g.*, Michael T. Cahill, *Offense Grading and Multiple Liability: New Challenges for A Model Penal Code Second*, 1 OHIO ST. J. CRIM. L. 599, 606 (2004) ("[Rather than] considering the theoretical possibility of committing one offense without committing another" under the elements test, this "proposed ["entirely accounted for"] standard calls for a consideration of the relevant offenses' purposes") (discussing Proposed Ill. Crim. Code § 254(1)(a)); Brown, *supra* note 10, at 453 (many of the problems implicated by the elements test can be addressed by asking 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"); Stacy, *supra* note 1, at 855 ("In developing a common law of offense interrelationships, courts [should be] guided first by the overall aims of the criminal code, particularly the code's implicit principle of proportionality, and second by offense relationship doctrines.").

Numerous jurisdictions have adopted comparable proportionality-based approaches through case law. *See, e.g., Whitton v. State*, 479 P.2d 302, 306 (Alaska 1970) (replacing elements test with an approach 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") (collecting legal authorities and scholarly commentary that support this kind of approach); *Monoker v. State*, 582 A.2d 525, 529 (Md. 1990) (complementing elements test with proportionality-based approach founded upon recognition that one of "the most basic considerations in all our [merger] decisions is the principle of fundamental fairness in meting out punishment for a crime"); *State v. Davis*, 68 N.J. 69, 77, 81 (1975) (adopting proportionality-based approach to merger, which aims to "insure that the punishment imposed is commensurate with the criminal liability," and is "attended by considerations of fairness and fulfillment of reasonable expectations in the light of constitutional and common law goals"). It is important to note, however, that the scope of merger under paragraph (a)(4) is likely narrower than under any of these judicially-created approaches, all of which appear to rest upon consideration of the specific facts presented at trial. *See infra* notes 40-41 and accompanying text (discussing narrow role of factual considerations under section 214).

Note also that a handful of jurisdictions appear to have legislatively adopted categorical bars on multiple convictions arising from the same conduct—i.e., merger without regard to the nature of the

offense duplicates that of another offense.[22] This purpose-based evaluation goes beyond mere consideration of whether it is theoretically possible to commit one offense without committing another.[23] Instead, it requires evaluation of the harm or wrong, culpability, and penalty proscribed by each offense to determine whether a conviction for one offense reasonably accounts for a conviction for another offense.[24]

Paragraph (a)(5) addresses merger in two different situations involving multiple

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underlying offenses—which are significantly broader than paragraph (a)(4) (as well as any other principle in section 214). *See, e.g.*, Minn. Stat. Ann. § 609.035 ("[I]f 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 . . . ."); *State v. Norregaard*, 384 N.W.2d 449, 449 (Minn.1986) (this provision categorically "prohibits multiple sentences, even concurrent sentences, for two or more offenses that were committed as part of a single behavioral incident"); 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."); *People v. Myers*, 59 Cal. App. 4th 1523, 1529, 69 Cal. Rptr. 2d 889, 892 (1997) (observing that this categorical bar on multiple liability ensures that "punishment is commensurate with a defendant's culpability").

[22] *See, e.g.*, Cahill, *supra* note 21, at 606 (arguing that elements test should be replaced with a broader principle that "asks whether the gravamen of one offense duplicates that of another"); Antkowiak, *supra* note 1, 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."); *see also* Stacy, *supra* note 1, 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.").

[23] *See generally* RCC § 22E-214(a)(1).

[24] Compare, for example, the following aggravated theft and carjacking offenses. The aggravated theft offense applies a five-year statutory maximum (and no mandatory minimum) to anyone who "takes property of another valued at more than $25,000 dollars with the intent to permanently deprive." The carjacking offense, in contrast, applies a twenty-year statutory maximum and a five-year mandatory minimum to anyone who "intentionally causes bodily harm to another person in the course of committing theft of a motor vehicle in the immediate possession of another." While the elements of these two offenses are quite similar, they do not satisfy the elements test because, *inter alia*, it is possible to steal a car worth less than $25,000. As a result, it cannot be said that by committing carjacking one necessarily commits aggravated theft. That being said, a consideration of the harm, culpability, and penalty proscribed by each offense—when viewed in light of the fact that a $25,000 vehicle is well within the norm of carjackings—provides the basis for concluding that a carjacking conviction "reasonably accounts" for an aggravated theft conviction when based on the same course of conduct (i.e., the theft of a single automobile from an individual victim).

For another illustration of this merger principle, compare the general inchoate offense of conspiracy, which generally criminalizes agreements to commit crimes, and specific offenses that criminalize particular kinds of consensual transactions, such as, for example, drug distribution. Where dual convictions for conspiracy and a completed target offense that typically involves a mutual transaction both arise from the same course of conduct, paragraph (a)(4) would require merger given the overlapping harm, culpability, and penalty proscribed by each offense. *Compare infra* note 26 (discussing paragraph (a)(5), which generally *does not* require that conspiracy and completed target offense merge). This means that (for example) where D, a drug dealer, is convicted of both conspiracy to commit drug distribution and drug distribution, and those convictions arise from the same course of conduct (e.g., a single drug deal with purchaser X), the conspiracy charge would merge with the drug distribution charge, since the latter, by effectively requiring an agreement to distribute as a precursor, "reasonably accounts" for the former. *See also* RCC § 22E-304(a), Explanatory Notes (explaining that this outcome accords with the narrower, and most justifiable, interpretation of Wharton's Rule, and collecting legal authorities in support).

convictions for general inchoate offenses and completed offenses.[25] The first is where "[o]ne offense consists only of an attempt or solicitation toward commission of [t]he other offense."[26] The second is where "[o]ne offense consists only of an attempt or solicitation toward commission of . . . "[a] substantive offense that is related to the other

[25] The merger principle set forth in this paragraph arguably departs from the elements test, codified in paragraph (a)(1), in that convictions for both a substantive offense and an inchoate offense designed to culminate in that same offense "would not necessarily be barred under *Blockburger*." Model Penal Code § 1.07, cmt. at 108. So, for example, under *Blockburger*, "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." *Id.* Nevertheless, because the general inchoate crime of solicitation is "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," it "would be a perversion of the legislative intent to [] pyramid convictions and punishment." *Id.* at 109.

[26] RCC § 22E-2214(a)(5)(A); *see, e.g.*, Model Penal Code § 1.07(1)(a) (establishing that no person may be convicted of more than one offense if one offense is "included in the other charge," which, as defined in Model Penal Code § 1.07(4)(b), includes "an attempt or solicitation to commit the offense charged"); ROBINSON, *supra* note 3, at 1 CRIM. L. DEF. § 84 ("It 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").

Note that paragraph (a)(5) *excludes* the general inchoate offense of conspiracy from its reach. This is consistent with the well-established common law rule, which authorizes multiple liability "for both the conspiracy and the completed offense." Model Penal Code § 1.07 cmt. at 109. However, it is inconsistent with the recommendations of the Model Penal Code, which precludes multiple liability where one offense "consists only of a conspiracy or other form of preparation to commit the other." Model Penal Code § 1.07(1)(b).

The drafters of the Model Penal Code sought to overturn the common law rule on the rationale that general inchoate liability largely exists to provide a basis for arresting, incarcerating, and rehabilitating dangerous offenders—which purposes are equally well-served by a conviction for the completed offense. Model Penal Code § 1.07 cmt. at 109 (conviction for a completed offense alone "adequately deals with such conduct"). Since publication of the Model Penal Code, however, "only [] a minority of the modern recodifications" appear to have been persuaded by this position. WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.4(d) (3d ed. Westlaw 2019) (collecting statutes); *see, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.03 (6th ed. 2012) (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").

Today, most American jurisdictions appear to believe that—consistent with the common law approach—"[conspiratorial] agreement is 'a distinct evil,' which 'may exist and be punished whether or not the substantive crime ensues.'" *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003) (quoting *Salinas v. United States*, 522 U.S. 52, 65 (1997)). Specifically, the argument driving the common law approach is that "collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts" for three interrelated reasons: (1) it "increases the likelihood that the criminal object will be successfully attained"; (2) it "decreases the probability that the individuals involved will depart from their path of criminality"; and (3) it "makes more likely the commission of crimes unrelated to the original purpose for which the group was formed." *Callanan v. United States*, 364 U.S. 587, 593-94 (1961). And where, as under the RCC, a criminal code employs a bilateral definition of conspiracy, the argument against categorical merger of all conspiracies rests on an even stronger foundation. *See, e.g.*, DRESSLER, *supra* note 26, 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.*") (italics added); RCC § 22E-303(a) (requiring proof that the defendant and "at least one other person" agree to commit a crime).

offense in the manner described in paragraphs (1)-(4)."[27] In the first situation, subparagraph (a)(5)(A) requires merger for engaging in preparation to commit an offense and the subsequent completion of that offense whenever the convictions involve the same criminal objective.[28] In the second situation, subparagraph (a)(5)(B) ensures that the outcome is the same although the completed offense is not the target of the general inchoate offense, provided that the completed offense and the target of the general inchoate offense: (1) involve the same criminal objective; and (2) would otherwise be subject to merger under any of the other principles specified in subsection (a).[29]

Paragraph (a)(6) addresses merger in two different situations involving multiple convictions for general inchoate offenses.[30] The first is where the general inchoate offenses are "designed to culminate in commission of [t]he same offense."[31] The second

[27] RCC § 22E-2214(a)(5)(B); *see, e.g.,* Proposed Ill. Crim. Code § 254(1)(b) (requiring merger whenever: "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)."); *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).

[28] Where, for example, X fatally shoots V with intent to kill, X has satisfied the requirements of liability for both the *armed murder* of V and the *attempted armed murder* of V. However, subparagraph (a)(5)(A) precludes imposing multiple convictions upon X for both offenses. Likewise, if X successfully persuades Y to fatally shoot V, X has satisfied the requirements of liability for both the *armed murder* of V (as an accomplice) and *solicitation of armed murder* of V. However, subparagraph (a)(5)(A) precludes imposing multiple convictions upon X for both offenses. Note that the above limitations would not apply if the charges for either attempt or solicitation to commit armed murder and the (completed) armed murder involved *different victims*.

[29] Where, for example, X fatally shoots V with intent to kill, X has satisfied the requirements of liability for both the *armed murder* of V and the *attempted (unarmed) murder* of V. However, subparagraph (a)(5)(B) precludes imposing multiple convictions upon X for both offenses. Likewise, if X successfully persuades Y to fatally shoot V, then X has satisfied the requirements of liability for both the *armed murder* of V (as an accomplice) and *solicitation of (unarmed) murder* of V. However, subparagraph (a)(5)(B) precludes imposing multiple imposing multiple convictions upon X for both offenses because armed murder and murder satisfy the general merger principles set forth in paragraphs (a)(1)-(4). Note that the above principles would not apply if the charges for either attempt or solicitation to commit (unarmed) murder and the (completed) armed murder involved *different victims*.

[30] The merger principle set forth in this paragraph, like that set forth in paragraph (a)(5), arguably departs from the elements test, codified in paragraph (a)(1). *See supra* note 25 (providing analysis consistent with this conclusion); Model Penal Code § 5.05, cmt. at 492 (arguing that there's "no warrant for cumulating convictions of attempt, solicitation and conspiracy to commit the same offense").

[31] RCC § 22E-2214(a)(6)(A); *see, e.g.,* Model Penal Code § 5.05(3) ("A person may not be convicted of more than one [general inchoate inchoate offense] for conduct designed to commit or to culminate in the commission of the same crime."); ROBINSON, *supra* note 3, at 1 CRIM. L. DEF. § 84 ("Most jurisdictions bar multiple convictions for combinations of inchoate offenses designed to culminate in the same offense.").

Note that paragraph (a)(6) is limited to merger of multiple inchoate offenses that occur in the "same course of conduct." This is in contrast to the Model Penal Code approach, which appears to categorically preclude multiple liability for more than one general inchoate crime directed towards a single criminal objective, even where the convictions rest upon *separate* courses of conduct. *See* Model Penal Code § 5.05(3) (merger for multiple inchoate crimes whenever they rest upon "*conduct designed to commit or to culminate in the commission of the same crime*") (italics added); ROBINSON, *supra* note 3, at 1 CRIM. L. DEF. § 84 ("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."). If this reading of the Model Penal Code is accurate, then subsection 5.05(3)

is where the general inchoate offenses "are designed to culminate in commission of "[d]ifferent offenses that are related to one another in the manner described in paragraphs (1)-(4)."[32] In the first situation, subparagraph (a)(6)(A) requires merger for engaging in various forms of preparation to commit the same offense whenever the convictions involve the same criminal objective.[33] In the second situation, subparagraph (a)(6)(B) ensures that the outcome is the same although the general inchoate offenses are oriented towards completion of different target offenses, provided that those target offenses: (1) involve the same criminal objective; and (2) would otherwise be subject to merger under any of the other principles specified in subsection (a).[34]

Subsection (b) establishes that the "merger rules set forth in subsection (a) are inapplicable whenever the legislature clearly expresses an intent to authorize multiple convictions for different offenses arising from the same course of conduct."[35] This

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would dictate that (for example) where X unsuccessfully attempts to murder V in 2015, and thereafter unsuccessfully attempts to murder V again (or, alternatively, unsuccessfully solicits Y to murder V) in 2018, X *cannot* be convicted for more than one general inchoate crime. ROBINSON, *supra* note 3, at 1 CRIM. L. DEF. § 84.

Given the unintuitive nature of this outcome, various jurisdictions appear have revised this aspect of the Model Penal Code to incorporate a "same course of conduct" requirement. *See, e.g.,* Ky. Rev. Stat. Ann. § 506.110(3) ("A person may not be convicted of more than one (1) [general inchoate offense] for a *single course of conduct* designed to consummate in the commission of the same crime."); *State v. Badillo*, 317 P.3d 315, 321 (Or. Ct. App. 2013) ("[T]he commission intended [the Oregon Criminal Code] 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."). The RCC accomplishes the same through paragraph (a)(6), which effectively limits merger of multiple inchoate offenses to situations where the underlying convictions share a relatively close temporal/substantive relationship to one another. *Compare, e.g., 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).

[32] RCC § 22E-2214(a)(6)(B); *see also* sources cited *supra* note 27 (providing support for comparable principle specified in subparagraph (a)(5)(B)).

[33] Where, for example, X persuades Y to attempt to kill V with a gun, but Y is subsequently intercepted by police immediately prior to pulling the trigger, X has satisfied the requirements of liability for *attempted armed murder* (as an accomplice to Y), *solicitation of armed murder*, and *conspiracy to commit armed murder*. However, subparagraph (a)(6)(A) precludes imposing multiple convictions upon X for more than one of these three offenses. Note that this rule would not apply if the charges for attempted armed murder, solicitation of armed murder, and conspiracy to commit armed murder involved *different victims*.

[34] Where, for example, X persuades Y to attempt to kill V with a gun, but Y is subsequently intercepted by police immediately prior to pulling the trigger, X has satisfied the requirements of liability for *attempted armed murder* (as an accomplice to Y), *solicitation of (unarmed) murder*, and *conspiracy to commit aggravated assault*. However, subparagraph (a)(6)(B) precludes imposing multiple convictions upon X for more than one of these three offenses because *armed murder*, *murder*, and *aggravated assault* satisfy the general merger principles set forth in paragraphs (a)(1)-(4). Note that this rule would not apply if the charges for attempted armed murder, solicitation of murder, and conspiracy to commit aggravated assault involved *different victims*.

[35] *See, e.g.,* Antkowiak, *supra* note 1, 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 . . . ."); Poulin, *supra* note 4, at 647 (when courts are confronted with merger issues, "the

means that where the legislature has clearly expressed a prerogative to allow for—or preclude—multiple liability in prosecutions involving commission of substantially related offenses that prerogative must be followed.[36]

Subsection (c) provides a legal framework for applying the principles set forth in subsections (a) and (b) to statutes comprised of alternative elements.[37] In many

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focus is legitimately, inevitably, and almost exclusively on legislative intent"); *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."); *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.").

[36] Provided, of course, that it respects other constitutional limitations on excessive punishment. *See supra* note 3.

[37] This addresses one of the most significant areas of confusion in merger analyses, which hinge upon a comparison of the elements of the offenses of conviction. *See, e.g.*, Hoffheimer, *supra* note 10, at 367 ("A [significant] source of indeterminacy in applying the elements test results from the fact that legislation routinely defines alternative methods of committing a crime."); JOSHUA DRESSLER & ALAN MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: ADJUDICATION § 14.07(C) (4d ed. 2006). Where one or more of the underlying offenses of conviction is comprised of alternative elements, courts struggle to determine the appropriate unit analysis for such determinations, as well as the concomitant role that factual considerations should play in determining the underlying basis of a criminal conviction.

The most frequently noted case raising these issues is *Whalen v. United States*, 445 U.S. 684 (1980) in which:

> [T]he United States Supreme Court struggled to determine whether a felony murder conviction merged with a conviction for the underlying felony where a felony murder conviction could hinge on any one of six enumerated offenses. 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 *Blockburger* (often used synonymously with "strict elements approach") held that the two convictions merged for sentencing. In this regard, the 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.

Com. v. Baldwin, 604 Pa. 34, 45 n.6 (2009); *compare, e.g., 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.") (collecting cases), *with Whalen*, 445 U.S. at 708-712 (1980) (Rehnquist, J. dissenting) (rather than defining "felony murder" in a factual vacuum, the majority decision in *Whalen* effectively "looked to the facts alleged in a particular indictment" to deem rape a lesser included offense of felony murder).

This is also an issue that modern merger legislation—as typified by Model Penal Code § 1.07—consistently fails to clarify. 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."

Note that under Model Penal Code § 210.3(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." And, under Model Penal Code § 211.1, "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

situations, the fact that an offense can be established in different ways is of no significance to the merger analysis.[38] Where, however, an offense is comprised of alternative elements that speak to distinct societal interests,[39] then the particular basis upon which a conviction for that offense rests becomes essential to determining whether merger actually serves the interests of proportionality.[40] To that end, subsection (c)

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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, per section 210.3(1)(a), and reckless assault, per 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 10, at 410; *see also* 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 Model Penal Code § 1.07 "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").

[38] For example, the fact that a theft statute can be satisfied by proof that a person, acting with the intent to permanently deprive, variously "(A) possesses, (B) uses, or (C) exercises control" over the property of another, will typically not be of any import to merger analyses given that these distinctions do not speak to distinct societal interests.

[39] One example of this kind of statute is a child mistreatment offense that reads: "Section 100: Mistreatment of Children. (a) No person shall recklessly: (1) cause bodily injury to a child; or (2) fail to make a reasonable effort to provide essential food, clothing, shelter, supervision, medical services, or medicine to a child that the person is legally obligated to provide as a parent." The alternative elements in this offense are paragraph (a)(1), child mistreatment *by assault*, and (a)(2), and child mistreatment *by parental neglect*. These alternative elements protect distinct societal interests because protecting children from physical harm perpetrated by anyone, (a)(1), appears to be a materially different goal than protecting children from neglect by their parents, (a)(2).

Another example of this kind of statute is a felony murder offense that reads: "Section 200: Felony Murder. (a) No person shall unlawfully kill another person in the course of committing or attempting to commit: (1) Rape; (2) Burglary; (3) Arson; or (4) Robbery. The alternative elements in this offense are paragraph (a)(1), felony murder *by rape*, (a)(2), felony murder *by burglary*, (a)(3), felony murder *by arson*, and (a)(4), felony murder *by robbery*. The distinct societal interests protected by these alternative elements are both the actual harm and added risk of death inherent in the commission of these specific offenses.

[40] This is because only one of the alternative elements that provide the basis for establishing one offense may speak to the same societal interests protected by another offense. *See, e.g.*, Antkowiak, *supra* note 1, 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)). For example, whether merger is proportionate for a conviction for child mistreatment, as defined *supra* note 39, and a conviction for assault combined with a minor enhancement, when based on the same course of conduct, is proportionate depends upon the basis of the child mistreatment conviction. If that basis is child mistreatment *by assault* then merger would be proportionate because the gravamen of child mistreatment *by assault* duplicates that of the enhanced assault offense. If, in contrast, the basis is child mistreatment *by parental neglect* then merger would not be proportionate because enhanced assault and child mistreatment by parental neglect address distinct societal interests.

Along similar lines, whether merger is proportionate for a conviction for felony murder, as defined *supra* note 39, and a conviction for one of the four offenses enumerated in that statute, when based on the same course of conduct, depends upon the basis of the felony murder conviction. Where an enumerated

requires courts to perform the merger analysis proscribed in section 214 by reference to the unit of analysis that most clearly captures the societal interests implicated by a defendant's criminal convictions.[41]

Subsection (d) establishes a rule of priority for determining which of two or more merging convictions should be vacated and which should remain.[42] It is comprised of two different principles. The first dictates that where, among any group of merging offenses, one has a higher statutory maximum than the others, the conviction for that more severely punished offense is the one that should remain. The second proscribes that where, among any group of merging offenses, two or more offenses have the highest statutory maximum, then the determination of which among those more severely punished offenses should remain is submitted to the court's discretion.

Subsection (e) clarifies two important procedural aspects of the merger analysis set forth in section 214. First, section 214 should not be construed as constraining the number of offenses over which the fact finder may deliberate. Rather, the trier of fact may find the defendant guilty of any number of offenses that merge under section 214 for which the requirements of liability have been met.[43] Second, section 214 only places limitations on the entry of a final judgment of liability—i.e., a conviction that exists after the expiration of appellate rights or affirmance on appeal—for merging offenses.[44]

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offense is serving as the basis for aggravation (e.g., convictions for felony murder-rape and rape committed against a single victim), then merger would further the interests of proportionality—whereas it would not if the enumerated offense is not serving as the basis for aggravation (e.g., convictions for felony murder-rape and burglary committed against a single victim).

[41] *See, e.g.*, *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); *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").

For example, the relevant questions in determining whether child mistreatment merges with enhanced assault, see *supra* note 39, is: (1) whether "paragraph (a)(1), child mistreatment-assault" merges with enhanced assault; and (2) whether "paragraph (a)(2), child mistreatment-neglect" merges with enhanced assault. It is not whether "subsection 100(a), child mistreatment" merges with enhanced assault. Likewise, the question of whether felony murder merges with an enumerated offense, see *supra* note 39, must be approached on a similar theory-specific basis (e.g., does "paragraph 200(a)(1), felony murder-rape" merge with rape, not whether "section 200, felony murder" merges with rape).

[42] *See, e.g.*, 42 Pa.C.S. § 9765 ("Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense."); 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.");

[43] *See, e.g.*, Model Penal Code § 1.07 ("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 . . . ."); Alaska Stat. Ann. § 11.31.140(d) ("[The merger principle set forth in this] section does not bar inclusion of multiple counts in a single indictment or information charging commission of a crime defined by AS 11.31.100-11.31.120 and commission of the crime that is the object of the attempt, conspiracy, or solicitation.").

[44] This clarification is intended to provide D.C. Superior Court judges with sufficient leeway to continue their current practice of entering judgment on all counts for which the defendant has been convicted, thereby leaving merger issues to the D.C. Court of Appeals for resolution on direct review, should they so choose. *See, e.g.*, *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).

The principles of merger set forth in section 214 present questions of law regarding the manner in which the statutory elements of criminal offenses relate to one another.[45] Therefore, the determination of whether those principles preclude multiple liability for two or more substantially related offenses should generally be conducted without regard to the underlying facts of a case. [46] And once a court determines that section 214 requires merger of two or more offenses, that determination should be treated as binding on all future cases involving the same offenses.[47]

The principles of merger set forth in section 214 do not have legal import for the resolution of issues that go beyond determining when the legislature has authorized the imposition of multiple liability for substantially related offenses prosecuted in a single proceeding. This includes, but is not limited to, determining: (1) when successive prosecutions for substantially related offenses may be brought[48]; (2) when a jury may be

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At the same time, this provision would not preclude D.C. Superior Court judges from changing their current practice, and instead conducting merger analyses at initial sentencing, either. *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*.").

In the event that one or more convictions is dismissed by the trial court pursuant to section 214, that dismissal shall not be considered an acquittal on the merits, such that a vacated conviction may be re-instated in appropriate circumstances (e.g., where the remaining offense is overturned on appeal for reasons that do not effect the vacated offense).

[45] Cahill, *supra* note 21, at 607 (observing that comparable merger principles "would present issues of law regarding how defined offenses relate to each other," and arguing that, because "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," this would enhance the "predictability, stability, and evenhandedness in the imposition of multiple liability.") (discussing Proposed Ill. Crim. Code § 254(1)(a)); *see, e.g.*, Commentary on Proposed Del. Crim. Code § 210(a).

[46] Note that where the merger analysis involves one or more offenses comprised of alternative elements of a nature described in subsection (c), then a limited factual inquiry will be necessary to determine the particular basis upon which a conviction for that offense is based (e.g., was the defendant convicted of felony murder-*rape* or felony murder-*burglary*). *See supra* notes 39-41 and accompanying text (discussing appropriate treatment of alternative elements).

[47] Provided, of course, that they arise from the same course of conduct. *See, e.g.*, Cahill, *supra* note 21, at 607 ("[Under this kind of approach to merger] any bar on multiple convictions would govern only subsequent cases where those two offenses were again based on the same conduct. Multiple convictions for the two offenses would remain acceptable where they are not both based on the same conduct.") (discussing Proposed Ill. Crim. Code § 254(1)(a)); *see, e.g.*, Commentary on Proposed Del. Crim. Code § 210(a).

This same principle of *stare decisis* also applies where one of the offenses under consideration is comprised of alternative elements of a nature described in subsection (c). While a limited factual analysis may be necessary to determine the particular paragraph of an alternative element statute upon which a criminal conviction rests, a court's holding concerning the relationship between an offense committed pursuant to that paragraph and another offense would still be binding on all future cases involving those same provisions.

[48] *See, e.g., 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); Poulin, *supra* note 4, at 646 (["T]he courts must distinguish between the analysis appropriate for double jeopardy claims based on successive prosecution, and that appropriate for claims of multiple punishment. Although conflating the

instructed on an offense that was not specifically charged in the indictment[49]; and (3) when an appellate court may direct the entry of judgment for an offense over which the jury never deliberated.[50]

Relation to Current District Law. RCC § 22E-214 codifies, clarifies, changes, and fills in gaps reflected in District law governing merger.

The District's current approach to merger is, as a matter of substantive policy, piecemeal, frequently ambiguous, and unduly narrow. The D.C. Court of Appeals (DCCA), construing D.C. Code § 23-112,[51] employs the elements test as the primary basis for determining whether to impose multiple liability for substantially related offenses arising from the same course of conduct. The court's application of the elements test to address this issue is at times inconsistent, and, in many situations where there is no clear legislative intent, may have the unintended effect of authorizing the imposition of disproportionate punishment. Subsections (a)-(d) of RCC § 22E-214 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.

As a matter of judicial administration, the District's law of merger is currently treated as the sole province of appellate, rather than trial, courts. D.C. Superior Court judges, based on explicit instructions from the DCCA, appear to systematically ignore merger issues at sentencing, leaving them for appellate resolution. This approach brings with it both efficiency gains as well as potential liberty costs. The RCC merger provisions do not resolve this tension. Paragraph (e) enables the substantive policies set forth in subsections (a)-(d) to be implemented in a manner consistent with the District's

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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.").

[49] *See, e.g., Com. v. Jones*, 590 Pa. 356, 369-70 (2006) ("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."); *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."); WAYNE R. LAFAVE ET AL., 6 CRIM. PROC. § 24.8(e)) (4th ed. Westlaw 2019)) ("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.").

[50] *See, e.g., Rutledge v. United States*, 517 U.S. 292, 306 (1996) ("Consistent with the views expressed by the District of Columbia Circuit, federal appellate courts appear to have uniformly concluded that they may direct the entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds that affect only the greater offense.") (citing, e.g., 8A J. MOORE, FEDERAL PRACTICE ¶ 31.03[5], and n. 54 (2d ed. 1995)).

[51] D.C. Code § 23-112 ("A sentence imposed on a person for conviction of an offense shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence imposed on such person for conviction of an offense, whether or not the offense (1) arises out of another transaction, or (2) arises out of the same transaction and requires proof of a fact which the other does not.").

current approach of not addressing merger issues at initial sentencing, without precluding future administrative changes should District courts deem them to be appropriate.

RCC § 22E-214(a)-(d): Relation to Current District Law on Substantive Merger Policy. Subsections (a), (b), (c), and (d) comprise a clear and comprehensive body of substantive merger policies that are in some ways consistent with and in others ways broader than the District's current approach.

It is well established under District law that the Double Jeopardy Clause of the U.S. Constitution prohibits the imposition of multiple punishments when—but only when—doing so would conflict with legislative intent.[52] As a result, the DCCA views "legislative intent [as the] key in determining whether offenses merge, as 'the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed.'"[53] And, in the District, "the *Blockburger* rule, albeit in less than felicitous language, has been codified as an express declaration of legislative intent" as to merger under D.C. Code § 23-112.[54]

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[52] *E.g., Byrd v. United States*, 598 A.2d 386, 388 (D.C. 1991) (*en banc*) ("The role of the constitutional guarantee [against double jeopardy] is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.") (quoting *Albernaz v. United States*, 450 U.S. 333, 334 (1981)); *Robinson v. United States*, 608 A.2d 115, 115 (D.C. 1992); *Lennon v. United States*, 736 A.2d 208, 209 (D.C. 1999). Beyond this limitation on multiple punishments, the DCCA recognizes that the same double jeopardy guarantee has been said to "protect[] against a second prosecution for the same offense after acquittal," as well as a "second prosecution for the same offense after conviction." *Byrd*, 598 A.2d at 387 n.4 (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)).

[53] *Young v. United States*, 143 A.3d 751, 760 (D.C. 2016) (quoting *Graure v. United States*, 18 A.3d 743, 765 n.31 (D.C. 2011)). Because the Double Jeopardy Clause of the Fifth Amendment prohibits "multiple punishments for the same offense," *Lennon v. United States*, 736 A.2d 208, 209 (D.C. 1999), it "compels merger of duplicative convictions for the same offense, so as to leave only a single sentence for that single offense." *McCoy v. United States*, 890 A.2d 204, 216 (D.C. 2006).

[54] *Byrd*, 598 A.2d at 386 (internal quotations and citation omitted); *see Blockburger v. United States*, 284 U.S. 299, 301 (1932) ("[W]here 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."). The relevant statute, D.C. Code § 23-112, establishes that:

> A sentence imposed on a person for conviction of an offense shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence imposed on such person for conviction of an offense, whether or not the offense (1) arises out of another transaction, or (2) arises out of the same transaction and requires proof of a fact which the other does not.

In *Whalen v. United States*, the U.S. Supreme Court had the occasion to interpret this statute, observing that:

> The legislative history rather clearly confirms that Congress intended the federal courts to adhere strictly to the *Blockburger* test when construing the penal provisions of the District of Columbia Code. The House Committee Report expressly disapproved several decisions of the United States Court of Appeals for the District of Columbia Circuit that had not allowed consecutive sentences notwithstanding the fact that the offenses were different under the *Blockburger* test. *See* H.R. Rep. No. 91–907, p. 114 (1970). The Report restated the general principle that "whether or not consecutive sentences may be imposed depends on the intent of Congress." *Ibid*. But "[s]ince Congress in enacting legislation rarely specifies its intent on this matter, the courts have

The *Blockburger* rule, as applied to multiple convictions for different offenses prosecuted in a single proceeding, supports a rebuttable presumption of legislative intent[55] as to merger when (but only when) two basic requirements are met: (1) the convictions arise from the same act or course of conduct[56]; and (2) the underlying offenses upon which the convictions are based entail proof of the same facts.[57] The DCCA has expounded upon the contours of each of these requirements through a robust and well-developed body of case law.

Whether, for purposes of the first requirement, multiple convictions arise from separate acts or transaction depends upon an analysis of three factors. The first factor is the appropriate unit of prosecution, which is "generally a question of what the legislature intended to be the act or course of conduct prohibited by the statute for purposes of a single conviction and sentence."[58] The second factor is the duration of the conduct in

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> long adhered to the rule that Congress did intend to permit consecutive sentences . . . when each offense "'requires proof of a fact which the other does not,'" *ibid*., citing *Blockburger v. United States, supra*, and *Gore v. United States, supra.* The Committee Report observed that the United States Court of Appeals had "retreated from this settled principle of law" by requiring specific evidence of congressional intent to allow cumulative punishments, H.R. Rep. No.91–907, at 114, and the Report concluded as follows:
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> > "To obviate the need for the courts to search for legislative intent, section 23–112 clearly states the rule for sentencing on offenses arising from the same transaction. For example, a person convicted of entering a house with intent to steal and stealing therefrom shall be sentenced consecutively on the crimes of burglary and larceny unless the judge provides to the contrary."
>
> We think that the only correct way to read § 23–112, in the light of its history and its evident purpose, is to read it as embodying the *Blockburger* rule for construing the penal provisions of the District of Columbia Code. Accordingly, where two statutory offenses are not the same under the *Blockburger* test, the sentences imposed "shall, unless the court expressly provides otherwise, run consecutively." And where the offenses are the same under that test, cumulative sentences are not permitted, unless elsewhere specially authorized by Congress.

445 U.S. 684, 692–93 (1980).

[55] Because the *Blockburger* rule merely creates a presumption of legislative intent, the results it yields can always be overcome by 'a clearly contrary legislative intent' manifested by the D.C. Council. *Sanchez-Rengifo v. United States*, 815 A.2d 351, 354 (D.C. 2002).

[56] *Hanna v. United States*, 666 A.2d 845, 853 (D.C. 1995); *Allen v. United States*, 580 A.2d 653, 657 (D.C. 1990)); *Villines v. United States*, 320 A.2d 313, 314 (D.C. 1974); *Logan v. United States*, 460 A.2d 34, 36 (D.C. 1983).

[57] *Alfaro v. United States*, 859 A.2d 149, 155 (D.C. 2004) (quoting *Blockburger*, 284 U.S. at 301).

[58] *Brown v. State*, 535 A.2d 485, 489 (Md. 1988); *see, e.g., Briscoe v. United States*, 528 A.2d 1243, 1245 (D.C. 1987) ("[W]e must determine whether the Council of the District of Columbia intended to permit multiple punishments for possession of the same drug at the same time and at approximately the same place."). Sometimes, however, the unit of prosecution centers around the kind of interest protected by the statute. For example, in *Vines v. United States*, the defendant damaged two cars in a single course of conduct, and was later convicted of two counts of MDP. 70 A.3d 1170, 1176-77 (D.C. 2013), *as amended* (Sept. 19, 2013). On appeal, the defendant argued that this was inappropriate because the MDP statute contemplated the destruction of "property" in a more general sense; thus, because there was only one property-destroying act, there should only be one conviction. *Id.* A majority of the panel rejected this

question; the analysis here focuses on whether there was an "appreciable length of time 'between the acts [alleged to] constitute the [multiple] offenses.'"[59] The third factor asks whether "a subsequent criminal act is '[] not the result of the original impulse, but a fresh one.'"[60] Judicial evaluation of the first factor is purely a matter of law; the inquiry focuses on legislative intent as discerned from the traditional sources of statutory meaning.[61] Judicial evaluation of the latter two factors, in contrast, requires application of "a fact-based approach,"[62] which revolves around whether the defendant reached a "fork-in-the-road."[63]

The second requirement, which is the crux of the *Blockburger* rule, incorporates what is often referred to as the elements test.[64] The central question presented by the elements test is whether, "where the same act or transaction constitutes a violation of two different statutory provisions, 'each provision require[] proof of a fact which the other does not[?]'"[65] If, based on consideration of the statutory elements of two offenses for which the defendant has been convicted, this question can be answered in the negative, then the operative assumption is that the legislature intended to preclude the imposition of multiple liability and punishments, such that one of the convictions must be vacated.[66] Where, in contrast, an affirmative answer can be rendered—i.e., because element analysis indicates that both offenses of conviction require proof of at least one distinct fact—then it is presumed that the legislature intended to authorize multiple liability and punishments.[67] Judicial application of the elements test is generally understood by the DCCA to entail a pure legal analysis, which is to be conducted without regard to the underlying facts of a case.[68]

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argument, looking to the legislative intent underlying the statute and finding that "the definition contemplates that an injury to each new victim will constitute a separate offense." *Id.*

[59] *Hanna*, 666 A.2d at 853 (quoting *Blockburger*, 284 U.S. at 303).

[60] *Hanna*, 666 A.2d at 853. *See, e.g., Maddox v. United States*, 745 A.2d 284, 294 (D.C. 2000) (Therefore, whether [appellant]'s convictions of armed robbery and assault with a deadly weapon merge, depends on "whether there was any evidence that [appellant] reached a 'fork in the road,' leading to a 'fresh impulse' which resulted in a separate offense."); *Bullock v. United States*, 709 A.2d 87, 91 (D.C. 1998) (defendant properly convicted both of distribution of drugs and subsequent possession with intent to distribute where defendant reached "fork in the road" but remained on scene as result of "renewed criminal impulse").

[61] *See, e.g., Briscoe*, 528 A.2d at 1245.

[62] *Morris v. United States*, 622 A.2d 1116, 1130 (D.C.1993); *Gray v. United States*, 544 A.2d 1255, 1257–59 (D.C. 1988); *Sanchez-Rengifo v. United States*, 815 A.2d 351, 354 (D.C. 2002); *Spain v. United States*, 665 A.2d 658, 661 (D.C. 1995); *Cullen v. United States*, 886 A.2d 870, 873 (D.C. 2005).

[63] *Hanna*, 666 A.2d at 853 ("If at the scene of the crime the defendant can be said to have realized that he [or she] has come to a fork in the road, and nevertheless decides to invade a different interest, then his [or her] successive intentions make him [or her] subject to cumulative punishment, and he [or she] must be treated as accepting that risk, whether in fact he [or she] knows of it or not.") (quoting *Owens v. United States*, 497 A.2d 1086, 1095 (D.C. 1985)).

[64] *Alfaro*, 859 A.2d at 155.

[65] *Robinson v. United States*, 608 A.2d 115, 115 (D.C. 1992) (quoting *Blockburger*, 284 U.S. at 304).

[66] *See, e.g., Briscoe*, 528 A.2d at 1245.

[67] *Hanna*, 666 A.2d at 854; *Sanchez-Rengifo v. United States*, 815 A.2d 351, 354 (D.C. 2002).

[68] *See, e.g., Spain v. United States*, 665 A.2d 658, 662 (D.C. 1995) ("Whether two charged offenses merge into one is not for the jury to decide; rather, it is a question of law for the court.") (citing *Hagins v. United States*, 639 A.2d 612, 617 (D.C. 1994)); *Hanna*, 666 A.2d at 859 ("[W]hen more than one offense is founded on the same conduct the merger analysis must focus exclusively on the elements of the various offenses and not on the facts introduced to prove those elements."); *Alfaro*, 859 A.2d at 155 ("In applying

This wholly legal approach to the elements test is to be contrasted with the "fact-based analysis in determining whether multiple punishments [are] permissible" frequently applied by the DCCA prior to its *en banc* decision in *Byrd v. United States*.[69] Under this broader approach to merger, the DCCA would look beyond "abstract consideration of the statutes involved or the wording of the indictment,"[70] and instead look to the proof presented at trial to assess whether there exists a "significant difference in the nature of [the defendant's conduct]."[71] In *Byrd*, however, the *en banc* court opted to abandon this fact-sensitive analysis, reasoning that prior DCCA cases "erred in concluding that since the facts as actually presented by the government to prove one charge were necessarily used by the government to prove the second charge, the two charges constituted the 'same offense.'"[72] Under *Blockburger*, as the *Byrd* court concludes, "the focus should have been on the statutory elements of the two distinct charges," that is, "whether each statutory provision required proof of an element that the other did not."[73]

Although the general applicability of the elements test is clear in principle, District courts frequently struggle to determine when the standard is satisfied as a matter

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the *Blockburger* test, the focus is on the statutorily-specified elements of each offense and not the specific facts of a given case.").

[69] 598 A.2d 386, 390 (D.C. 1991); *see, e.g.*, *Arnold v. United States*, 467 A.2d 136, 138-39 (D.C. 1983) (holding that a defendant could not be punished both for grand larceny and unauthorized use of a motor vehicle, and "observing that with respect to the specific factual situation in that case, the conviction for unauthorized use included proof of no fact not also adduced on the larceny charge"); *Worthy v. United States*, 509 A.2d 1157 (D.C. 1986) (applying the same fact-based analysis to convictions for unauthorized use of a vehicle and receiving stolen property, deeming Arnold "dispositive").

The District's pre-*Byrd* application of the "doctrine of merger and lesser included offenses" was based upon the U.S. Court of Appeals for the D.C. Circuit's decision in *United States v. Whitaker*, which the DCCA in *Hall v. United States* summarized as follows:

> In *Whitaker* the court held that unlawful entry was a lesser included offense of burglary for the purpose of allowing the defendant to request a jury instruction on unlawful entry, despite the fact that unlawful entry need not have necessarily been established as an element of burglary under the D.C. Code or under the indictment of that case. The *Whitaker* court reasoned that because unauthorized entry was an element of the vast majority of burglaries it should be considered a lesser included offense where the facts of the particular case indicate that it was a lesser included offense. The court added, however, that its novel analysis of lesser included offenses was given with the caveat that there must also be 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.

343 A.2d 35, 39 (D.C. 1975) (discussing 447 F.2d 314, 319 (D.C. Cir. 1971)).

[70] *Hall*, 343 A.2d at 39.

[71] *Arnold*, 467 A.2d at 139 ("In this case there appears to be no significant difference in the nature of appellant's use of the vehicle with regard to the unauthorized use conviction, which might have distinguished it from his use and possession of the vehicle with regard to grand larceny. Unauthorized use required no proof beyond that required for conviction of grand larceny.").

[72] 598 A.2d at 390.

[73] *Id.*

of course.[74] To help clarify matters, the DCCA frequently relies on the concept of a "lesser included offense" (LIO) to guide its analysis.[75] The general rule applied by District courts is that two offenses merge when (but only when) one of two offenses is an LIO of the other.[76] One offense is an LIO of another, in turn, if "the elements of the lesser offense are a subset of the elements of the charged offense."[77] Practically speaking, this means that Offense X is only an LIO of Offense Y if it is literally impossible to commit Offense Y without necessarily also committing Offense X under any set of facts.[78] Where application of this comparative analysis leads to the conclusion that one of two convictions is an LIO of the other, then "the trial court has but one course, to vacate the lesser-included offense," thereby imposing liability and punishment for the greater, more serious offense.[79]

An illustrative example of two crimes that share this kind of element-based, LIO relationship are the District's offenses of second degree murder[80] and murder of a police officer (MPO).[81] Both offenses require a malicious killing; however, MPO, but not second degree murder, requires that the victim be a police officer.[82] Therefore, it *cannot*

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[74] *See, e.g., Rose v. United States*, 49 A.3d 1252 (D.C. 2012); *Alfaro v. United States*, 859 A.2d 149 (D.C. 2004); *Mungo v. United States*, 772 A.2d 240 (D.C. 2001); *see also Byrd*, 598 A.2d at 390 ("We recognize that legitimate questions may arise at times with respect to the manner in which the *Blockburger* test is to be applied in a given case.").

[75] *See, e.g., Alfaro*, 859 A.2d at 155; *Lee v. United States*, 668 A.2d 822, 825 (D.C. 1995).

[76] *See, e.g., Alfaro*, 859 A.2d at 155; *Lee*, 668 A.2d at 825.

[77] *Alfaro*, 859 A.2d at 155 (quoting *Schmuck v. United States*, 489 U.S. 705, 716 (1989)); *Mungo*, 772 A.2d at 245 (D.C. 2001) ("the statutory elements of the lesser offense are contained within those of the greater charged offense").

[78] *Alfaro*, 859 A.2d at 155 ("[T]o constitute a lesser-included offense, 'the lesser [offense] must be such that it is impossible to commit the greater without first having committed the lesser.'") (quoting *Schmuck*, 489 U.S. at 719).

[79] *Mooney v. United States*, 938 A.2d 710, 724 (D.C. 2007) ("[W]here the illegality of multiple punishments results from convictions of a greater and a lesser-included offense, the double jeopardy bar is fully addressed, and the illegal sentence corrected, by merging the lesser into the greater offense so that only the latter remains . . . ."); *Franklin v. United States*, 392 A.2d 516, 519 n.3 (D.C. 1978) ("[W]here an appellant has been convicted of both the crime and a lesser included offense, the appropriate appellate remedy is vacation of the lesser included offense.") (citing *Franey v. United States*, 382 A.2d 1019, 1021 (D.C. 1978)); *see, e.g., In re T.M.*, 155 A.3d 400, 408 (D.C. 2017) ("Appellant's conviction for felony assault . . . merges with her conviction for AAWA because felony assault is a lesser-included offense of AAWA.").

It's worth noting that for a significant amount of time "it was generally thought that the prohibition against multiple punishments applied only to *consecutive* sentencing." *Byrd*, 598 A.2d at 393. This view changed, however, in *Doepel v. United States*, where the DCCA recognized that "even a concurrent sentence is an element of punishment because of potential collateral consequences" and accordingly forbade concurrent sentences for both felony murder and the underlying felony. 434 A.2d 449, 459 (D.C. 1981). And "[t]his interpretation of the result that follows from a *Blockburger* analysis of multiple punishments was, four years later, confirmed by the Supreme Court in *Ball v. United States.*" *Byrd*, 598 A.2d at 393 (citing *Ball v. United States*, 470 U.S. 856 (1985) (because a separate conviction, even with a concurrent sentence, could have collateral consequences, the imposition of concurrent sentences "cannot be squared with Congress' intention")).

[80] D.C. Code § 22-2103 ("Whoever with malice aforethought . . . kills another, is guilty of murder in the second degree.")

[81] D.C. Code § 22-2106 ("Whoever, with deliberate and premeditated malice, and with knowledge or reason to know that the victim is a law enforcement officer or public safety employee, kills any law enforcement officer or public safety employee . . . .").

[82] *Compare* D.C. Code § 22-2103 *with* D.C. Code § 22-2106.

be said that each offense "requires proof of a fact which the other does not."[83] Rather, MPO requires proof of the same facts as second degree murder, plus at least one additional fact, namely, that the victim be a police officer.[84] As a result, it impossible to commit MPO without also committing second degree murder. It therefore follows that second degree murder is an LIO of MPO. Under the elements test, then, multiple convictions for both offenses, if based on the same course of conduct/committed against a single victim, would merge at sentencing, thereby leaving a single conviction for only the greater offense, MPO.

Many (if not most) of the substantially overlapping offenses contained in the D.C. Code do not share this kind of element-based, LIO relationship, and, therefore, are not subject to a presumption of merger under the *Blockburger* rule. A comparison of the District's carjacking and robbery statutes is illustrative.

The District's robbery statute applies a fifteen year statutory maximum to any person who, "by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value."[85] Similarly, the District's carjacking statute applies a twenty one year statutory maximum (and seven year mandatory minimum) to any person who "by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, or attempts to do so, shall take from another person immediate actual possession of a person's motor vehicle . . . ."[86]

Comparing the elements of carjacking and robbery in *Pixley v. United States*, the DCCA ultimately concluded that the *Blockburger* rule supports the imposition of multiple liability and punishment for both offenses when based on the same course of conduct.[87] Central to the court's analysis is the theoretical possibility of satisfying the elements of carjacking without also satisfying the elements of robbery. True, "*most* carjackings" are likely to constitute robberies; however, this is not always the case.[88] For example, it is possible to commit carjacking without also committing a robbery since robbery requires proof that the property have been *carried away*.[89] And, of course, it is possible to commit robbery without also committing carjacking since carjacking requires proof that the property at issue be a *motor vehicle*.[90] Accordingly, the DCCA concluded, the District's carjacking and robbery offenses do not merge under the elements test.[91]

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[83] *Blockburger*, 284 U.S. at 304.

[84] Note also that MPO requires proof that the malice was "deliberate and premeditated." D.C. Code § 22-2106.

[85] D.C. Code § 22-2801.

[86] D.C. Code § 22-2803(a)(1).

[87] *Pixley v. United States*, 692 A.2d 438, 440 (D.C. 1997).

[88] *Id.* at 440 (quoting LETTER TO THE CHAIRPERSON OF THE COMMITTEE ON THE JUDICIARY FROM THEN-CORPORATION COUNSEL JOHN PAYTON (November 17, 1992), at 1 (emphasis added)).

[89] *Id.* ("[W]hile robbery requires a carrying away or asportation, carjacking by its terms does not; as the government points out, it can be committed by putting a gun to the head of the person in possession and ordering the person out of the car.").

[90] *Pixley*, 692 A.2d at 440 ("Plainly carjacking requires proof of an element that robbery does not: the taking of a person's motor vehicle.").

[91] *Id.* The *Pixley* court also observed the inclusion of the culpable mental state of recklessness and an alternative attempts element in the carjacking statute to provide additional reasons weighing against merger. *See id.*

The merger analysis reflected in both the *Pixley* decision and in many other areas of District law is consistent with the DCCA's frequent assertion that the elements test is to be conducted without regard to the government's theory of prosecution or the specific facts of a case. However, a close reading of DCCA case law post-*Byrd* reveals the periodic application of a broader, theory-specific/fact-sensitive approach to the elements test.

Illustrative is the District law pertaining to merger of robbery and assault. The DCCA has repeatedly held that convictions for robbery and assault merge.[92] However, this conclusion is contrary to the results generated by a strict application of the elements test, which indicates that each "requires proof of a fact which the other does not."[93] For example, the District's assault offense requires "the unlawful use of force causing injury to another or the attempt to cause injury with the present ability to do so," without regard to whether a theft was involved.[94] In contrast, the District's robbery offense requires the theft of property in the victim's immediate actual possession, without regard to whether an assault was involved (i.e., a taking by "stealthy seizure" or "snatching" will suffice).[95] It is, therefore, theoretically possible to commit one of these offenses without necessarily committing the other.[96]

How, then, has the DCCA determined that the District's robbery and assault offenses are subject to merger? The legal basis for this conclusion is not clearly articulated in the case law. However, it seems to rest upon a theory-specific construction of *robbery by assault* (i.e., a taking "against resistance" rather than a taking by "sudden or stealthy seizure or snatching"), under which a fact-based consideration of how the

[92] *Simms v. United States*, 634 A.2d 442, 447 (D.C. 1993); *In re Z.B.*, 131 A.3d 351, 355 (D.C. 2016) ("[I]t is not possible to commit robbery without also committing assault, and assault accordingly merges as a lesser-included offense."); *Beaner v. United States*, 845 A.2d 525, 540–41 (D.C. 2004) ("ADW is a lesser included offense of armed robbery when the assault is committed in order to effectuate the robbery."); *In re T.H.B.*, 670 A.2d 895, 899 (D.C. 1996) (assault with intent to rob LIO of robbery). *But see 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."). For pre-*Byrd* case law, see, for example, *Rogers v. United States*, 566 A.2d 69, 71 n.3 (D.C. 1989) (assault LIO of robbery); *Norris v. United States*, 585 A.2d 1372, 1375 (D.C. 1991) (assault with a dangerous weapon LIO of armed robbery); *Harling v. United States*, 460 A.2d 571, 574 (D.C. 1983).

[93] *Pearsall v. United States*, 812 A.2d 953, 961 (D.C. 2002) (quoting *Iannelli v. United States*, 420 U.S. 770, 777 (1975)).

[94] *Mungo v. United States*, 772 A.2d 240, 245 (D.C. 2001).

[95] D.C. Code § 22-2801. Although the phrase "stealthy seizure or snatching" was included to address pickpockets, both the DCCA and U.S. Court of Appeals for the D.C. Circuit have interpreted such language to encompass *any situation* involving the "actual physical taking of the property from the person of another, even though [it is] without his knowledge and consent, and though the property [is] unattached to his person." *Ulmer v. United States*, 649 A.2d 295, 298 (D.C. 1994) (quoting *Turner v. United States*, 16 F.2d 535, 536 (D.C. Cir. 1926)). In practical effect, this means that a defendant can be convicted of robbery in the District "when the only force used is that necessary to [move property from Point A to Point B]." *United States v. Mathis*, 963 F.2d 399, 410 (D.C. Cir. 1992). Indeed, the DCCA has been particularly candid on this point, "consistently and for many years" holding that "any taking" of property in the immediate actual possession of another "is a robbery—not simply larceny." *Leak v. United States*, 757 A.2d 739, 742 (D.C. 2000).

[96] Indeed, the reported cases contain numerous examples of instances of where this has, in fact, occurred *See* cases cited *supra* note 95.

robbery was committed effectively limits the scope of the elements being compared under *Blockburger*.[97]

This same theory-specific, fact-based approach also appears to be at the heart of District law governing merger of felony murder and the underlying offense. An abstract elemental analysis of felony murder and any particular offense that serves as the source of aggravation—e.g., rape, burglary, arson, etc.—weighs against merger given that each offense "requires proof of a fact which the other does not."[98] For example, felony murder requires proof of a killing, which is not required by any specific enumerated felony. In contrast, each of these specific enumerated felonies requires proof of facts that are not necessary to prove felony murder, since proof of the commission of a different enumerated felony may always suffice. As a result, it is always theoretically possible to commit felony murder without necessarily committing the offense that actually serves as the basis for the aggravation of the homicide in any particular case.

In the face of this abstract elemental analysis, the DCCA (as well as the U.S. Supreme Court interpreting District law[99]) has repeatedly held that "the underlying felony will merge with [] felony murder."[100] Yet, as with the case law pertaining to merger of assault and robbery, the rationale for this outcome is not explicitly provided by the DCCA. Here again, though, the conclusion only seems supportable if one accounts for the government's theory of liability—as reflected in the charging document and/or

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[97] That is, an approach that analyzes the elements of *robbery by assault*, which necessarily include the elements of assault. This has been described as a "pleadings," rather than "statutory," approach. *See* Model Penal Code § 1.07 cmt. at 130 ("[U]nder the statutory approach, the offense of battery would not be an included offense in a charge of robbery because an element of battery, the use of force, is not a necessary element of robbery; the threat of force suffices to establish robbery. Battery would, however, be included in a charge of robbery under the pleadings approach if the pleading alleged the use of force.").

[98] *Pearsall v. United States*, 812 A.2d 953, 961 (D.C. 2002) (quoting *Iannelli v. United States*, 420 U.S. 770, 777 (1975)).

[99] *Whalen v. United States*, 445 U.S. 684 (1980). The defendant in *Whalen* was "convicted in the Superior Court of the District of Columbia of rape, and of killing the same victim in the perpetration of rape." *Id.* at 685. Thereafter, the defendant appealed the convictions (and consecutive sentences) to the DCCA, arguing that "his sentence for the offense of rape must be vacated because that offense merged for purposes of punishment with the felony-murder offense, just as, for example, simple assault is ordinarily held to merge into the offense of assault with a dangerous weapon." *Id.* at 686. However, the DCCA "disagreed, finding that 'the societal interests which Congress sought to protect by enactment [of the two statutes] are separate and distinct,' and that 'nothing in th[e] legislation . . . suggest[s] that Congress intended' the two offenses to merge." *Id.* at 687 (quoting *Whalen v. United States*, 379 A.2d 1152, 1159 (D.C. 1977)). The U.S. Supreme Court subsequently granted the case "to consider the contention that the imposition of cumulative punishments for the two offenses was contrary to federal statutory and constitutional law." *Id.* at 687. The *Whalen* court ultimately answered this question in the affirmative, holding that "the District of Columbia Court of Appeals was mistaken in believing that Congress authorized consecutive sentences in the circumstances of this case." *Id.*; *see also Doepel v. United States*, 434 A.2d 449, 459 (D.C. 1981) (recognizing that "even a concurrent sentence is an element of punishment because of potential collateral consequences" and accordingly precluding concurrent sentences for both felony murder and the underlying felony).

[100] *Newman v. United States*, 705 A.2d 246, 265 n.19 (D.C. 1997); *see, e.g., Mooney*, 938 A.2d at 721 n.11 ("Where two different persons are robbed, as here, [] the underlying felony conviction (armed robbery) merges into the felony murder conviction related to the same victim") (citing *Green v. United States*, 718 A.2d 1042, 1063 (D.C. 1998)); *Spencer v. United States*, 132 A.3d 1163, 1173–74 (D.C. 2016); *Baker v. United States*, 867 A.2d 988, 1010 (D.C. 2005); *Bonhart v. United States*, 691 A.2d 160, 164 (D.C. 1997).

facts proven at trial—to ensure that the underlying felony upon which merger is sought is, in fact, the basis for aggravation of homicide.

It's also worth noting that, in rare situations, the DCCA requires merger of overlapping offenses under circumstances that do not seem supportable under any construction of the elements test. Illustrative is the District law pertaining to merger of assault and attempt offenses. The DCCA has held that assault with a dangerous weapon is an LIO of, and therefore merges under *Blockburger* with, the while armed versions of both attempted robbery and attempted aggravated assault.[101] However, neither an abstract elemental analysis of the relevant statutes, nor a more context-sensitive evaluation of those elements in light of the government's theory of prosecution, would seem to support this conclusion. The lesser offense of assault with a dangerous weapon requires proof of a fact—an attempted battery, *plus the present ability* to commit, a battery[102]—that neither of the greater offenses of attempted robbery and attempted aggravated assault while armed require proof of. Therefore, the DCCA's decision to merge a conviction for assault with a dangerous weapon into both of these substantially overlapping offenses, while both intuitive and seemingly just, does not appear to be consistent with the results generated by a *Blockburger* analysis.[103]

Even accounting for the DCCA's periodic *de facto* application of a broader approach to the elements test, there is little question that the overall scope of merger under District law is exceedingly narrow. Indeed, relatively minor variances between

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[101] *See, e.g., Morris v. United States*, 622 A.2d 1116, 1129 (D.C. 1993) (holding, post-*Byrd*, that convictions for attempted armed robbery and assault with a dangerous weapon against the same victim as a part of the same criminal incident merge); *Frye v. United States*, 926 A.2d 1085, 1098 (D.C. 2005) (same for attempted aggravated assault while armed and assault with a dangerous weapon).

[102] *Mungo*, 772 A.2d at 245; *see, e.g., Joiner-Die v. United States*, 899 A.2d 762, 765 (D.C. 2006).

[103] In holding that assault with a dangerous weapon merges with attempted aggravated assault while armed, the *Frye* court deemed it "doubtful" that the dangerous proximity test applicable to criminal attempts under District law, as applied to the offense of aggravated assault, could be established by proof of "action short of some assaultive conduct." *Frye*, 926 A.2d at 1099 ("Short of some assaultive conduct or some other specific effort to inflict harm on the victim, it is difficult to discern any overt act which would cross the threshold from mere preparation to an actual attempt for [aggravated assault]."). However, it appears to be well established in both case law and commentary that the dangerous proximity test can indeed be satisfied prior to reaching the present ability requirement of assault. As the Maryland Court of Appeals has observed:

> Because the overt act necessary for an attempt is frequently an assault, the two crimes have a significant overlap. But the overlap is not complete, because an overt act can qualify as an attempt and yet not rise to the level of an assault. For example, an attempted poisoning would qualify as attempted murder, but it would not be an assault, especially if the poison did not come in contact with the victim. *See Bittle v. State*, 78 Md. 526, 28 A. 405 (1894). An aborted attempt to bomb an airplane would not be an assault, but it would be attempted murder. *See People v. Grant*, 105 Cal.App.2d 347, 233 P.2d 660 (1951). [] A person who fires a shot at an empty bed where he mistakenly believes the victim is sleeping has committed attempted murder, but not an assault. *State v. Mitchell*, 170 Mo. 633, 71 S.W. 175 (1902).

Hardy v. State, 301 Md. 124, 129, 482 A.2d 474, 477 (1984); *see, e.g.*, R. PERKINS, *Criminal Law* 578 (2d ed. 1969) ("The law of assault crystallizing at a much earlier day than the law of criminal attempt in general, is much more literal in its requirement of 'dangerous proximity to success' (actual or apparent) than is the law in regard to an attempt to commit an offense other than battery.")

what are otherwise very similar offenses routinely provide District courts with the basis for rejecting claims of merger.[104] This is problematic given that the breadth of liability inherent in such an approach has the potential to be highly disproportionate.

The disproportionality problem is comprised of two different dimensions. The first relates to the disproportionate accumulation of convictions, namely, application of the elements test supports the imposition of multiple convictions for conduct that intuitively reflects a single crime. Second, but relatedly, this accumulation of convictions authorizes the imposition of a disproportionate sentence by effectively summing the statutory maxima of all non-merging offenses.

To illustrate both dimensions, consider again the DCCA's holding in *Pixley v. United States* that the District's carjacking and robbery offenses do not merge under the elements test.[105] In practical effect, this means that any person who participates in a successful carjacking in the District can always be convicted of both robbery and carjacking—notwithstanding the fact that, from a communicative perspective, a single conviction for carjacking would seem to suffice.[106] And it also means that any person who participates in a successful, unarmed carjacking in the District is subject to thirty-six years of incarceration (regardless of whether any force is actually applied[107]), which is three-and-a-half times the ten year statutory maximum facing someone who commits a "life-threatening or disabling" aggravated assault.[108]

The kinds of disproportionality inherent in the elements test stem from placing a singular focus on whether offenses require proof of different facts. This is problematic from the perspective of proportionate punishment because two substantially overlapping offenses may require proof of slightly different facts, yet the gravamen of one offense—based upon the harm, culpability, and penalty it proscribes—may still duplicate that of the other.

Here again, a comparison of the District's robbery and carjacking offenses is illustrative. It is certainly true that a person can commit carjacking without necessarily committing robbery. Not only is asportation an essential element of robbery but not carjacking, but carjacking can be proven without regard to the defendant's extremely

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[104] *See, e.g., Pixley*, 692 A.2d at 440; *Allen v. United States*, 697 A.2d 1, 2 (D.C. 1997) (rejecting claim of merger for UUV and carjacking, notwithstanding the fact that it would take "an improbable scenario" to commit a carjacking without also committing UUV); *In re Z.B.*, 131 A.3d 351, 355 (D.C. 2016) (holding that a conviction for robbery does not merge with threats because "it *is* possible to commit a robbery without committing verbal threats—that is, through the use of violence or conduct that puts one in fear").

[105] *Pixley*, 692 A.2d at 440.

[106] Which is to say, that a carjacking conviction by itself would seem to express the nature of what has occurred where a single victim is robbed of his or her automobile. This is, of course, a subjective assertion; however, it seems relatively clear that the most common-sense interpretation of the phrase "X was convicted of both robbery and carjacking" is that X engaged in two separate criminal acts.

[107] Under District law, it appears that a non-violent theft of an automobile located near the owner constitutes carjacking. *Young v. United States*, 111 A.3d 13, 14 (D.C. 2015); *see* cases cited *supra* note 95 (discussing alternative element of "stealthy seizure" in the context of robbery).

[108] D.C. Code § 22-404.01(b) ("Any person convicted of aggravated assault shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned for not more than 10 years, or both."); *Swinton v. United States*, 902 A.2d 772, 775 (D.C. 2006) (observing that "[t]he injuries in [aggravated assault] cases usually [are] life-threatening or disabling. The victims typically require[] urgent and continuing medical treatment (and, often, surgery), carr[y] visible and long-lasting (if not permanent) scars, and suffer[] other consequential damage, such as significant impairment of their faculties. In short, these cases [are] horrific.").

intoxicated state, which is not true of robbery.[109] These moral distinctions, while narrow, are meaningful: all else being equal, for example, a sober theft of property from a person is more blameworthy than a failed attempt at taking property while in an inebriated state. That said, the existence of these distinctions does not undercut a more general recognition that carjacking speaks to the same combined threat to personal security and property rights addressed by robbery.[110] The central difference is that carjacking affords additional protections—in the form of substantially increased minimum and maximum penalties—where the theft of property implicates an automobile.[111] (This conclusion is further bolstered by a recognition that the elements of an offense only set the floor of liability, while the statutory maximum is geared towards addressing more culpable/harmful variations of the same basic conduct—a characterization that seems to easily fit *sober* and *successful* carjackings.[112]) With that in mind, and assuming that the District's robbery and carjacking statutes are individually proportionate, then imposing multiple convictions and punishments for both offenses—where the gravamen of one duplicates that of the other—necessarily leads to the disproportionate duplication of liability and punishment.

It's important to highlight that the disproportionalities inherent in the application of the elements test go well beyond the *double* counting of similar harms, implicating *triple* counting and beyond. Consider, for example, the actual extent of liability and punishment confronting an actor who commits an unarmed carjacking in the District based on the following facts:

Unarmed Carjacking. X confronts Y while Y is sitting in her new Mercedes Benz at a gas station. X threatens to inflict physical harm upon Y unless she hands over her keys and immediately exits the vehicle. Y complies with the threat. X thereafter drives away in the vehicle without inflicting any physical harm on Y.

In this scenario, Defendant X has not only satisfied the requirements of liability for carjacking and robbery, but also, at least three other District offenses: (1) unauthorized use of a vehicle (UUV), which subjects a person who uses the motor

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[109] *See, e.g., Pixley*, 692 A.2d at 440.

[110] *See* COMMITTEE REPORT OF THE COMMITTEE ON THE JUDICIARY ON BILL 10-16, *Carjacking Prevention Amendment Act of 1993*, at 2 (Feb. 25, 1993) (hereinafter "Committee Report") ("Background and Need" section of the legislative history notes that "[f]or the victim, carjacking is an especially traumatic experience"); *id.* at 3 (noting that the bill was passed a month after "[t]he issue of carjacking began to receive media and national attention as a result of the September, 1992 carjacking which ended with the murder of Pamela Basu, who died while being dragged in her car.")

[111] For example, the "Background and Need" section of the Committee Report notes that:

> [C]arjacking takes from its victims their mobility. Where a vehicle is used for employment or transportation to employment, a carjacker has stolen the victim's means of earning a living. Additionally, in a city of renters, their automobile probably represents the most valuable piece of property owned by victims. Even if properly insured, the cost of replacement may be too much to bear.

Id. at 3.

[112] Indeed, *sober* and *successful* carjackings are presumably the norm rather than the exception.

vehicle of another without permission to a five year statutory maximum[113]; (2) felony threats, which subjects a person who makes verbal threats to do bodily harm to a twenty year statutory maximum; and (3) felony theft, which subjects a person who steals property worth more than $1,000 to a ten year statutory maximum.[114]

None of these offenses appear to be subject to a presumption of merger under the elements test. For example, the DCCA has explicitly determined that UUV does not merge with carjacking because UUV, but not carjacking, requires the actual *use* of the vehicle.[115] DCCA case law likewise suggests that felony threats would not merge with carjacking because "it is possible to commit a robbery without committing verbal threats—that is, through the use of violence or conduct that puts one in fear."[116] And DCCA case law also indicates that felony theft would not merge with carjacking because for felony theft, but not carjacking, the value of the property stolen must be greater than $1,000.[117] (One could imagine, for example, a carjacking implicating a vehicle worth less than $1,000). Under the elements test, then, it appears that Defendant X could be could be convicted of, and cumulatively sentenced for, all five offenses, with an accompanying aggregate statutory maxima of seventy-one years.

Now consider the further accumulation of convictions and aggregation of sentencing exposure that occurs under the elements test when a weapon is introduced into the fact pattern:

Armed Carjacking. X confronts Y while Y is sitting in her new Mercedes Benz at a gas station. X brandishes a firearm and threatens to shoot Y unless she hands over her keys and immediately exits the vehicle. Y complies with the threat. X thereafter drives away in the vehicle without inflicting any physical harm on Y.

In this scenario, Defendant X has satisfied the requirements of liability for at least seven different offenses: (1) armed carjacking, an aggravated form of carjacking that is subject to a forty year statutory maximum alongside a fifteen year mandatory minimum[118]; (2) robbery while armed, a combination offense subject to a forty five year statutory maximum alongside a five to ten year mandatory minimum[119]; (3) felony theft

[113] D.C. Code § 22-3215(b) ("A person commits the offense of unauthorized use of a motor vehicle under this paragraph if, without the consent of the owner, the person takes, uses, or operates a motor vehicle, or causes a motor vehicle to be taken, used, or operated, for his or her own profit, use, or purpose.").

[114] D.C. Code § 22-3214(a) ("Any person convicted of theft in the first degree shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 10 years, or both, if the value of the property obtained or used is $1,000 or more.").

[115] *Allen*, 697 A.2d at 2.

[116] *In re Z.B.*, 131 A.3d at 353 (comparing robbery and misdemeanor threats, which has essentially the same elements as felony threats).

[117] *See Foreman v. United States*, 988 A.2d 505, 506 n.1 (D.C. 2010) (parties agreeing that felony theft is not a lesser-included offense of armed robbery).

[118] D.C. Code § 22-2803(b)(1) ("A person commits the offense of armed carjacking if that person, while armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, dirk, bowie knife, butcher knife, switch-blade knife, razor, blackjack, billy, or metallic or other false knuckles), commits or attempts to commit the offense of carjacking."); *id.* at (b)(2) ("A person convicted of armed carjacking shall be fined not more than the amount set forth in § 22-3571.01 and be imprisoned for a mandatory-minimum term of not less than 15 years and a maximum term of not more than 40 years, or both.").

[119] The applicable enhancement statute, D.C. Code § 22–4502, provides, in relevant part:

(ten year statutory maximum); (4) felony threats (twenty year statutory maximum); (5) UUV (five year statutory maximum); (6) possession of a firearm during a crime of violence (PFCOV), which is subject to a fifteen year statutory maximum alongside a five year mandatory minimum[120]; and (7) carrying a pistol without a license (CPWL), which is subject to a five year statutory maximum.[121]

None of these offenses appear to be subject to a presumption of merger under the elements test. The first five offenses—armed carjacking, robbery while armed, felony theft, felony threats, and UUV—would not merge for the same reasons previously mentioned above in the context of an unarmed carjacking. Nor, however, would the PFCOV and CPWL convictions appear to be subject to merger under the elements test either. For example, PFCOV does not merge with either armed carjacking or robbery while armed because, as the DCCA has explained, "proof of possession does not necessarily prove armed with/readily available, and proof of a dangerous weapon does not necessarily prove a firearm or imitation thereof."[122] And CPWL does not merge with either of these offenses because, as the DCCA has explained, CPWL "presupposes an operable and unlicensed pistol outside one's own premises or place of business, but not proof that the pistol was used in a robbery or, for that matter, in any other crime."[123] Finally, the DCCA has determined that PFCOV does not merge with CPWL because, whereas "[t]he lack of a license is an element of CPWL, but not of PFCOV," the "commission of a crime of violence or a dangerous crime while in possession of a firearm or imitation firearm is an element of PFCOV, but not of CPWL."[124] Pursuant to the elements test, therefore, it appears that Defendant X could be convicted of, and

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> (a) Any person who commits a crime of violence, or a dangerous crime in the District of Columbia when armed with or having readily available any pistol or other firearm . . . .
>
> (1) May, if such person is convicted for the first time of having so committed a crime of violence, or a dangerous crime in the District of Columbia, be sentenced, in addition to the penalty provided for such crime, to a period of imprisonment which may be up to, and including, 30 years for all offenses . . . [and] shall, if convicted of such offenses while armed with any pistol or firearm, be imprisoned for a mandatory-minimum term of not less than 5 years; [or]
>
> (2) [] shall, if convicted of [a] second offense while armed with any pistol or firearm, be imprisoned for a mandatory-minimum term of not less than 10 years . . . .

[120] D.C. Code § 22-4504(b) ("No person shall within the District of Columbia possess a pistol, machine gun, shotgun, rifle, or any other firearm or imitation firearm while committing a crime of violence or dangerous crime as defined in § 22-4501. Upon conviction of a violation of this paragraph, the person may be sentenced to imprisonment for a term not to exceed 15 years and shall be sentenced to imprisonment for a mandatory-minimum term of not less than 5 years and shall not be released on parole, or granted probation or suspension of sentence, prior to serving the mandatory-minimum sentence.")

[121] D.C. Code § 22-4504(a)(1) ("A person who violates this section by carrying a pistol, without a license issued pursuant to District of Columbia law or any deadly or dangerous weapon, in a place other than the person's dwelling place, place of business, or on other land possessed by the person, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 5 years, or both . . . .").

[122] *Thomas v. United States*, 602 A.2d 647, 655 (D.C. 1992); *Stevenson v. United States*, 760 A.2d 1034, 1035 (D.C. 2000) ("convictions for PFCV do not merge into the predicate armed offenses").

[123] *Rouse v. United States*, 402 A.2d 1218, 1221 (D.C. 1979).

[124] *Ray v. United States*, 620 A.2d 860, 865 (D.C. 1993)

cumulatively sentenced for, all seven offenses, with an accompanying aggregate statutory maxima of over one hundred and thirty years alongside at least twenty five years of aggregated mandatory minima.[125]

It's important to point out that the breadth of liability inherent in the District's approach to merger, while illustrated in the context of a carjacking, is by no means limited to this particular context. Rather, application of the elements test to just about any area of District law is likely to reflect it. To take just one more example, consider the intersection between the elements test and general inchoate liability. Although the inchoate offenses of attempt, solicitation, and conspiracy are similarly targeted at preventing the consummation of criminal offenses, none appear to be subject to a presumption of merger under the elements test.

For example, the DCCA in *Robinson v. United States* specifically rejected the defendant's claim that conspiracy to commit robbery and attempted robbery merge, observing that:

> There are obvious differences between the two offenses, and each requires proof of a fact which the other does not. Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act.[] To establish a conspiracy, the government must prove an unlawful agreement among two or more persons. No such proof is required for attempted robbery. To establish attempted robbery, the government must prove that the defendant committed an overt act which was done with the intent to commit the crime and which, but for the intervention of some cause preventing the carrying out of the intent, would have resulted in the commission of the crime. [] No such proof is required for conspiracy, for the "overt act" requirement as to that crime is far less exacting; a preparatory act, innocent in itself, may be sufficient.[126]

Likewise, although the DCCA has never explicitly addressed the issue, the same *Blockburger*-based rationale would similarly seem to support the imposition of multiple convictions and punishments for both solicitation and attempt, as well as solicitation and conspiracy, to commit a single crime of violence.[127] If true, however, this would mean

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[125] *See, e.g., Hanna*, 666 A.2d at 859 ("This court has expressly ruled [that the while armed enhancement and PFCOV "do not merge and, therefore, that a defendant subject to a mandatory minimum sentence as a result of a conviction under [PFCOV] may also be subject to the [while armed] enhancement provisions [in the D.C. Code] . . . At resentencing, therefore, appellants are subject to the mandatory minimum sentences required by [both].") (citing *Thomas*, 602 A.2d at 654).

[126] *Robinson v. United States*, 608 A.2d 115, 116 (D.C. 1992); *see, e.g., McCullough v. United States*, 827 A.2d 48, 59 (D.C. 2003)

[127] The phrase "crime of violence," in turn, is defined in D.C. Code § 23-1331(4) to encompass the following offenses:

> 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,

that a person could—pursuant to the elements test—be convicted of, and sentenced for, attempt, conspiracy, and solicitation to commit the same crime of violence.[128]

Beyond authorizing the imposition of three felony convictions for an effort to accomplish a single criminal objective, the resulting aggregation of punishments could potentially impose a significantly greater level of sentencing exposure upon an actor who *fails to accomplish a criminal objective* than one who *successfully completes it*. A comparative analysis of the two following scenarios under District law is illustrative:

Scenario 1. X1 intentionally crushes Y's jaw with a sucker punch to the face. X1's goal is to inflict a horrific but non-fatal injury. X1 is successful; Y's injury requires urgent and continuing medical treatment, and results in visible and long-lasting scars.[129]

Scenario 2. X2 offers Z $1,000 to sucker punch Y in the face. X2's goal is to inflict a horrific but non-fatal injury. Z initially agrees, but, after making substantial preparations, later renounces, informing the police of the plan. X2 subsequently decides to carry out the plan himself. However, as X2 approaches Y, the police intercede, thereby preventing X2 from injuring Y.

In scenario 1, X1 has committed aggravated assault, and is therefore subject to ten years of potential punishment. In scenario 2, X2 came close, but ultimately failed, to commit aggravated assault. He does, however, satisfy the requirements of liability for attempted aggravated assault, and is therefore subject to five years of potential punishment for that general inchoate offense.[130] In addition, X2 has also satisfied the requirements of liability for two other general inchoate offenses: (1) solicitation of aggravated assault, which is subject to ten years of potential punishment[131]; and (2) conspiracy to commit aggravated assault, which is subject to ten years of potential punishment.[132] Assuming, pursuant to the elements test, that convictions for these general inchoate offenses do not merge, then X2 would be facing a maximum sentence of twenty-five years for his unsuccessful effort at harming Y. This outcome, when viewed

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> 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.

[128] *Robinson*, 608 A.2d at 116.

[129] *See Swinton*, 902 A.2d at 775 (observing that "[t]he injuries in [aggravated assault] cases usually [are] life-threatening or disabling. The victims typically require[] urgent and continuing medical treatment (and, often, surgery), carr[y] visible and long-lasting (if not permanent) scars, and suffer[] other consequential damage, such as significant impairment of their faculties. In short, these cases [are] horrific.").

[130] D.C. Code § 22-404.01(c) ("Any person convicted of attempted aggravated assault shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned for not more than 5 years, or both.").

[131] D.C. Code § 22-2107(b) ("Whoever is guilty of soliciting a crime of violence as defined by § 23-1331(4), whether or not such crime occurs, shall be sentenced to a period of imprisonment not exceeding 10 years, a fine not more than the amount set forth in § 22-3571.01, or both.").

[132] D.C. Code § 22-1805a(2) ("If 2 or more persons conspire to commit a crime of violence as defined in § 23-1331(4), each shall be . . . imprisoned not more than 15 years nor the maximum imprisonment prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or both.").

in light of the ten years of potential incarceration confronting X1 for successfully causing the same injury to Y, seems highly disproportionate.

Prior to concluding the proportionality analysis in this section, one important caveat bears notice: the fact that the elements test authorizes the disproportionate aggregation of statutory maxima does not mean that the sentences actually imposed by D.C. Superior Court judges in any particular case will reflect this disproportionality. This is because, while the District's trial judges must determine a sentence for every offense of conviction, they typically have discretion to have those sentences run at the same time, thereby effectively neutralizing the imprisonment terms of all but the most severe sentence—a practice generally referred to as concurrent sentencing.

There are two different sources of legal authority relevant to understanding the scope of concurrent sentencing in the District. The first is the D.C. Code. A handful of District statutes *affirmatively require* the sentences arising from multiple convictions for two or more substantially overlapping offenses to run concurrently. The most notable example of this kind of legislative provision is D.C. Code § 22-3203, which statutorily requires judges to impose concurrent sentences for certain combinations of overlapping property offenses. More specifically, this provision states that:

> A person may be convicted of any combination of theft, identity theft, fraud, credit card fraud, unauthorized use of a vehicle, commercial piracy, and receiving stolen property for the same act or course of conduct; provided, that no person shall be consecutively sentenced for any such combination or combinations that arise from the same act or course of conduct.[133]

The D.C. Code likewise contains a few additional provisions that impose a comparable requirement of concurrent sentencing on a narrower, offense-specific basis. For example, the District's enticing a child statute establishes the following:

> No person shall be consecutively sentenced for enticing a child or minor to engage in a sexual act or sexual contact . . . and engaging in that sexual act or sexual contact with that child or minor, provided, that the enticement occurred closely associated in time with the sexual act or sexual contact.[134]

The second relevant source of legal authority are the Voluntary D.C. Sentencing Guidelines (DCSG), which direct Superior Court judges to run such overlapping convictions concurrently in a variety of situations. The relevant provision, Rule 6.2, offers the following non-binding[135] guidance:

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[133] D.C. Code § 22-3203. This provision accordingly dictates that a person who violates two or more of the enumerated property offenses—theft, identity theft, fraud, credit card fraud, unauthorized use of a vehicle, commercial piracy, and receiving stolen property—during a single course of conduct *must* be sentenced concurrently. *See, e.g., Youssef v. United States*, 27 A.3d 1202, 1206 (D.C. 2011).

[134] D.C. Code § 22-3010.

[135] The DCSG are completely voluntary. *See, e.g.,* D.C. Code § 3–105(c) (sentencing guidelines promulgated by the D.C. Sentencing Commission "shall not create any legally enforceable rights in any party"); *Speaks v. United States*, 959 A.2d 712, 718 (D.C. 2008).

6.2 Concurrent Sentences

The following sentences must be imposed concurrently:

For offenses that are not crimes of violence: multiple offenses in a single event, such as passing several bad checks . . . .

The above language—when viewed in light of the relevant DCSG definitions of "crimes of violence"[136] and "event"[137]—indicates that multiple convictions for all non-violent offenses arising from the same course of conduct are to be sentenced concurrently. This appears to be true, moreover, without regard to whether there exists *any overlap* between the offenses of conviction in the first place. So, for example, a judge sentencing a defendant convicted of theft and carrying a dangerous weapon (CDW) based on the same course of conduct would, under this rule, impose concurrent sentences for each offense—notwithstanding the fact that CDW and theft are completely different offenses.[138] All the more so, then, Rule 6.2 appears to direct judges to impose concurrent

[136] The DCSG clarify that "[t]he term "crime of violence" under the Guidelines is . . . identical to the crime of violence definition provided in D.C. Code § 23-1331(4)." DCSG R. 7.4. That statutory provision, in turn, denotes the following list of offenses:

> (4) The term "crime of violence" means aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.

D.C. Code § 23-1331(4).

[137] DCSG R. 7.10 provides the following definition of "event":

> [O]ffenses are part of a single event if they were committed at the same time and place or have the same nucleus of facts. Offenses are part of multiple events if they were committed at different times and places or have a different nucleus of facts. When an offense(s) crosses jurisdictional lines (e.g. from Maryland into the District), it may result in multiple cases. However, this should not change the analysis regarding whether the offense(s) constitutes a single or multiple events.

[138] This practice may lead to disproportionate leniency in certain situations. *See, e.g.*, Michael T. Cahill, *Offense Grading and Multiple Liability: New Challenges for A Model Penal Code Second*, 1 OHIO ST. J. CRIM. L. 599, 605 (2004) (noting that the problem with a system in which courts "impose concurrent sentences for multiple offenses of conviction [when such offenses do not overlap]" is that it "has the obvious and pervasive flaw of trivializing, to the point of complete irrelevance, every offense other than the most serious one. A sensible liability scheme should require, or at least allow, some additional punishment

sentences on a defendant who is convicted of multiple non-violent offenses that actually overlap.[139]

The District's concurrent sentencing policies, when viewed collectively, seem to *modestly* mitigate *some* of the proportionality problems inherent in the elements test. At the same time, however, the relevant safeguards these policies appear to provide are limited in key ways.

First, various provisions in the D.C. Code affirmatively encourage judges to run the sentences for substantially overlapping offenses back-to-back (hereinafter, "consecutive sentencing"). In some instances, the encouragement is "soft." For example, the DCCA has construed D.C. Code § 23-112 to embody a general "preference . . . that consecutive sentences be imposed when an individual is convicted of two or more offenses, even if the convictions arise out of the same act or transaction."[140] In other instances, however, the D.C. Code legally compels consecutive sentencing. For example, the District's UUV statute establishes that any person who commits the offense "during the course of or to facilitate a crime of violence, *shall be*," *inter alia*, "imprisoned for not more than 10 years, or both, *consecutive to the penalty imposed for the crime of violence*."[141]

Second, the relatively few number of offenses subject to a statutorily mandated rule of concurrent sentencing means that the circumstances in which an accused has a *legally enforceable right to concurrent sentencing* for substantially overlapping offenses are quite rare.

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for each such harm—although perhaps incrementally reduced punishment instead of the equally crude alternative of full consecutive sentences for each offense.").

[139] The DCSG provides the following relevant example:

> The defendant sold heroin and cocaine to an undercover narcotics officer as part of a "buy – bust" operation. The defendant was not apprehended at the time of the transaction and a warrant was issued for her arrest. The defendant was arrested three days later. A search of the defendant's person at the time of her arrest uncovered liquid PCP. The defendant was convicted of distribution of heroin, distribution of cocaine, and possession of liquid PCP. The sentences imposed for distribution of heroin and distribution of cocaine should run concurrently because they are non-violent crimes that arose from the same event. The court has the discretion to impose a sentence for possession of liquid PCP that runs either concurrently or consecutively to the sentences imposed for the distribution of heroin and distribution of cocaine convictions because they are not part of the same event.

DCSG R. 6.3.

[140] *Jones v. United States*, 401 A.2d 473, 475 (D.C. 1979); *see, e.g.*, *Banks v. United States*, 307 A.2d 767, 769 (D.C. 1973) ("Congress has clearly stated its intent [in the general sentencing statute with respect to consecutive sentences]."); *Bragdon v. United States*, 717 A.2d 878, 880 (D.C. 1998) (same). In practice, the statutory preference articulated in D.C. Code § 23-112 has little legal effect; for the most part, it merely makes consecutive sentencing the *default* in the absence of judicial specification. That is, where the sentencing court forgets to specify in a multi-conviction case how the various sentences are supposed to run. At the same time, there's also a local rule of criminal procedure, which more explicitly mandates this outcome as well. *See* D.C. Super. Ct. R. Crim. P. 32 ("Unless the Court pronouncing a sentence otherwise provides, a sentence imposed on a defendant for conviction of an offense shall run consecutively to any other sentence imposed on such defendant for conviction of an offense.").

[141] D.C. Code § 22-3215(2)(A).

Third, the concurrent sentencing policies reflected in the DCSG are—their non-binding nature aside[142]—limited in important ways. Most significant is the fact that they only address the sentencing of multiple non-violent offenses arising from the same course of conduct.[143] In contrast, the DCSG are completely silent on how to deal with comparable convictions for violent offenses.[144] Further, the relevant DCSG rule applicable to the sentencing of multiple non-violent offenses arising from the same course of conduct it itself subject to a "departure principle," under which judges may "deviat[e]" from the "consecutive and concurrent sentencing rules" if they believe that "adhering to them would result in a manifest injustice."[145]

Fourth, and perhaps most fundamentally, concurrent sentencing policies only address one kind of disproportionality arising from multiple convictions for substantially related offenses: the aggregation of sentencing exposure. They do nothing, in contrast, to address the second relevant kind of disproportionality: the accumulation of criminal convictions. The disproportionate accumulation of criminal convictions is a distinct problem given that a criminal conviction is—sentence length aside—a form of punishment.[146] This is a function of "the extra stigma imposed upon one's reputation" by the imposition of multiple criminal convictions.[147] And it is also a function of the collateral consequences associated with those convictions, which may include "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."[148]

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[142] That is, because the DCSG are completely voluntary, an accused sentenced consecutively for committing two or more substantially overlapping offenses in contravention to Rule 6.2 effectively has no legal recourse.

[143] In practical effect, this means that a District judge faced with sentencing an offender like Defendant X in the carjacking hypothetical discussed earlier receives no guidance from the DCSG regarding the critical determination of whether that offenders sentences ought to run concurrently or consecutively.

[144] To be sure, there is a provision in the DCSG that addresses the overarching topic of sentencing an offender convicted of multiple violent offenses. However, that provision, Rule 6.1, appears to ignore the issue of how to sentence an offender who has committed multiple violent offenses in a single course of conduct, which involve one victim. *See id.* at R. 6.1 ("The following sentences must be imposed consecutively: For multiple crimes of violence: multiple victims in multiple events; multiple victims in one event; and one victim in multiple events for offenses sentenced on the same day . . .").

[145] *See* DCSG R. 6.3 ("The court has discretion to sentence everything else either consecutively or concurrently . . . The departure principles permit deviating from these consecutive and concurrent sentencing rules if adhering to them would result in a manifest injustice . . . ."). Presumably, then, a judge could impose consecutive sentences for the commission of multiple non-violent, substantially overlapping offenses without violating the DCSG at all—so long as the imposition would avoid a "manifest injustice." *Id.* And of course, this decision would not be subject to any legal review.

[146] *Com. v. Jones*, 382 Mass. 387, 396 (1981).

[147] *O'Clair v. United States*, 470 F.2d 1199, 1203 (1st Cir. 1972).

[148] *Jones*, 382 Mass. at 396 (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)). To be sure, some of these collateral consequences can be dealt with in other ways. Illustrative is the current version of D.C. Code § 22-3203, which also establishes that for the relevant offenses subject to concurrent sentencing, "[c]onvictions arising out of the same act or course of conduct shall be considered as one conviction for purposes of any application of repeat offender sentencing provisions." D.C. Code § 22-3203. Still, this kind of roundabout solution is far from perfect.

When viewed as a whole, then, the District's law of merger poses two different sets of problems. First, it suffers from a marked lack of clarity and consistency, as reflected in the DCCA's disparate and conflicting application of the elements test. Second, and perhaps more significant, application of the elements test—under any construction—creates the possibility of a disproportionate multiplication of criminal convictions and punishment. With those problems in mind, RCC § 22E-214 incorporates a comprehensive legislative framework for addressing merger issues that is both clearer and broader than the District's current approach, and which is oriented towards improving the consistency and proportionality of District law.[149]

The centerpiece of this framework is RCC § 22E-214(a), which incorporates a cluster of principles to guide the judicial inquiry into legislative intent as to merger where substantially related offenses are based on the same course of conduct. The first, and most narrow, of these principles is the elements test. More specifically, paragraph (a)(1) codifies the elements test by requiring merger where "[o]ne 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."[150]

Thereafter, paragraph (a)(2) addresses three particular kinds of variances, which, when constituting the sole distinctions between substantially related offenses, require merger. The first is where the offenses differ only in that one requires a less serious injury or risk of injury than is necessary to establish commission of the other offense (e.g., assault and aggravated assault). The second is where the offenses differ only in that one requires a lesser form of culpability than the other (e.g., murder and manslaughter). And the third is 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 (e.g., murder and murder of a police officer).

Next, paragraph (a)(3) requires merger where "[o]ne offense requires a finding of fact inconsistent with the requirements for commission of the other offense as a matter of law." This limitation on multiple liability is intended to apply to convictions for two or more substantially related offenses that are "inconsistent with each other as a matter of law,"[151] that is, where the proof necessary to establish one offense necessarily precludes the existence of the proof necessary to establish another offense under any set of facts when based on the same course of conduct (e.g., intent to steal-theft and intent to use-theft).[152]

For example, it only applies to local repeat offender sentencing provisions, and thus presumably would not govern the calculation of an offender's criminal history score in another jurisdiction.

[149] To be sure, the most direct way of dealing with the proportionality problems that arise from offense overlap under current District law is to revise individual offenses in a manner that reflects their appropriate breadth, and to eliminate unnecessary offenses that merely duplicate preexisting coverage. CCRC work has endeavored to move in this direction. As a practical matter, however, drafting offenses that perfectly line up next to one another without any overlap (and avoiding gaps in coverage) is unachievable.

[150] *See Byrd v. United States*, 598 A.2d 386, 398 (D.C. 1991) (*en banc*) (While the *Blockburger* test, as codified by D.C. Code § 23-112, "uses the phrase 'proof of a fact,' the reference is to what the statutory 'offense' requires in the way of proof, not to the specific 'transaction,'" i.e., "[t]he word 'requires' can refer only to elements, not to whatever facts may be adduced at trial").

[151] *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*).

[152] This rule against multiple liability based on inconsistent guilty verdicts is to be distinguished from, and is therefore not intended to displace, the legal system's well established "tolerat[ion]" of verdicts of *guilt*

Although the District's law of merger is not a paradigm of clarity, it nevertheless appears that that each of the principles in paragraphs (a)(1)-(a)(3) is supported by District case law.[153] However, the next merger principle in RCC § 22E-214 clearly goes beyond it.

Specifically, paragraph (a)(4) requires merger where "one 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), calls for the merger of convictions for two or more substantially related offenses when the gravamen of one offense duplicates that of another. The pertinent evaluation goes beyond consideration of whether it is theoretically possible to commit one offense without

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and *innocence* that are inconsistent with one another. *Evans v. United States*, 987 A.2d 1138, 1140–41 (D.C. 2010) ("[A] logical inconsistency between a guilty verdict and a verdict of acquittal does not impugn the validity of either verdict") (quoting *Yeager v. United States*, 557 U.S. 110, 112 (2009) (discussing *Dunn v. United States*, 284 U.S. 390 (1932))); *see, e.g., United States v. Powell*, 469 U.S. 57 (1984).

[153] For District case law in support of the elements test as codified RCC § 22E-2214(a)(1), see, for example, cases cited *supra* notes 52-68 and accompanying text.

For District case law in support of the lesser harm principle as codified in RCC § 22E-2214(a)(2)(A), see, for example, *In re T.M.*, 155 A.3d 400, 408 (D.C. 2017) ("Appellant's conviction for felony assault . . . merges with her conviction for AAWA because felony assault is a lesser-included offense of AAWA."); *Medley v. United States*, 104 A.3d 115, 132 (D.C. 2014) ("[Felony assault] is a lesser-included offense of aggravated assault.") (quoting *Collins v. United States*, 73 A.3d 974, 985 (D.C. 2013)).

For District case law in support of the lesser culpability principle as codified in RCC § 22E-2214(a)(2)(B), see, for example, *Washington v. United States*, 884 A.2d 1080, 1085 (D.C. 2005) (involuntary manslaughter LIO of premeditated murder); *In re T.H.B.*, 670 A.2d 895 (D.C. 1996) (simple assault merges with assault with intent to commit robbery); *Teneyck v. United States*, 112 A.3d 906, 913 (D.C. 2015) (same).

For District case law in support of the specificity principle as codified in RCC § 22E-2214(a)(2)(C), see, for example, *Waller v. United States*, 389 A.2d 801, 808 (D.C. 1978) (assault merges with assault with a dangerous weapon).

Note that the District considers these three principles to be an extension of the elements test, whereas in at least some jurisdictions they are considered to be an addition to/expansion of the elements test. *See, e.g.*, Commentary on Haw. Rev. Stat. Ann. § 701-109(c); *Fraser v. State*, 523 S.W.3d 320, 333 (Tex. App. 2017).

For District case law consistent with RCC § 22E-2214(a)(3), see, for example, *Davis v. United States*, 37 App. D.C. 126, 133 (D.C. Cir. 1911) (precluding multiple convictions for logically inconsistent offenses of obtaining money by false pretenses and embezzlement of the same money in a case where "the trial court pertinently suggested, that the 'verdict under the embezzlement counts negatives one essential fact in the crime of procuring money by false pretenses, namely, the devesting of the title originally'"); *Fulton v. United States*, 45 App. D.C. 27, 41–42 (D.C. Cir. 1916) (reaffirming the principle set forth in *Davis*, namely, that multiple convictions are inappropriate for "counts charging distinct and inconsistent offenses," and holding that guilty verdicts on two embezzlement counts alleging ownership of the same property in different persons could not stand); *United States v. Daigle*, 149 F. Supp. 409, 414 (D.D.C), *aff'd*, 248 F.2d 608 (D.C. Cir. 1957) ("[W]here a guilty verdict on one count negatives some fact essential to a finding of guilty on a second count, two guilty verdicts may not stand."); *see also Byrd*, 598 A.2d at 397 (observing that "theft and RSP [] are closely related to one another, but mutually inconsistent," and that therefore, "unlike a lesser included offense where the lesser offense is committed at the same time as the greater offense, a defendant cannot commit theft and RSP at the same time.") (Belson, J., concurring in part and dissenting in part); *compare Edmonds v. United States*, 609 A.2d 1131, 1132 (D.C. 1992) ("Even if we assume that the verdicts on these two counts were inconsistent, it has long been recognized that inconsistent verdicts are permissible.").

committing another. Instead, it asks the court to consider the relevant offenses' purposes, accounting for the harm or wrong, culpability, and penalty proscribed by each.

The final two principles incorporated into RCC § 22E-214(a) address merger of general inchoate offenses. The first principle, codified in paragraph (a)(5), requires merger where "[o]ne offense consists only of an attempt or solicitation toward commission of [t]he other offense," or, alternatively, "[a] substantive offense that is related to the other offense in the manner described in paragraphs (1)-(4)." The first portion of this provision precludes multiple convictions for an attempt or solicitation and the completed offense (e.g. attempt or solicitation to commit murder and murder). The second portion of this principle extends the same treatment to an attempt or solicitation and a completed offense that varies from the target of the attempt or solicitation in a manner that reflects the other, more general merger principles enumerated in subsection (a) (e.g., attempt or solicitation to commit murder and aggravated assault). This principle appears to at least generally reflect current District law.[154]

The second principle, codified in paragraph (a)(6), requires merger where "[e]ach offense is a general inchoate offense designed to culminate in the commission of [t]he same offense"; or, alternatively, "[d]ifferent offenses that are related to one another in the manner described in paragraphs (1)-(4)." The first portion of this provision precludes multiple convictions for attempt, solicitation, and conspiracy to commit the same offense. The second portion of this principle extends the same treatment to multiple convictions for attempt, solicitation, and conspiracy to commit distinct target offenses, provided that the variance between those target offenses reflects the other, more general merger principles enumerated in subsection (a). This principle appears to be contrary to current

[154] For District case law in support of RCC § 22E-2214(a)(5)(A) as it pertains to criminal attempts, see, for example, *In re T.M.*, 155 A.3d 400, 408 (D.C. 2017) (holding that convictions for attempt and completed offense merge); *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990) ("Every completed criminal offense necessarily includes an attempt to commit that offense.").

Note that these cases support merger notwithstanding the fact that the offenses of attempt and the completed offense do not always satisfy the elements test. Consider that for a criminal attempt, the government must prove that the accused acted with the intent to cause any result required by the target offense, regardless of whether a lower culpable mental state, such as recklessness or negligence, will suffice to establish the target offense. *See Jones v. United States*, 124 A.3d 127, 132–34 (D.C. 2015); *see also Williams v. United States*, 130 A.3d 343, 347 (D.C. 2016) (discussing *Jones*). Practically speaking, this means that, where the target of an attempt is a crime of recklessness or negligence, it is not necessarily true that one who commits the target offense necessarily also commits an attempt. *Compare* D.C. SUPER. CT. R. CRIM. P. 31(c) ("A defendant may be found guilty of any of the following: (1) an offense necessarily included in the offense charged; (2) an attempt to commit the offense charged; or (3) an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right.").

No District case law on general solicitation liability exists. *See* Commentary on D.C. Crim. Jur. Instr. § 4.500 (observing, with respect to the District's general solicitation offense, that there does not appear to be a single reported decision "involving this statute"). However, it seems at least plausible that the DCCA would apply a similar approach to dealing with merger of solicitation and the completed offense.

For District case law allowing multiple convictions for conspiracy and the completed offense, see, for example, *McCullough v. United States*, 827 A.2d 48, 59 (D.C. 2003) (citing *Robinson v. United States*, 608 A.2d 115, 116 (D.C. 1992)).

For District case law in support of RCC § 22E-2214(a)(5)(B) as it pertains to criminal attempts, see, for example, *Frye v. United States*, 926 A.2d 1085, 1099 (D.C. 2005) (finding that attempted aggravated assault while armed merges with assault with a dangerous weapon).

District law at least insofar as merger of attempt and conspiracy is concerned.[155]

Subsection (b) establishes when the principles in subsection (a) are inapplicable, namely, "whenever the legislature clearly manifests an intent to authorize multiple convictions for different offenses." This explicitly codifies what is otherwise well established in the District: that legislative intent is the touchstone of judicial merger analysis.[156]

Subsection (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 provision reflects the approach inherent in some areas of District law.[157]

Subsection (d) establishes a rule of priority for guiding 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 the "offense with the highest statutory maximum among the offenses in question."[158] However, "[i]f the offenses have the same statutory maximum," then "any offense that the court deems appropriate" may remain.[159] This rule of priority is consistent with current District law.[160]

When viewed collectively, subsections (a)-(d) comprise a clear and comprehensive body of substantive merger policies that would broaden the District's current approach to merger in furtherance of the overall proportionality of District law. It's important to note, however, that this expansion would not change the essential nature of the merger inquiry currently facing District courts. This is because, although some of the merger principles enumerated in these provisions go beyond the scope of the elements test as enumerated by the DCCA (and codified in RCC § 22E-214(a)(1)), these principles all share one core similarity: they present questions of law regarding the manner in which the statutory elements of criminal offenses relate to one another. Therefore, the determination of whether those principles preclude multiple liability for two or more substantially related offenses can—as is currently the case in the District[161]—be conducted without regard to the underlying facts of a case.[162]

RCC § 22E-214(e): Relation to Current State of Judicial Administration of Merger Policy. RCC § 22E-214(e) would neither require nor preclude changes to current District law pertaining to judicial administration of merger policy.

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[155] *See supra* notes 30-21 and accompanying text (discussing merger of conspiracy and attempt under District law).

[156] *See* cases cited *supra* notes 52-54 and accompanying text.

[157] *See* cases cited *supra* notes 99-106 and accompanying text.

[158] RCC § 22E-2214(d)(1).

[159] RCC § 22E-2214(d)(2).

[160] *See* cases cited *supra* note 79 and accompanying text.

[161] Note that where the merger analysis involves one or more offenses comprised of alternative elements of a nature described in RCC § 22E-2214(c), then a limited factual inquiry will be necessary to determine the particular basis of a conviction (i.e., was the defendant convicted of felony murder-*rape* or felony murder-*burglary*). However, this also appears to reflect current District practice in at least some areas of law. *See* cases cited *supra* notes 99-106 and accompanying text.

[162] Therefore, the merger analysis under RCC § 22E-2214 is not a return to the fact-based approach disclaimed in *Byrd*, but rather, an expansion of the current law-based approach.

In the District, the law of merger is generally deemed to be the province of the appellate courts, with little role for trial judges to play in safeguarding "the double jeopardy bar on multiple punishments for the same offense."[163] This is reflected in the fact that D.C. Superior Court judges appear to systematically ignore all merger issues at sentencing, thereby leaving them for appellate resolution by the DCCA in the first instance. More specifically, the standard procedure followed by the District's trial judges seems to be as follows: (1) sentence the defendant on all counts of conviction without regard to whether any of those counts are likely to merge; and (2) determine whether those counts should run consecutively or concurrently.[164]

This sentencing regime appears to have its roots in the DCCA's decision in *Garris v. United States*, where the court explained that:

> Initially permitting convictions on both counts serves the useful purpose of allowing this court to determine whether there is error concerning one of the counts that does not affect the other . . . If so, then no merger problem even arises as only one conviction stands. If not, a

[163] *Mooney v. United States*, 938 A.2d 710, 724 (D.C. 2007).

[164] Here's one example from *Hanna v. United States*:

> After a hearing on January 28, 1992, appellants were sentenced to prison on February 3, 1992 for the first incident as follows: (1) three counts of armed kidnapping (D, E, I), eight to twenty-four years for each count; (2) two counts of first degree burglary while armed (F, G), four to twelve years for each count; (3) two counts of assault with a dangerous weapon (H, J), three to nine years for each count; (4) one count of armed robbery (K), three to nine years; and (5) one count of possession of a firearm during a crime of violence (L), a mandatory minimum sentence of five to fifteen years. Sentences on the two burglary counts (F, G) were concurrent with each other but consecutive to all the other counts. Sentences for the seven crimes of violence counts D, E, H, I, J, K, L were concurrent with each other. The overall sentence for the first incident was 12 to 36 years.
>
> Appellants received prison sentences for the second incident as follows: (1) two counts of first degree burglary while armed (M, N), four to twelve years for each count; (2) five counts of assault with a dangerous weapon (O, P, Q, R, S), three to nine years for each count; (3) one count of armed robbery (T), three to nine years; (4) one count of possession of a firearm during a crime of violence (U), a mandatory minimum sentence of five to fifteen years; (5) one count of carrying a pistol without a license (V), one year; and (6) one count of possession of a prohibited weapon (W), one year. Sentences on the two burglary counts (M, N) were concurrent with each other but consecutive to all other counts; sentences for the seven crimes of violence counts O, P, Q, R, S, T, U were concurrent with each other; and the sentences for carrying a pistol without a license and for possession of a prohibited weapon were concurrent with all other counts. The overall sentence for the second incident was nine to 27 years.
>
> Appellants' sentences for the two incidents, therefore, totaled 21 to 63 years of imprisonment. In sentencing appellants on all counts, the trial court acted consistently with this court's suggestion that sentence should initially be imposed on all counts to allow this court to review merger issues and to remand to the trial court for resentencing as necessary.

Hanna v. United States, 666 A.2d 845, 859 (D.C. 1995).

> remand to the trial court with instructions to vacate one conviction cures the double jeopardy problem without risk to society that an error free count was dismissed . . . .
>
> The policy sought to be vindicated [by sentencing merger] is better served, in cases of appeal on issues other than validity of the sentence alone, by waiting for completion of the appeal process before vacating judgment on one of multiple counts. No legitimate interest of the defendant is served by requiring a trial court to guess which of multiple convictions will survive on appeal. Indeed, if the count chosen is reversed on grounds independent of the validity of the one vacated, a substitution would have to be made [] and a new appeal thereunder must be permitted if error independent of the reversed conviction is to be raised.[165]

In subsequent years, the DCCA has "reiterate[d] the suggestion . . . made in *Garris*," namely, that:

> [W]hen a jury has returned guilty verdicts on two counts which merge, the trial court need not guess which [] conviction will survive on appeal and enter an acquittal on the other count. [Rather, the trial court should simply leave the issues to be resolved by the DCCA]. This policy will avoid situations [] in which it becomes necessary to remand for substitution of convictions, from which the defendant may take a second appeal.[166]

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[165] *Garris v. United States*, 491 A.2d 511, 514–15 (D.C. 1985). Nearly two decades earlier, the D.C. Circuit observed in *Fuller v. United States* that:

> There are sound reasons for permitting the jury to render verdicts as to separate offenses even where consecutive sentences are not permitted. For example, in the murder situation, a prosecutor should be permitted to proceed on both first degree murder theories. Perhaps the jury will believe one and not the other, and perhaps the jury will believe both. We see no reason for a rule of law that would require the prosecutor to elect between the offenses before the case is sent to the jury. Nor do we see why the jury must elect. Permitting a guilty verdict on each count—if warranted by the facts—may serve the useful purpose of avoiding retrials by permitting an appellate court, or a trial court on further reflection, to uphold a conviction where there is error concerning one of the counts that does not infect the other. Moreover, that course precludes a range of double jeopardy contentions.
>
> There is no general reason why the jury should not be permitted to render a verdict on each theory, so long as the offenses are not in conflict and no aspect of the case gives reasonable indication that the jury might be confused or led astray.

407 F.2d 1199, 1224–25 (D.C. Cir. 1967).

[166] *Warrick v. United States*, 528 A.2d 438, 443 n.6 (D.C. 1987) (internal quotations and alterations omitted).

When, pursuant to this regime, the DCCA is presented with merger issues on appeal, they are subject to a *de novo* standard of review[167] in which context the court "is limited to assuring that the sentencing court d[id] not exceed its legislative mandate by imposing multiple punishments for the same offense."[168] If, in the course of conducting this review, the DCCA concludes that two or more convictions should merge—or, alternatively, where the government concedes that two or more convictions should merge[169]—then the appellate court will remand the convictions "to the trial court for the limited purpose of merger and resentencing."[170] Importantly, however, "when resentencing to respect the double jeopardy bar on multiple punishments for the same offense where the defendant has been convicted of a greater and lesser-included offense, the trial court has but one course, to vacate the lesser-included offense."[171] And, when a

[167] *Roy v. United States*, 871 A.2d 498, 510 (D.C. 2005) ("We review issues of merger *de novo*, to determine whether there has been a violation of the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States.") (quoting *Nixon v. United States*, 730 A.2d 145, 151–52 (D.C. 1999)); *Robinson v. United States*, 50 A.3d 508, 532 (D.C. 2012).

[168] *James v. United States*, 718 A.2d 1083, 1086–87 (D.C. 1998).

[169] *Collins v. United States*, 73 A.3d 974, 985 (D.C. 2013) ("The government concedes that appellant's conviction for ASBI of Brown merges with his conviction for aggravated assault of Brown because ASBI is a lesser-included offense.").

[170] *Newman v. United States*, 705 A.2d 246, 265 (D.C. 1997) (citing *Whalen v. United States*, 445 U.S. 684 (1980)). Insofar as correction of illegal sentences is concerned, the District's rules of criminal procedure provide:

> Rule 35. Correction or reduction of sentence or collateral; setting aside forfeiture.
>
> (a) *Correction of sentence.* The Court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.
>
> (b) *Reduction of sentence.* A motion to reduce a sentence may be made not later than 120 days after the sentence is imposed or probation is revoked, or not later than 120 days after receipt by the Court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or not later than 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. The Court shall determine the motion within a reasonable time. After notice to the parties and an opportunity to be heard, the Court may reduce a sentence without motion, not later than 120 days after the sentence is imposed or probation is revoked, or not later than 120 days after receipt by the Court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or not later than 120 days after entry of any order or judgment of the Supreme Court, denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this paragraph.

Super. Ct. Crim R. 35(a) & (b).

[171] *Mooney v. United States*, 938 A.2d 710, 724 (D.C. 2007); *see Franklin v. United States*, 392 A.2d 516, 519 n.3 (D.C. 1978) ("[W]here an appellant has been convicted of both the crime and a lesser included offense, the appropriate appellate remedy is vacation of the lesser included offense.") (citing *Franey v. United States*, 382 A.2d 1019, 1021 (D.C. 1978)).

defendant's sentences for the merged counts "are concurrent and congruent," it is well-established that "[r]esentencing is not required."[172]

The current state of judicial administration regarding merger issues in the District is notable. The approach to merger proscribed by the DCCA in *Garris* and its progeny is one that, in effect, seems to require and/or encourage trial judges to disregard clear or potential constitutional violations at initial sentencing, in favor of initial appellate resolution.

The unintuitive-ness of such an approach is well captured by the DCCA's decision *Mooney v. United States*.[173] On the one hand, the *Mooney* court recognized that the merger-based remands to trial courts produced by this regime involve a mandate to "correct the *illegality* of a sentence that violates double jeopardy's bar on the imposition of multiple punishments for the same offense."[174] But, on the other hand, the *Mooney* court also recognized that the "illegality" of a sentence in this context "does not imply trial court error as [DCCA case law has] established that the trial court should enter convictions on all guilty verdicts returned by the jury, subject to review by this court on appeal on 'issues other than the validity of the sentence alone.'"[175]

As a matter of policy, the current judicial approach favoring initial review of merger issues at the appellate level has mixed support. There surely are, as the *Garris* decision highlights, important judicial efficiency benefits under the current system, which helps to avoid cases from being sent back and forth between Superior Court and the Court of Appeals for re-adjudication of sentencing issues. At the same time, the *Garris* decision seems to either overlook or misconstrue at least some of the relevant considerations. The court says little, for example, about the risk of "leav[ing] both sentences standing if for any reason there were no appeal" that exists under the District's

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[172] *Collins*, 73 A.3d at 985; *see, e.g., United States v. Battle*, 613 F.3d 258, 266 (D.C. Cir. 2010) ("Because the court sentenced [appellant] to the same, concurrent terms of imprisonment for [both] convictions, resentencing is unnecessary."); *Medley v. United States*, 104 A.3d 115, 133 (D.C. 2014).

One key procedural question on remand is whether the defendant has a right to allocute. For example, "a defendant is constitutionally 'guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his [or her] presence would contribute to the fairness of the procedure.'" *Kimes v. United States*, 569 A.2d 104, 108 (D.C. 1989) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987)). This includes the right to be present upon the imposition of sentence—"a fundamental [right] which implicates the due process clause." *Warrick*, 551 A.2d at 1334 (citing *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (per curiam)). Additionally, Superior Court Rule of Criminal Procedure 32(c)(1) provides that at the time of sentencing, the defendant shall have the right to allocute, that is, to present any information in mitigation of punishment, and to make a statement on his or her "own behalf." Super. Ct. Crim R. 32(c)(1). However, Superior Court Rule of Criminal Procedure 43 provides that a defendant is not required to be present "[w]hen the proceeding involves a reduction or correction of sentence under Rule 35." Super. Ct. Crim R. 43(c)(4). Rule 35, in turn, states that the Superior Court "may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein . . . . " Super. Ct. Crim. R. 35(a). Typically, therefore, the defendant's presence is only required after an appeal that remands for sentencing based upon a count that was not originally sentenced. *Mooney*, 938 A.2d at 724.

[173] *Mooney*, 938 A.2d at 722–23.

[174] *Id.*

[175] *Id*.

present system of dealing with merger issues, which is a concern that has lead at least one state judiciary to explicitly reject adoption of a similar regime.[176]

In addition, the *Garris* decision seems to highlight—as a supposed benefit of the District's present system of dealing with merger issues—the need to safeguard against a "risk to society that an error free count was dismissed."[177] Yet it is not at all clear that this risk actually exists. The situation envisioned by the *Garris* court seems to be as follows: (1) the sentencing judge enters a judgment on one conviction and merges the rest; (2) the defendant files an appeal arguing that an (evidentiary) error should lead to that conviction being overturned; (3) the appellate court agrees, but finds that the error does not effect any of the merged offenses. Under these circumstances, it does not appear—contra *Garris*—that an appellate court would have any difficulty ordering the re-imposition of one of the previously merged offenses by the trial court.

The DCCA's subsequent decision in *Warrick v. United States* is illustrative.[178] In that case, the trial court merged two convictions for burglary, which were respectively based on an underlying assault and theft committed in the same course of conduct, and sentenced the defendant on the former.[179] On the first appeal, the DCCA overturned the burglary (assault) conviction, and ordered the previously vacated burglary (theft) conviction to be reinstated.[180] Thereafter, the trial court reinstated the burglary (theft) conviction and sentenced the defendant on that conviction.[181] The defendant appealed again arguing that the reinstatement of the burglary (theft) conviction violated the Double Jeopardy Clause.[182] The DCCA rejected this argument, noting that the trial court's "dismissal of the intent to steal count under the merger doctrine was not on the merits."[183]

One other relevant point is the fact that the government may, under District law, "appeal an order which terminates the prosecution in favor of the defendant" so long as it "is not an acquittal on the merits."[184] So, for example, in *D.C. v. Whitley*, the DCCA asserted jurisdiction over a government appeal of a judge's *sua sponte* dismissal of a conviction for want of prosecution, reasoning that "reversal of the dismissal order

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[176] *State v. Cloutier*, 286 Or. 579, 601 (1979). For at least one case where counsel for the defendant overlooked a meritorious merger argument, see *Medley v. United States*, 104 A.3d 115, 132 (D.C. 2014) ("Richardson does not argue that his convictions for ADW and ASBI merge with his conviction for AAWA, but we conclude for the foregoing reasons that they do merge."); *Carter v. United States*, 957 A.2d 9, 22 (D.C. 2008) (raising merger issue *sua sponte* as to co-appellant).

[177] *Garris v. United States*, 491 A.2d 511, 514–15 (D.C. 1985).

[178] 551 A.2d 1332, 1336 (D.C. 1988). *See, e.g.*, *Byrd*, 500 A.2d at 1389 ("If the unvacated murder conviction is subjected later to a successful collateral attack, the trial court should consider favorably a government motion to reinstate the vacated murder conviction"); *Garris*, 491 A.2d at 515 ("[I]f the count chosen is reversed on grounds independent of the validity of the one vacated, a substitution would have to be made.").

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *United States v. Shorter*, 343 A.2d 569, 571 (D.C. 1975); *see* D.C. Code § 23-104 ("The United States or the District of Columbia may appeal an order dismissing an indictment or information or otherwise terminating a prosecution in favor of a defendant or defendants as to one or more counts thereof, except where there is an acquittal on the merits.").

w[ould] require simple reinstatement of the guilty plea and no further proceedings to determine guilt or innocence."[185]

More generally, U.S. Supreme Court precedent appears to clearly dispense with any constitutional concerns that might arise from a regime in which trial judges conducted merger analyses at initial sentencing. Consider the following passage from *United States v. Wilson*:

> [W]here there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended. In various situations where appellate review would not subject the defendant to a second trial, this Court has held that **an order favoring the defendant could constitutionally be appealed by the Government.** Since the 1907 Criminal Appeals Act, for example, the Government has been permitted without serious constitutional challenge to appeal from orders arresting judgment after a verdict has been entered against the defendant. *See, e.g., United States v. Bramblett*, 348 U.S. 503, 75 S.Ct. 504, 99 L.Ed. 594 (1955); *United States v. Green*, 350 U.S. 415, 76 S.Ct. 522, 100 L.Ed. 494 (1956); *Pratt v. United States*, 70 App.D.C. 7, 11, 102 F.2d 275, 279 (1939). **Since reversal on appeal would merely reinstate the jury's verdict, review of such an order does not offend the policy against multiple prosecution.**
>
> **Similarly, it is well settled that an appellate court's order reversing a conviction is subject to further review even when the appellate court has ordered the indictment dismissed and the defendant discharged.** *Forman v. United States*, 361 U.S. 416, 426, 80 S.Ct. 481, 487, 4 L.Ed.2d 412, 419 (1960). If reversal by a court of appeals operated to deprive the Government of its right to seek further review, disposition in the court of appeals would be 'tantamount to a verdict of acquittal at the hands of the jury, not subject to review by motion for rehearing, appeal, or certiorari in this Court.' *Ibid*. *See also United States v. Shotwell Mfg. Co.*, 355 U.S. 233, 243, 78 S.Ct. 245, 251, 2 L.Ed.2d 234, 240 (1957).
>
> **It is difficult to see why the rule should be any different simply because the defendant has gotten a favorable postverdict ruling of law from the District Judge rather than from the Court of Appeals, or because the District Judge has relied to some degree on evidence presented at trial in making his ruling.** Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an error of law when

[185] 934 A.2d 387, 389 (D.C. 2007) (citing *United States v. Wilson*, 420 U.S. 332, 353 (1975); *United States v. Wall*, 521 A.2d 1140, 1142 n.2 (D.C. 1987)).

> that error could be corrected without subjecting him to a second trial before a second trier of fact.[186]

The foregoing passage from the *Wilson* decision seems to clarify, first, that the improper post-verdict dismissal of a conviction by a trial judge may be appealed by the government without offending the Double Jeopardy Clause so long as there is express statutory authorization to do so; second, that this dismissed conviction may be reinstated by the second tier of appellate review without offending the Double Jeopardy Clause; and third, that if such a conviction is improperly dismissed by the second tier of appellate review, the third tier of appellate review may reinstate it without offending the Double Jeopardy Clause.

Based on the above analysis, it appears that the largest hurdle confronting trial court resolution of merger issues in the District is not constitutional, but rather, pragmatic. Beyond the efficiency issues raised by the *Garris* decision, shifting the initial burden to conduct merger analyses to Superior Court judges might compel more sweeping procedural changes to current District practice. For example, in order to reliably implement such a system, it would probably be necessary to impose a formal requirement that judges provide on-the-record explanations of their sentencing decisions.[187] Further, one probable byproduct of a system of trial level merger analyses would be a greater imperative for government appeals (e.g., where the sentencing court inappropriately merges one or more offenses), which is a topic that has garnered considerable attention in the District.[188]

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[186] *United States v. Wilson*, 420 U.S. 332, 344–45 (1975).

[187] Under current District law "the [sentencing] judge [is not] required to provide an explanation for the sentence imposed." *Coles v. United States*, 682 A.2d 167, 173 (D.C. 1996). Which is not to say that Superior Court judges need not provide any information relevant to sentencing; District law recognizes that a "defendant has the right to be informed of [the] information" a trial court considers "in evaluating the appropriate sentence for a defendant." *Foster v. United States*, 615 A.2d 213, 220–21 (D.C. 1992). "This right," in turn, "is intertwined with a defendant's right to allocute and speak to the issue of appropriate punishment, a right which is acknowledged by statute and court rule, but ultimately is a fundamental one which implicates the due process clause." *Bradley v. D.C.*, 107 A.3d 586, 599–600 (D.C. 2015). Nevertheless, while the trial court must specify the facts upon which it is relying for a given sentence, it does not appear that the sentencing judge needs to provide any explanation of *why* a given sentence is being imposed based on those facts. *See also* D.C. Super. Ct. R. Crim. P. 32 ("*Pronouncement.* Sentence shall thereafter be pronounced . . . . *Judgment.* A judgment of conviction shall set forth the plea, verdict or finding, and the adjudication and sentence . . . .").

[188] *See, e.g.*, *D.C. v. Fitzgerald*, 953 A.2d 288, 291 (D.C. 2008), *opinion amended on denial of reh'g*, 964 A.2d 1281 (D.C. 2009); *D.C. v. Whitley*, 934 A.2d 387, 388 (D.C. 2007). *See also* D.C. Code § 11-721(a) ("The District of Columbia Court of Appeals has jurisdiction of appeals from—(1) all final orders and judgments of the Superior Court of the District of Columbia . . . . (3) orders or rulings of the Superior Court of the District of Columbia appealed by the United States or the District of Columbia pursuant to section 23-104 or 23-111(d)(2)."); D.C. Code § 23-111(2) ("If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the prosecutor, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by law. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered."); D.C. Code § 23-104(c) ("The United States or the District of Columbia may appeal an order dismissing an indictment or information or otherwise terminating a prosecution in favor of a defendant . . . as to one or more counts thereof, except where there is an acquittal on the merits.").

In the final analysis, then, both the District's current appellate-centric approach to adjudicating merger issues and a more conventional trial-level regime present their own set of costs and benefits. With that in mind, and given the distinctively procedural nature of the underlying issues, RCC § 22E-214 has been drafted in a manner that is susceptible to being implemented in accordance with either approach, thereby leaving the discretion to choose between these two systems in the same place that it currently exists: the province of the courts.[189]

The key provision, subsection (e), provides that "[a] person may be found guilty of two or more offenses that merge under [RCC § 22E-214]; 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 decided." This language is comprised of two different procedural principles. The first is that RCC § 22E-214 should not be construed as in any way constraining the number of offenses over which the fact finder may deliberate. Rather, the trier of fact may find the defendant guilty of two or more offenses for which sentencing merger is required under RCC § 22E-214.[190] The second, and perhaps more important, procedural principle is that the merger analysis set forth in RCC § 22E-214 only places limitations on the entry of a final judgment of liability—i.e., a conviction that exists after the expiration of appellate rights or affirmance on appeal—for merging offenses.

The latter clarification is intended to provide Superior Court judges with sufficient leeway to continue their current practice of entering judgment on all counts for which the defendant has been convicted, thereby leaving merger issues to the DCCA for resolution on direct review, should they so choose. At the same time, this provision would not preclude Superior Court judges from changing their current practice, and instead conducting merger analyses at initial sentencing, either. Rather, it is sufficiently flexible to accommodate a change in merger practice should District judges deem one to be appropriate.

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[189] One other alternative worth considering is that proposed by the Oregon Supreme Court in *State v. Cloutier*:

> 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. Such an order would make it clear on the record that the conviction on the secondary charge retains no legal effect in the absence of a further order reviving it in case a successful appeal from the judgment on the gravest charge is not followed by a retrial on that charge.

286 Or. 579, 602–03 (1979).

[190] Provided, of course, that the defendant actually satisfies the requirements of liability for those offenses.

RCC § 22E-301. Criminal Attempt.

Explanatory Notes. Section 301 provides a comprehensive statement of general attempt liability under the RCC. This statement establishes the culpable mental state requirement and conduct requirement of a criminal attempt, the relationship between a criminal attempt and the target offense, and the penalties applicable to a criminal attempt. Section 301 replaces the District's current general attempt statute, D.C. Code § 22-1803.

Paragraphs (a)(1) and (2) establish two basic culpability principles governing general attempt liability. The first principle, set forth in paragraph (a)(1), is that an attempt entails proof that the defendant "plann[ed] to engage in conduct constituting [an] offense."[1] This planning requirement is the foundation of attempt liability[2]; it communicates the basic tenet that attempting to commit an offense involves, among other things, being committed to a course of conduct that, if carried out, would[3] satisfy the objective elements of that offense.[4]

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[1] *See, e.g.*, Model Penal Code § 5.01(1)(c) (liability for incomplete attempt entails proof of, *inter alia*, "a course of conduct *planned* to culminate in his commission of the crime").

[2] *See, e.g.*, Gideon Yaffe, *Criminal Attempts*, 124 YALE L.J. 92, 109 (2014) ("Plans play various roles in making possible and effective organized behavior that takes place over extended periods of time."); Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 864 (1994) (planning requirement, referred to as "future conduct intention," has "a critical independent role to play" in criminal code); Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1170 (1997) ("[T]he most coherent justification [for attempt liability] rests on the assumption that forming an intention to engage in future criminal conduct is itself a culpable act[.]").

[3] That is, assuming "the situation was as the person perceived it." RCC § 22E-301(a)(3)(A)(ii); *see infra* notes 15-19 and accompanying text (discussing impossibility).

[4] *See, e.g.*, Michael T. Cahill, *Defining Inchoate Crime: An Incomplete Attempt*, 9 OHIO ST. J. CRIM. L. 751, 755 (2012) (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"); Gideon Yaffe, *Attempt, Risk-Creation, and Change of Mind: Reflections on Herzog*, 9 OHIO ST. J. CRIM. L. 779, 781 (2012) ("To attempt murder is to have an intention that commits one to causing another's death and to be guided by that intention in one's conduct.").

This planning requirement is largely implicit in the other elements of a criminal attempt. For example, to hold that a defendant arrested by the police two blocks away from a bank in possession of a mask and firearm was "dangerously close to completing" a bank robbery, see RCC § 22E-301(a)(3)(A), necessarily entails a determination that the defendant was planning to engage in conduct that, but for the police intervention, would have culminated in a bank robbery. Conversely, if the only reason the defendant's criminal scheme failed is because the bank manager, upon threat of death, was unable or unwilling to hand over physical currency, then the requisite plans would be established by the fact that the defendant's scheme was actually carried out.

This planning requirement is to be distinguished from the voluntariness requirement under section 203. *See* RCC § 22E-203(a) ("No person may be convicted of an offense unless the person voluntarily commits the conduct element necessary to establish liability for the offense."). The voluntariness requirement, which implicates what is sometimes referred to as a "*present* conduct intention," can be "satisfied simply by showing that the actor did in fact intend to perform the bodily movements that he performed." Robinson, *supra* note 2, at 864. In contrast, the planning requirement, which implicates what is sometimes referred to as a "*future* conduct intention," "serves to show that the actor is planning to do more than what he has already done." *Id.*

This planning requirement should also be distinguished from the culpability requirement derived from the target offense. *See* RCC § 22E-301(a)(2) (defendant must act "[w]ith the culpability required by [the target] offense"). For example, an actor may be committed to carrying out a course of conduct that, if completed, would cause a prohibited result without being culpable at all—as would be the case where the

The second principle, set forth in paragraph (a)(2), is that a criminal attempt necessarily incorporates "the culpability required by [the target] offense."[5] Pursuant to this principle, a defendant may not be convicted of a criminal attempt absent proof that he or she acted with, at minimum, the culpable mental state(s)[6]—in addition to any broader aspect of culpability[7]—required to establish that offense.[8]

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police stop a demolition operator just in the nick of time from destroying an apparently abandoned building that, unbeknownst to the operator, is occupied by a person who would have died in the resulting destruction. Conversely, that same demolition operator may know that a person resides in the building, and, therefore, act with the intent to kill, in which case the defendant would likely have committed attempted murder. *See infra* notes 5-8 and accompanying text (discussing culpability required by target offense).

[5] *See, e.g.*, Model Penal Code § 5.01(1) (government must prove that the defendant "acted with the kind of culpability otherwise required for commission of the crime").

[6] It is possible, and may sometimes be necessary, to distinguish between an attemptor's state of mind as to: the planning requirement; the result elements of the target offense; and the circumstance elements of the target offense.

To illustrate, consider the situation of an individual who is arrested by police just as he's about to set off an explosive device near an unmarked metropolitan police department building in the middle of a work day. This individual is subsequently prosecuted for attempting to murder a police officer under a statute that prohibits: "(1) knowingly killing another person, (2) reckless as to whether the person is a police officer." On these facts, the defendant satisfies the planning requirement, namely, he planned to engage in conduct that, if carried out, would have resulted in the death of a police officer. Likewise, the defendant also seems to satisfy the culpable mental state governing the result element incorporated into prong (1), namely, he either desired to kill or was practically certain that his conduct would result in the death of a person (i.e., the unmarked building's occupants). Less clear (and also a separate question), however, is whether the defendant satisfies the culpable mental state governing the circumstance element incorporated into prong (2), namely, that he was aware of a substantial risk that he would kill a police officer (i.e., that one of the unmarked building's occupants was a police officer). Absent proof of such recklessness, which is required by the target offense, the defendant could not be convicted of attempting to murder a police officer. *See infra* note 8 (further discussing treatment of culpability as to circumstance elements).

[7] The term "culpability" includes, but also goes beyond, the culpable mental state requirement governing an offense. *See* RCC § 22E-201(d) (culpability requirement defined). For example, if the target offense requires proof of premeditation, deliberation, or the absence of any mitigating circumstances, the government is still required to prove these broader aspects of culpability to secure a conviction. *See* RCC § 22E-201(d)(3) ("'Culpability requirement' includes . . . Any other aspect of culpability specifically required by an offense."); *id.*, at Explanatory Notes (noting that "premeditation, deliberation, and absence of mitigating circumstances" would so qualify). And, of course, attempt liability is subject to the same voluntariness requirement governing all offenses under RCC § 22E-203(a). *See* RCC § 22E-201(d)(1) (voluntariness requirement also part of culpability requirement).

[8] Note that whereas the culpable mental state(s) governing the result element(s) of the target offense are subject to an additional principle of culpable mental state elevation under subsection (b), the culpable mental state(s) governing the circumstances element(s) of the target offense are not. *See infra* notes 23-25 and accompanying text (discussing RCC § 22E-301(b)). This means that, with respect to circumstance elements, it is both "[necessary and] sufficient that the actor possessed the degree of culpability required to commit the target offense." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.09(C) (6th ed. 2012).

So, for example, "if D would be guilty of statutory rape on proof that he was reckless as to the girl's age (the attendant circumstance), then he may be convicted of attempted statutory rape if he was reckless, but not if he was negligent or innocent, as to the girl's age." DRESSLER, *supra* note 8, at § 27.09(c). And, along similar lines, "[i]f the material element of the girl's age is one of strict liability, i.e., D may be convicted of statutory rape although he reasonably believed that she was old enough to consent, then he may also be convicted of attempted statutory rape although he lacked a culpable mental state as to this attendant circumstance." *Id.*; *see, e.g.*, Commentary on Haw. Rev. Stat. Ann. § 705-500 ("[I]t would

Paragraph (a)(3) establishes that attempt liability under the RCC rests upon dangerous proximity to completion of the target offense. This addresses a complex issue of longstanding disagreement in the criminal law[9]: at what point has an actor, intending to commit an offense, made sufficient progress towards the completion of his or her criminal objective to be subject to attempt liability?[10] Under RCC § 22E-301(a)(3)(A)(i), the requisite line between preparation and perpetration is crossed when an actor engages in conduct that is "dangerously close to completing that offense."[11] This threshold does

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be anomalous to hold that . . . the defendant's lack of intent with respect to an attendant circumstance precludes penal liability for the attempt," whereas "had the defendant succeeded, and the substantive crime been consummated, the defendant would be guilty of the substantive crime[.]"); DRESSLER, *supra* note 8, at § 27.05(d) ("There is relatively little case law on point, but virtually all commentators agree that the ordinary specific-intent requirement of attempt law should not apply to attendant circumstances[.]").

[9] *See, e.g.*, O.W. HOLMES, JR., THE COMMON LAW 68 (1881) ("Eminent 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 . . . ."); *Mims v. United States*, 375 F.2d 135, 148 (5th Cir. 1967) ("Much ink has been spilt in an attempt to arrive at a satisfactory standard for telling where preparations ends and attempt begins").

[10] At the heart of the issue is the fact that the intentional perpetration of a crime "is the result of a six-stage process," which has been described accordingly:

> First, the actor conceives the idea of committing a crime. Second, she evaluates the idea, in order to determine whether she should proceed. Third, she fully forms the intention, i.e., resolves, to go forward and commit the crime. Fourth, she prepares to commit the crime, for example, by obtaining any instruments necessary for its commission. Fifth, she commences commission of the offense. Sixth, she completes her actions[.]

DRESSLER, *supra* note 8, at § 27.01; *see* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 3.3.2 (2000).

It is well established that attempt liability is not supportable during the first three stages of the process. DRESSLER, *supra* note 8, at § 27.01 ("Until the third step occurs, the actor lacks a mens rea," and "[e]ven after the mens rea is formed, she is not punished . . . for thoughts alone."). Conversely, it is equally well established that once a person reaches the sixth stage, and has carried out all that he or she plans to do in order to consummate an offense, attempt liability is appropriate. *See, e.g., United States v. Coplon*, 185 F.2d 629, 633 (2d Cir. 1950) (all who engage in last proximate act may be subject to attempt liability); Model Penal Code § 5.01 cmt. at 321 n.97 ("No jurisdiction operating within the framework of Anglo-American law requires that the last proximate act occur before an attempt can be charged."). The controversy over the conduct requirement governing criminal attempts thus focuses on "[a]ctivity in the middle ranges, i.e., after the formation of the *mens rea* but short of attainment of the criminal goal." DRESSLER, *supra* note 8, at § 27.01; *see, e.g.*, FLETCHER, *supra* note 10, at § 3.3.2 (having "br[oken] from the moorings of the 'last step,' it proves harder than expected to find a secure anchor in the ebb and flow of events leading from preparation to consummation").

[11] The dangerous proximity standard is rooted in the writings of former U.S. Supreme Court Justice Oliver Wendell Holmes, and has subsequently been adopted by many jurisdictions, including the District of Columbia. *See, e.g., Jones v. United States*, 386 A.2d 308, 312 (D.C. 1978) ("The act [necessary for attempt liability] must carry the criminal venture forward to within dangerous proximity of the criminal end sought to be attained. This 'dangerous proximity' test, formulated by Justice Holmes, does not require that appellants have commenced the last act sufficient to produce the crime but focuses instead on the proximity of appellants' behavior to the crime intended.") (quoting CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 4.04 (2d ed. 1972)); *Com. v. Bell*, 455 Mass. 408, 425 (2009) (discussing genesis of dangerous proximity standard); FLETCHER, *supra* note 10, at § 3.3.2-.4 (discussing relevant policy and philosophical considerations).

Explicitly, the dangerous proximity standard addresses *incomplete attempts*, which involve situations where an attempt fails because external events frustrate a person from carrying out all that he or she planned to do. *See* Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. COLO. L. REV. 879, 901 n.59 (2007) ("An incomplete attempt would be one where the shot has not yet

not entail proof that the actor carried out every part of his or her criminal scheme.[12] However, it does require that the actor have taken more than a mere "substantial step" towards completion of the target offense.[13] In evaluating whether the dangerous

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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."). Implicitly, however, this standard also covers *complete attempts*, which involve situations where the person has, in some sense, done everything he or she plans to do, yet the target offense is not consummated by virtue of an accident on behalf of the person. *Id.* ("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.").

[12] So, for example, an armed bank robber arrested blocks away from his intended target has committed an attempt to commit armed bank robbery under this standard. *See Jones*, 386 A.2d at 312 (upholding attempt liability on such facts). Along similar lines, the dangerous proximity standard could also be established in the following illustrative contexts: (1) the attempted murder prosecution of a person whose pistol accidentally slips from that person's hand and breaks as he or she, with the intent to kill, is walking towards the front door of the victim's residence; (2) the attempted felony assault prosecution of a person who suffers a debilitating heart attack minutes before he or she plans to walk across the street and repeatedly beat, with the intent to cause significant bodily injury, a neighbor mowing her front lawn; and (3) the attempted arson prosecution of a person who is arrested at the site of a building she intends to burn down upon exiting her vehicle with flammable materials in her trunk.

[13] This means that conduct which satisfies the Model Penal Code's widely adopted substantial step standard may nevertheless fail to provide the basis for attempt liability under section 301. *See, e.g.*, Model Penal Code § 5.01(1) (attempt liability where, *inter alia*, defendant engages in an "act or omission constituting a *substantial step* in a course of conduct planned to culminate in his commission of the crime") (italics added); *id.* § 5.01(2) (enumerating situations that, "if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law" under the "substantial step" standard). Indeed, the drafters of the Model Penal Code developed the substantial step standard for the express purpose of "broadening liability" beyond that provided for under common law tests such as the dangerous proximity standard. Model Penal Code § 5.01, cmt. at 294; *see id*. at 333 (enumerated situations in subsection (2) will support "convictions on the basis of circumstances that courts have considered insufficient").

At the heart of the Model Penal Code's expansion of attempt liability was a belief that "[c]onduct designed to cause or culminate in the commission of a crime obviously yields an indication that the actor is disposed towards such activity, not alone on this occasion but on others." *Id.* at 294, 331. In accordance with this line of reasoning, the drafters of the Model Penal Code argued that attempters present "a special danger," who must "be made amenable to the corrective process that the law provides," without regard to proximity to completion. *Id*. at 294, 331.

These policy arguments are "a reflection of the so-called rehabilitative ideal," which has been described as a "future-oriented predictively based theory of guilt and of punishment" under which "personal dangerousness justifies the decision to prohibit attempts equally as much as it justifies sentencing and correctional decisions." Paul R. Hoeber, *The Abandonment Defense to Criminal Attempt and Other Problems of Temporal Individuation*, 74 CAL. L. REV. 377, 384 (1986). While popular during the mid-twentieth century, the "rehabilitative ideal, of which the concept of dangerousness is a cornerstone, has [more] recently undergone a rather painful process of demystification." Thomas Weigend, *Why Lady Eldon Should Be Acquitted: The Social Harm in Attempting the Impossible*, 27 DEPAUL L. REV. 231, 235 (1978). That is, "[t]he optimistic view . . . that we are able to diagnose an individual's dangerous propensities and to treat him effectively . . . has given way to widespread skepticism." *Id.*

This skepticism is clearly reflected in, for example, the recently completed Model Penal Code Sentencing Project, which retreats from the dangerousness-based rationales at the heart of many of the original Code's provisions (including the substantial step standard), based upon a recognition that:

> There are undenied elements of inefficacy and injustice in the Code's endorsement of incapacitation as a ground for incarceration, particularly when authorities misapprehend the dangerousness of individual offenders. Any sentencing policy based on predictions of future misconduct will yield a significant number of "false positives"—that is,

proximity standard is met, the focus should be placed on closeness to completion considered in light of "the gravity of the crime, the uncertainty of the result, and the seriousness of the apprehension."[14]

Paragraph (a)(3) also codifies an alternative formulation of the dangerous proximity standard, which is articulated in terms of the actor's view of the situation. This reframing addresses yet another complex criminal law issue of longstanding disagreement[15]: is impossibility—i.e., the fact that the target offense cannot be consummated under the circumstances due to a mistake on behalf of the defendant—a defense to attempt liability?[16] The RCC largely answers this question in the negative

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> individuals who have been classified as dangerous when, in fact, they would not reoffend if released or would commit only minor crimes.

Model Penal Code: Sentencing § 6.06 PFD (2017); *see, e.g.*, Model Penal Code: Sentencing § 1.02(2) TD No 1 (2007) ("[I]t is not reasonably feasible to pursue the goal of incapacitation of dangerous offenders through the confinement of individuals who pose little or no risk of serious reoffending."); Hoeber, *supra* note 13, at 386 (questioning whether the MPC drafters "can explain why personal dangerousness should nevertheless continue to be thought an appropriate basis for criminalizing attempts").

[14] *Com. v. Kennedy*, 170 Mass. 18, 22 (1897) (Holmes, J.); *see, e.g.*, HOLMES, *supra* note 11, at 68 ("[The] considerations [central to attempt liability are] the nearness of the danger, the greatness of the harm, and the degree of apprehension felt."). So, for example, in a prosecution for attempted murder by poisoning:

> Any unlawful application of poison is an evil which threatens death according to common apprehension, and the gravity of the crime, the uncertainty of the result, and the seriousness of the apprehension, coupled with the great harm likely to result from poison, even if not enough to kill, would warrant holding the liability for an attempt to begin at a point more remote from the possibility of accomplishing what is expected than might be the case with lighter crimes.

Kennedy, 170 Mass. at 22; *see, e.g.*, FLETCHER, *supra* note 10, at § 3.3.2 (discussing relevant factors).

[15] *See, e.g.*, DRESSLER, *supra* note 8, at § 27.07 ("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"); Jerome Hall, *Criminal Attempt—A Study of Foundations of Criminal Liability*, 49 YALE L.J. 789, 789 (1940) ("Whoever has speculated on criminal attempt will agree that the problem is as fascinating as it is intricate.").

[16] The defendant in this kind of situation may admit that he or she possessed the requisite intent to commit that target offense and engaged in significant conduct, but nevertheless argue that impossibility of completion should by itself preclude the imposition of attempt liability. *See, e.g.*, WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5(a) (3d ed. Westlaw 2019); DRESSLER, *supra* note 8, at § 27.07. In resolving this claim, there are four general categories of impossibility that might be considered for evaluative purposes (i.e., these are not analytically perfect distinctions).

The first category 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. Illustrative scenarios include: (1) 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); and (2) a murderer-for-hire who is unable to complete the job because, unbeknownst to him, his murder weapon malfunctions.

The second category is *pure legal impossibility*, which arises where a person acts under a mistaken belief that the law criminalizes his or her intended objective. For an illustrative scenario, consider the attempted statutory rape prosecution of a 44-year-old male who: (1) has consensual sexual intercourse with someone he knows to be 17 years of age; (2) in a jurisdiction that sets the age of consent for intercourse at 16; (3) while mistakenly believing the age of consent in that jurisdiction to be 18. *See* DRESSLER, *supra* note 8, at § 27.07 ("This is a mirror image of the usual mistake-of-law case, in which an actor believes that

through RCC § 22E-301(a)(3)(A)(ii), which authorizes the fact-finder to evaluate whether the dangerous proximity standard is met based on "the situation . . . as the person perceived it."[17] Reliance on the defendant's perspective renders the vast majority of impossibility claims immaterial by authorizing an attempt conviction under circumstances in which the person's conduct *would have been* dangerously close to committing an offense *had* the person's view of the situation been accurate.[18]

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her conduct is lawful, but it is not. [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?").

The third category 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. Illustrative scenarios include: (1) 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; and (2) the prosecution of a defendant who purchases what he believes to be stolen property in a sting operation, but which property is not in fact stolen, for attempted receipt of stolen property.

The fourth category of impossibility is *inherent impossibility*, which arises where the actor "employs means which a reasonable man would view as totally inappropriate to the objective sought." LAFAVE, *supra* note 16, at 2 SUBST. CRIM. L. § 11.5(a)(4). Inherent impossibility can take the form of pure factual impossibility, such as, for example, where a person attempts to kill by a fantastic superstitious practice or by throwing red pepper in the eyes of another. And it can also take the form of hybrid impossibility, such as, for example, where a person, with intent to kill a person, shoots at what is obviously a manikin or statute. *See* Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237, 244-45 (1995) (common denominator underlying inherent impossibility 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").

[17] *See, e.g.*, Model Penal Code § 5.01(1)(c) ("[A] person is guilty of an attempt to commit a crime if," *inter alia*, the person engages in conduct that would satisfy the *actus reus* requirement "*under the circumstances as he believes them to be*[.]").

[18] Specifically, the subjective approach incorporated into RCC § 22E-301(a)(1)(B) renders pure factual and hybrid impossibility claims immaterial. *See supra* note 16 (defining these categories). For example, under the RCC it would not be a defense to attempted murder that: (1) the would-be victim was already dead, provided that the defendant mistakenly believed the person to be alive at the moment he pulled the trigger; or that (2) the murder weapon was empty, provided that the defendant mistakenly believed it be loaded. Nor would it preclude liability for attempted theft under the RCC that: (1) the owner of the target property consented to its taking, provided that the defendant mistakenly believed it to be absent; or that (2) the safe targeted by the defendant is empty, provided that the defendant mistakenly believed it be filled with valuable objects. *See, e.g.*, PAUL H. ROBINSON, 1 CRIM. L. DEF. § 85 (Westlaw 2019) ("The modern trend, evident in most jurisdictions, is to reject both [forms of] impossibility as defenses."); DRESSLER, *supra* note 8, at § 27.07 (same).

In contrast, pure legal impossibility remains a viable theory of defense under the RCC. *See supra* note 16 (defining this category). However, this does not hinge on RCC § 22E-301(a)(3)(A)(ii), or any other provision in section 301. *See generally* Larry Alexander, *Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction: An Essay in Memory of Mike Bayles*, 12 LAW & PHIL. 33 (1992). Rather, the "underlying basis for acquittal is the principle of legality," which "provides that we should not punish people—no matter culpable or dangerous they are—for conduct that does not constitute the charged offense at the time of the action." DRESSLER, *supra* note 8, at § 27.07; *see* Model Penal Code § 5.01 cmt. at 318 ("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.").

For example, "it is not a crime to throw even a [District of Columbia] steak into a garbage can." JEROME HALL, GENERAL PRINCIPLES OF THE CRIMINAL LAW 595 (2d ed. 1960). So if after a loss against the Washington Nationals, the Oriole Bird—the Baltimore Orioles mascot—places a local District steak in

Paragraph (a)(3) also establishes an additional aspect of the conduct requirement governing attempt liability, namely, that the defendant's conduct must have been "reasonably adapted" to completion of the target offense.[19] This reasonable adaptation requirement is intended to limit attempt liability to those situations where there exists a basic correspondence between the defendant's conduct and the criminal objective sought to be achieved.[20] Requiring the government to establish this basic correspondence both limits the risk that innocent conduct will be misconstrued as criminal[21] and precludes convictions for inherently impossible attempts.[22]

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the garbage, he is not guilty of committing any offense. Nor could the Oriole Bird be convicted of an attempt to commit an imaginary offense of this nature although he honestly believed such conduct to be prohibited by the D.C. Code. *E.g.*, DRESSLER, *supra* note 8, at § 27.07 ("Just as a person may not ordinarily escape punishment on the ground that she is ignorant of a law's existence, it is also true that we cannot punish people under laws that are purely the figments of their guilty imaginations."). Along similar lines (and perhaps more realistically), an actor is not guilty of a criminal attempt if, unknown to her, the legislature has repealed a statute that she believes that she is violating. "For example, if D attempts to sell 'bootleg' liquor after the repeal of the Prohibition laws, she is not guilty of an attempt even though she is unaware of their repeal." *Id.*; *see, e.g.*, ROBINSON, *supra* note 18, at 1 CRIM. L. DEF. § 85 (no attempt liability for pure legal impossibility).

Inherent impossibility also remains a viable (if exceedingly limited) theory of defense under the reasonable adaptation standard codified in subparagraph (a)(3)(B). *See infra* note 22 and accompanying text.

[19] RCC § 22E-301(a)(3)(B). This standard is drawn directly from D.C. Court of Appeals case law. *E.g.*, *Seeney v. United States*, 563 A.2d 1081, 1083 (D.C. 1989); *Robinson v. United States*, 608 A.2d 115, 116 (D.C. 1992); *Johnson v. United States*, 756 A.2d 458, 463 n.3 (D.C. 2000). However, numerous other jurisdictions employ comparable standards, whether through case law or by statute. *See* John F. Preis, *Witch Doctors and Battleship Stalkers: The Edges of Exculpation in Entrapment Cases*, 52 VAND. L. REV. 1869, 1902-04 (1999) (collecting relevant legal authorities); *compare* Model Penal Code § 5.05(2) (providing sentencing mitigation for an attempt that "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 under this Section").

[20] *See, e.g.*, Edwin R. Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 469 (1954) (where "the means employed are not reasonably adapted to carry out" the actor's intent to commit a crime, an attempt conviction is not justified "for in such case there can be no damage or danger of damage"); Ken Levy, *It's Not Too Difficult: A Plea to Resurrect the Impossibility Defense*, 45 N.M. L. REV. 225, 273 (2014) ("[I]t is difficult to see how a state could justify criminalizing [an attempt which lacks this basic correspondence.] Criminalizing attempted murder by means of implausible causal theories seems dangerously close to criminalizing the sincere hope that somebody dies accompanied by the slightest act in this direction—for example, a diary entry. And this kind of infringement on a person's thoughts is not only unjust; it is unconstitutional.").

[21] The risk of this kind of misconstruction is perhaps most obvious in the context of inherently impossible attempts. *See, e.g.*, Brodie, *supra* note 16, at 245-46 ("[I]t 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."). But it is also a more general concern for all incomplete attempts given that the "farther that one moves from the paradigm of a completed act," 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).

In light of these concerns, it is has been observed (in one of the most cited federal appellate decisions on the contours of attempt liability) that:

Subsection (b) provides additional clarity concerning the culpable mental state requirement governing a criminal attempt as it relates to the result elements (if any) of the target offense. Whereas the prefatory clause of subsection (a) generally clarifies that an attempt conviction entails proof that the defendant acted with a level of culpability that is no less demanding than that required by the target offense, subsection (b) specifically establishes that the "person must intend to cause any result elements required by that offense."[23] The latter requirement incorporates a principle of culpable mental state

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> When the question before the court is whether certain conduct constitutes mere preparation which is not punishable, or an attempt which is, the possibility of error is mitigated by the requirement that the objective acts of the defendant evidence commitment to the criminal venture and corroborate the *mens rea*. To the extent that this requirement is preserved it prevents the conviction of persons engaged in innocent acts on the basis of a *mens rea* proved through speculative inferences, unreliable forms of testimony, and past criminal conduct.

United States v. Oviedo, 525 F.2d 881, 884–85 (5th Cir. 1976) (internal citation omitted); *see, e.g.*, Model Penal Code § 5.01(2) (incorporating 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.").

[22] Inherent impossibility is an issue in attempt prosecutions where the defendant "employs means which a reasonable man would view as totally inappropriate to the objective sought." LAFAVE, *supra* note 16, at 2 SUBST. CRIM. L. § 11.5(a)(4); *see, e.g.*, Preis, *supra* note 20, at 1904 (recognition of inherent impossibility defense most strongly supported by relevant case law, statutes, and commentary); *see also* Peter Westen, *Impossibility Attempts: A Speculative Thesis*, 5 OHIO ST. J. CRIM. L. 523, 564 (2008) (attempt liability should entail proof that the defendant was "a substantial threat to the interests that the law declaring X to be an offense seeks to protect"). Conduct of this nature would not be "reasonably adapted" to completion of the target offense under subparagraph (a)(3)(B), and, therefore, could constitute a (failure of proof) defense to attempt liability under the RCC. In practice, however, it will take more than a "routine miscalculation of attendant circumstances, as in cases of factual or hybrid [] impossibility," to call into question the necessary correspondence between the defendant's conduct and the criminal objective sought to be achieved. Preis, *supra* note 19, at 1904. Rather, only "an exceedingly unreasonable miscalculation of circumstances" would be relevant (insofar as impossibility is concerned) to the determination of whether the reasonable adaptation standard is met. *Id.*

So, for example, the fact that the defendant in an attempted murder prosecution tried to kill the victim by pulling the trigger on a broken firearm that she mistakenly believed to be operable would not call into question whether the defendant's conduct was reasonably adapted to the completion of murder. In contrast, the fact that a defendant in an attempted murder prosecution tried to kill the victim by shooting a fully functional firearm at a voodoo doll with the victim's picture attached to it would be relevant—and ultimately preclude the attachment of attempt liability under subparagraph (a)(2)(B). *See, e.g.*, Keedy, *supra* note 20, at 470 (where the defendant "invokes witchcraft, charms, incantations, maledictions, hexing or voodoo," such conduct "cannot constitute an attempt to murder since the means employed are not in any way adapted to accomplish the intended result") (collecting authorities).

[23] *See, e.g.*, Model Penal Code § 5.01(1)(b) ("[W]hen causing a particular result is an element of the crime," a person is guilty if he "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[.]") (italics added); *see also* DRESSLER, *supra* note 8, at § 27.09(c) (this provision of the Model Penal Code, while explicitly addressing complete attempts, "implicitly" applies to incomplete attempts) (citing Model Penal Code § 5.01 cmt. at 305 n.17 (paragraphs (b) and (c) are to be "read in conjunction with [one another]")); *Cf.* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 758 n.301 (1983) ("'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.").

Note that RCC § 22E-301(b) expresses a principle of *intent* elevation, not *purpose* elevation. This means that (for example) if "the actor's purpose were to demolish a building and, knowing that persons

elevation applicable whenever the target offense is comprised of a result that may be satisfied by proof of a non-intentional mental state (i.e., recklessness or negligence), or none at all (i.e., strict liability).[24] To satisfy this threshold culpable mental state

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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." Model Penal Code § 501 cmt. at 305 (For both purposeful and knowing attempts, "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."); Commentary on Haw. Rev. Stat. Ann. § 705-500 (same).

[24] Which is to say, subsection (b) dictates that, "[w]here criminal liability rests on the causation of a prohibited result, the actor must have an intent to achieve that result even though violation of the substantive offense may require some lesser *mens rea*." Commentary on Haw. Rev. Stat. § 705-500 (quoting Prop. Mich. Rev. Cr. Code, comments at 82). This principle of culpable mental state elevation *does not* preclude the government from charging attempts to commit target offenses subject to non-intentional culpable mental states. However, to secure an attempt conviction for such offenses, proof that the accused acted with the intent to cause the required results is necessary. *Id.* ("A person charged with the substantive crime of manslaughter may be liable as a result of [] recklessness causing death, but the same recklessness would not be sufficient if the victim did not die and the actor were only charged with attempt; here, the state would have to show an intent to achieve the prohibited end result, death of the victim.").

This limitation on reckless and negligent attempt liability (as to result elements) precludes a wide range of endangerment activities, including, perhaps most notably, risky driving, from being treated as attempts to commit serious crimes (e.g., homicide). *See, e.g.*, Model Penal Code § 5.01, cmt. at 304 ("[T]he scope of the criminal law would be unduly extended if one could be liable for an attempt whenever he recklessly or negligently created a risk of any result whose actual occurrence would lead to criminal responsibility."); Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 1033 (1998) (observing that such treatment would open the "floodgates to attempt liability").

To illustrate, consider how reckless attempt liability could authorize many instances of consciously risky driving to be charged as multiple counts of attempted manslaughter: (1) as to *actus reus*, the reckless driver who closely speeds past pedestrians has engaged in conduct dangerously close to causing the death of others; and (2) as to *mens rea*, that same driver has consciously disregarded a substantial risk of death as to every pedestrian he or she passes on the road. Along similar lines, acceptance of negligent attempt liability could transform many instances of inadvertently risky driving into multiple counts of attempted negligent homicide along similar lines: (1) 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; and (2) as to *mens rea*, that same driver should have been aware that he or she was creating a substantial risk of death as to every pedestrian he or she passes on the road.

Subsection (b), by requiring proof of (at minimum) intent as to result elements, rejects these recklessness and negligence-based theories of attempt liability. *See, e.g.*, Model Penal Code § 5.01(1)(b) (excluding such theories through belief culpability threshold); LAFAVE, *supra* note 16, at 2 SUBST. CRIM. L. § 11.3 ("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."); Commentary on Haw. Rev. Stat. § 705-500 ("Reckless driving . . . does not constitute attempted manslaughter."); *State v. Holbron*, 904 P.2d 912, 920, 930 (Haw. 1995) ("We agree with the rest of the Anglo-American jurisprudential world that there can be no attempt to commit involuntary manslaughter."). And, according to the same reasoning, subsection (b) would also preclude attempt liability premised on the aggravated forms of recklessness at issue in depraved heart murder and aggravated assault. *See, e.g.*, DRESSLER, *supra* note 8, at § 27.09 ("For example, if D blindfolds herself and fires a loaded pistol into a room that she knows is occupied, she may be convicted of murder if someone is killed. Such a killing, although unintentional, is malicious (the mens rea of murder), because it evinces a reckless disregard for the value of human life. However, if D's reckless act does not kill anyone in the room, almost all jurisdictions would rule that she is not guilty of attempted murder."); Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78

requirement, the government must prove that the defendant acted with either a *practically certain belief* [25] that the prohibited result would occur, or, alternatively, that the defendant *consciously desired* to cause that result.[26]

Subsection (c) clarifies the relationship between a criminal attempt and the target offense. Specifically, this provision establishes that the government may, as an alternative to proving the requirements set forth in subsections (a) and (b), secure a conviction for an attempt by proving that the defendant satisfies the elements of the target offense itself.[27] In that case, however, subsection (c) also establishes that the accused may not be convicted of both the completed offense and an attempt to commit the same.[28]

Subsection (d) establishes the penalties for criminal attempts. Paragraph (d)(1) states the default rule governing the punishment of criminal attempts under the RCC: a fifty percent decrease in the maximum "punishment" applicable to the target offense.[29]

U. Colo. L. Rev. 879, 882 (2007) ("In nearly all jurisdictions to consider the question [of whether attempted enhanced reckless murder exists], courts have held that no such offense exists.").

[25] RCC § 22E-206(c)(1) (definition of intent as to result elements).

When formulating jury instructions for an attempt to commit a target offense subject to a culpable mental state of knowledge (whether as to a result or circumstance element), the term "intent," as defined in RCC § 22E-206(b), should instead be substituted for the term knowledge. This substitution is appropriate given that the term "knowledge" can be misleading in the context of inchoate offenses—whereas the substantively identical term "intent" is not. *See* RCC § 22E-206(b), Explanatory Notes.

[26] RCC § 22E-206(a)(1) (definition of purpose as to result elements).

[27] This alternative basis of attempt liability serves three related functions. First, it clarifies that failure to consummate the target offense is *not* an element of an attempt. *See, e.g., Richardson v. State*, 390 So. 2d 4, 5 (Ala. 1980) ("Although the crime of attempt is sometimes defined as if failure were an essential element, the modern view is that a defendant may be convicted on a charge of attempt even if it is shown that the crime was completed.") (quoting LAFAVE, *supra* note 16, at 2 SUBST. CRIM. L. § 11.5). Second, it avoids any procedural complications that might result from the fact that a criminal attempt is not always a lesser-included offense of the target offense in light of the principle of culpable mental state elevation set forth in subsection (b). *See, e.g.*, WAYNE R. LAFAVE & GERALD ISRAEL, 6 CRIM. PROC. § 24.8(e) (4th ed. Westlaw 2017) ("When attempt carries a more demanding *mens rea* than a completed offense, it may not be considered a lesser included offense.") (citing, *e.g., People v. Bailey*, 54 Cal.4th 740 (2012)). And third, it provides greater flexibility for reaching appropriate sentencing outcomes in individual cases. *Cf. Com. v. LaBrie*, 473 Mass. 754, 764 (2016) ("[R]equiring 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.") (quoting *United States v. York*, 578 F.2d 1036, 1039 (5th Cir. 1978)).

[28] *See, e.g.*, Model Penal Code §§ 1.07(1)(a), (1)(b), and (4)(b) (barring convictions for general inchoate offense and target offense); ROBINSON, *supra* note 17, at 1 CRIM. L. DEF. § 84 ("It 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."). This merger principle is similarly established in section 215. *See* RCC § 22E-215(a)(6) (barring multiple convictions for an attempt or solicitation to commit an offense and the target offense when arising from the same course of conduct).

[29] *See, e.g.*, DRESSLER, *supra* note 8, at § 27.04(b)(1) ("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."); LAFAVE, *supra* note 16, at 2 SUBST. CRIM. L. § 11.5(c) (modern attempt legislation typically grades attempts at "one degree below the object crime.") (collecting statutes). This penalty reduction is to be contrasted with the Model Penal Code approach, which grades most criminal attempts as "crimes of the same grade and degree as the most serious offense which is attempted." Model Penal Code § 5.05(1); *but see id.* ("[An] attempt . . . to commit a [capital crime or a] felony of the first degree is a felony of the second degree.").

The drafters of the Model Penal Code adopted this policy of attempt penalty equalization—which was a stark departure from prevailing common law trends—on the basis of the same dangerousness-based

"Punishment," for purposes of this paragraph, should be understood to mean: (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; and (3) fine only if imprisonment is not applicable to the target offense. Paragraph (d)(2) thereafter lists those offenses that are exempt from this default rule and specifies the punishment for each exception.[30]

Relation to Current District Law. RCC § 22E-301 clarifies, improves the proportionality of, and fill in gaps in the District law of criminal attempts.

The D.C. Code provides for attempt liability in a variety of ways. Most prominently, the D.C. Code contains a general attempt penalty provision that applies to a relatively broad group of offenses.[31] Additionally, the D.C. Code contains a variety of semi-general attempt penalty provisions, which create attempt liability for narrower groups of offenses with related social harms.[32] Finally, some specific offenses in the

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rationale that motivated their endorsement of the substantial step standard. *See, e.g.*, Model Penal Code § 5.05, cmt. at 490 ("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."). However, as discussed *supra* note 13, this rationale for punishment has been called into question by many on empirical grounds, including, perhaps most notably, by the drafters of the recent Model Penal Code Sentencing Project. *See, e.g.*, Model Penal Code: Sentencing § 6.06 PFD (2017) ("There are undenied elements of inefficacy and injustice in the Code's endorsement of incapacitation as a ground for incarceration, particularly when authorities misapprehend the dangerousness of individual offenders.").

The (original) Model Penal Code's equalization of attempt penalties also conflicts with a strong intuitive sense, captured by public opinion surveys, that resultant harm should matter for grading purposes. *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, 429-30 (1998) (failure to consummate an offense generates, at minimum, "a reduction in liability of about 1.7 grades" by lay jurors, while the earlier the defendant's plans are frustrated, the greater this "no harm" discount). This may explain why only a minority of "modern American codes that are highly influenced by the Model Penal Code" equalize penalties for criminal attempts. 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) ("Nearly two-thirds of American jurisdictions have adopted codes that have been heavily influenced by the Model Penal Code, but less than 30% of these have adopted the Code's inchoate grading provision or something akin to."). And it may also provide at least a partial explanation for why, "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)).

[30] Many jurisdictions that subject attempt liability to generally applicable grading principles statutorily recognize exceptions for particular attempt offenses or categories of attempt offenses. *See, e.g.*, LAFAVE, *supra* note 16, at 2 SUBST. CRIM. L. § 11.5(c) (observing "considerable variation" regarding the "authorized penalties for attempt," which includes routine departures from generally applicable grading principles); Model Penal Code § 5.05(1) ("[An] attempt . . . to commit a [capital crime or a] felony of the first degree is a felony of the second degree."); Robinson, *supra* note 29, at 320 n.67 (nearly all jurisdictions that statutorily equalize punishment for attempts recognize some exceptions); N.C. Gen. Stat. Ann. § 14-2.5 (applying standard attempt penalty discount "[u]nless a different classification is expressly stated").

[31] D.C. Code § 22-1803 ("Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished . . . .").

[32] *E.g.*, D.C. Code § 22-1837 (setting forth attempt penalties for the human trafficking related offenses); D.C. Code § 22-3018 (setting forth attempt penalties for the sexual offenses).

D.C. Code individually provide for attempt liability by incorporating the term "attempt" as an element of the offense.[33]

The District's recognized "patchwork of attempt statutes"[34] presents two main problems. The first is that it fails to clearly communicate the elements of a criminal attempt. In no place, for example, does the D.C. Code define the term attempt. This statutory silence has effectively delegated to District courts the responsibility to establish the contours of attempt liability. Over the years, the DCCA has issued numerous opinions and proffered a variety of statements relevant to determining the contours of attempt liability under District law. The case law in this area reflects the piecemeal evolution of doctrine over more than a century: it is sometimes ambiguous, occasionally internally inconsistent, and has never been clearly synthesized into a single analytical framework. Nonetheless, a holistic reading of District authority reveals basic and fundamental principles governing the contours of attempt liability. Consistent with the interests of clarity and consistency, RCC § 22E-301 translates these principles into a detailed statutory framework.

The second main problem reflected in the District's attempt statutes is that they lack a consistent grading principle. For example, some District attempts are subject to statutory maxima that are many orders of magnitude below the statutory maxima governing the completed offense. Other District attempts, in contrast, are subject to the same statutory maxima governing the completed offense. And still other District attempt statutes are subject to statutory maxima pegged to, but half as severe as, the statutory maxima applicable to the completed offense. Viewed collectively, then, the D.C. Code manifests at least three fundamentally different patterns in how it grades attempts, without any discernible rationale for the variances. This produces a penalty scheme which authorizes the imposition of sentences that are, at least in relation to one another, quite disproportionate. Consistent with the interests of consistency and proportionality, RCC § 22E-301 changes District law by adopting a uniform approach to grading attempts at one half the severity of the completed offense.

A more detailed analysis of District attempt law and its relationship with RCC § 22E-301 is provided below. It is organized according to five main topics: (1) the culpable mental state requirement governing as attempt; (2) the definition of an incomplete attempt; (3) impossible attempts; (4) the relationship between an attempt and the completed offense; and (5) attempt penalties.

RCC §§ 22E-301(a) & (b): Relation to Current District Law on Culpable Mental State Requirement. Subsections (a) and (b) codify, clarify, and fill in gaps reflected in District law governing the culpable mental state requirement of an attempt.

The DCCA has addressed the culpable mental state requirement of an attempt on a handful of occasions. While unclear and, in at least one important sense, contradictory, pertinent case law generally supports two propositions: (1) a principle of culpable mental state elevation applies to the results of the target offense when charged as an attempt; and (2) a principle of culpable mental state equivalency applies to the circumstances of the target offense when charged as an attempt. Subsections 301(a) and (b) respectively codify each of these principles.

[33] *E.g.*, D.C. Code § 22-2601 (prison escape); D.C. Code § 22-951(c)(1)(a) (forcible gang participation).
[34] 1978 D.C. Code Rev. § 22-201 cmt. at 113.

Most of the DCCA case law relevant to the culpable mental state of an attempt focuses on whether a principle of culpable mental state elevation applies to the results of the target offense. On this issue, there exists two different lines of cases: one which points towards a principle of culpable mental state elevation and another in support of a principle of culpable mental state equivalency. This "inconsistency" in District law was recently recognized in, and summarized by, Judge Beckwith's concurring opinion in Jones v. United States.[35] Three aspects of Judge Beckwith's analysis, abstracted in the accompanying footnote, are worth highlighting.[36]

[35] 124 A.3d 127, 132–34 (D.C. 2015); *see also Williams v. United States*, 130 A.3d 343, 347 (D.C. 2016) (discussing *Jones*).

[36] Judge Beckwith observes, in relevant part:

> In *Sellers v. United States*, 131 A.2d 300 (D.C. 1957), the Municipal Court of Appeals for the District of Columbia defined the elements of attempt as follows: "any overt act done with intent to commit the crime and which, except for the interference of some cause preventing the carrying out of the intent, would have resulted in the commission of the crime." *Id.* at 301 (quoting 14 Am. Jur., Criminal Law, § 65, p. 813). Thirty years later, in *Wormsley v. United States*, 526 A.2d 1373 (D.C. 1987), this court upheld the appellant's conviction for attempted taking property without right after concluding that the record contained sufficient evidence that she intended to steal a dress because of her "apparent dissemblance in folding the blue dress and concealing it inside her sweater, as well as her change of story about what she had done with the dress." *Id.* at 1375. Appellant's specific intent to commit a crime was central to the court's holding, even though the underlying crime required only general intent to commit the act constituting the crime. *See Fogle v. United States*, 336 A.2d 833, 835 (D.C. 1975).
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> Then in *Ray v. United States*, 575 A.2d 1196 (D.C. 1990), we stated that "[e]very completed criminal offense necessarily includes an attempt to commit that offense." *Id.* at 1199 (holding that appellant was guilty of the "attempted-battery" type of assault even though the evidence showed a completed battery). In reaching this conclusion, *Ray* did not grapple with *Wormsley's* premise that an attempt requires specific intent. We later applied *Ray* to an attempted threats charge . . . in *Evans v. United States*, 779 A.2d 891 (D.C. 2001), holding that the government could charge attempted threats "even though it could prove the completed offense." *Id.* at 894. In other words, the government needed only to prove general intent to sustain a conviction for attempted threats. *See also Jenkins v. United States*, 902 A.2d 79, 87 (D.C. 2006) (noting that *Evans* analyzed threats as a general intent crime). While the court in *Evans* acknowledged *Wormsley's* holding on attempt, *Wormsley* did not control its analysis. Relying principally on *Ray*, the court explained that "[o]ur decisions have repeatedly held that 'a person charged with an attempt to commit a crime may be convicted even though the evidence shows a completed offense, not merely an attempt.'" *Evans*, 779 A.2d at 894 (quoting *Ray*, 575 A.2d at 1199).
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> In *Smith v. United States*, 813 A.2d 216 (D.C. 2002), this court recognized the difficulty of the attempt issue, stating that "[t]o speak of 'specific intent' in the context of a prosecution for attempted anything is, in our view, somewhat misleading." *Id.* at 219. The court reiterated *Wormsley's* premise that "[t]he only intent required to commit the crime of attempt is an intent to commit the offense allegedly attempted." *Id.* (citing *Wormsley*, 526 A.2d at 1375). But the court also stated that "[o]ur decision in *Evans* necessarily means that when an attempt is proven by evidence that the defendant committed the crime alleged to have been attempted, the intent required to commit the crime of attempt can be no greater than the intent required to commit the completed crime." *Id.* (citing *Evans*, 779 A.2d at 894). The court then held that there was sufficient evidence of attempted second-degree cruelty to children when the appellant "intended to commit the acts which resulted in . . . the grave risk of injury" to the child, even though he did not intend to injure the child. *Id.* at 219–20.

First, although the discussion in Judge Beckwith's concurring opinion is framed around whether an attempt requires proof of "a specific intent to commit the unlawful act,"[37] the primary import of the relevant case law she discusses relates to whether the culpable mental state governing the results of the target offense must be elevated to one of "intent" when charged as an attempt. So, for example, while proof of recklessness as to the alternative results of second-degree child cruelty[38]—actually harming a child or creating a grave risk of harm to a child—will suffice to satisfy the completed offense, must the government prove an intent to cause such harm or, at the very least, an intent to create a risk of such harm in order to secure a conviction for attempted second-degree child cruelty?[39]

Second, although DCCA case law points in different directions on this issue, the reading that best synthesizes the relevant authorities is that a principle of culpable mental state elevation applies to attempts, but that this principle is subject to an exception when the government proceeds on a theory that the offense attempted was actually completed. In support of this reading is the fact that the reported opinions that involve traditional attempt prosecutions (i.e., decisions implicating conduct that falls short of completion)—what Judge Beckwith refers to as the *Wormsley-Brawner-Dauphine* line of cases—seem to favor a principle of culpable mental state elevation, while the conflicting reported opinions—what Judge Beckwith describes as the *Smith-Evans* line of cases—involve attempt prosecutions premised upon proof that the target offense was actually completed.[40]

> Yet while *Evans* continues to feature prominently in our case law, other recent cases have required specific intent for an attempt conviction. For example, in *Brawner v. United States*, 979 A.2d 1191 (D.C. 2009), the court held that for an attempted escape conviction, the government must prove "the mental state of intending to commit the underlying offense," that is, "intent to escape," even though a charge for a completed escape did not involve such intent. *Id.* at 1194. And in *Dauphine v. United States*, 73 A.3d 1029 (D.C. 2013), this court held that animal cruelty is a general intent crime but nonetheless stated that "where the government charges an individual with attempt, as it did here, the government must demonstrate that the defendant possessed the intent to commit the offense allegedly attempted." *Id.* at 1033 (citation and internal quotation marks omitted). We held that the record contained sufficient evidence that the "appellant acted with intent to commit the crime of cruelty to animals," and we affirmed her conviction. *Id.*
>
> The *Wormsley-Brawner-Dauphine* line of cases requiring the government to prove specific intent to commit the crime intended appears to be in direct tension with the *Evans-Smith* line of cases that does not require such proof . . .

124 A.3d at 133–34.

[37] *Jones*, 124 A.3d at 132-33 (citing *Morissette v. United States*, 342 U.S. 246, 263 (1952)).

[38] *See* D.C. Code § 22-1101(b)(1) ("A person commits the crime of cruelty to children in the second degree if that person intentionally, knowingly, or recklessly . . . Maltreats a child or engages in conduct which causes a grave risk of bodily injury to a child . . . .").

[39] *See generally Smith v. United States*, 813 A.2d 216 (D.C. 2002).

[40] *Compare Jones*, 124 A.3d at 134 n.4 ("As the elements of a crime are determined by what offense the government charges, not by what evidence it presents at trial, *Evans* and *Smith* cannot be distinguished from *Wormsley*, *Brawner*, and *Dauphine* on the ground that the government proved a completed offense in the former cases and an attempted offense in the latter."), *with* D.C. SUPER. CT. R. CRIM. P. 31(c) ("A defendant may be found guilty of any of the following: (1) an offense necessarily included in the offense charged; (2) an attempt to commit the offense charged; or (3) an attempt to commit an offense necessarily

In the latter context, it is not surprising that the DCCA has held that "the intent required to commit the crime of attempt can be no greater than the intent required to commit the completed crime."[41] "To hold otherwise," after all, "would create the anomalous result that appellant could be convicted of the completed crime . . . but, on the same facts, could not be convicted of an attempt to commit that same crime."[42] What the *Smith-Evans* line of cases does not discuss, however, are the consequences of this position—separate and apart from ensuring that "a person charged with an attempt to commit a crime may be convicted even though the evidence shows a completed offense, not merely an attempt.'"[43]

For example, if the culpable mental state requirement governing the results of an attempt is identical to that of the target offense, then it means that the government may charge, and a defendant may be convicted of, reckless or negligent attempts—such as, for example, attempted depraved heart murder, attempted involuntary manslaughter, or attempted vehicular homicide. (Indeed, under the *Smith-Evans* view, wherein the government need only prove that the defendant "intended to commit the acts" that would constitute the offense, even strict liability attempts would seem to provide a viable basis for liability.[44]) However, one does not see such theories of liability, which would entail proof that the defendant recklessly or negligently attempted to kill, being raised by the government or accepted by District courts—indeed, the *Jones* court itself appears to tacitly disclaim offenses such as "attempted involuntary manslaughter or attempted negligence."[45]

Perhaps this explains why, in those cases that involve traditional attempt prosecutions, one sees the DCCA articulating a principle of culpable mental state elevation as to results. Illustrative is *Brawner v. United States*.[46]

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included in the offense charged, if the attempt is an offense in its own right."). For further discussion of the relevant issues, see *infra* Commentary on RCC § 22E-301(b).

[41] *Smith*, 813 A.2d at 219.

[42] *Id.*; *see, e.g.*, *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990); *Jones*, 124 A.3d at 129-31.

[43] *Evans*, 779 A.2d at 894 (quoting *Ray*, 575 A.2d at 1199).

[44] *Smith*, 813 A.2d at 219. As discussed in the Commentary on RCC § 22E-205(a), an intent to engage in conduct is synonymous with voluntarily having engaged in an act or omission. Robinson, *supra* note 2, at 864. However, requiring proof of voluntary conduct, and nothing more, is entirely consistent with strict liability. *See, e.g.*, *Buchanan v. United States*, 32 A.3d 990, 1000 (D.C. 2011) (Ruiz, J., concurring) (noting that the "intent to act" interpretation of simple assault, if taken literally, would allow "the prosecution of individuals for criminal assault for actions taken with a complete lack of culpability"). Consider, for example, how the intent-to-act interpretation suggested in *Smith* would play out in the context of an attempted aggravated assault prosecution premised on the following facts. Imagine that D's plan is to fire a paintball gun into what appears to be an abandoned building to impress his friends. Although D *reasonably believes* the building to be unoccupied, it is actually occupied by a family. If D fires the paintball gun into the building and causes serious bodily injury to someone inside, he couldn't be convicted of aggravated assault, D.C. Code § 22-404.01, since he does not *consciously disregard* an extreme risk of death or serious bodily injury, see *Perry v. United States*, 36 A.3d 799, 816 (D.C. 2011). Nevertheless, the intent-to-act interpretation suggested in *Smith* would appear to indicate that a conviction for *attempted aggravated assault* would be appropriate in this situation—after all, D surely "intended to engage in the acts that caused the serious bodily injury."

[45] *See Jones*, 124 A.3d at 130 (apparently agreeing with the defendant that "[i]t makes no sense to speak of attempted involuntary manslaughter or attempted negligence," but noting that "[t]his maxim is irrelevant here because the misdemeanor offense of threats *does* require intent to act—intent to utter statements that constitute a threat").

[46] 979 A.2d 1191 (D.C. 2009).

At issue in *Brawner* was the culpable mental state governing the result of *attempted* prison escape, the departure from physical confinement. This issue was central to the case "[b]ecause appellant was apprehended within the jail, as opposed to outside the facility," thereby requiring "the government [to proceed] on an attempted escape theory."[47] At trial, "[t]he defense's theory of the case was that appellant lacked the intent to escape and so could not be convicted of attempted escape."[48] On appeal, the defendant "argue[d] that the trial court's failure to instruct the jury that the government was required to prove [t]his intent to leave the jail warrant[ed] reversal."[49]

In adjudicating this claim, the *Brawner* court determined that the culpable mental state requirement governing *attempted* prison escape was "distinguishable" from that of the completed offense. "[A]ttempted escape, like other inchoate offenses, requires the mental state of intending to commit the underlying offense."[50] Therefore, the DCCA concluded, "in a trial for attempted escape," that "the government must prove what the defendant was attempting to do, and, therefore, must prove intent to escape."[51]

The third, and final, point is that the precise contours of the principle of culpable mental state elevation supported by the *Wormsley-Brawner-Dauphine* line of cases is unclear in an important sense—namely, what does "intent" mean? For example, "[t]he element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose," which entails proof of a conscious desire, "or the more general one of knowledge," which entails proof of belief that one's conduct is practically certain to cause a result.[52] That said, intent is also sometimes used as a synonym for purpose, in which context proof of a practically certain belief *would not* provide an adequate basis for liability.[53]

Although the DCCA's understanding of intent (frequently referred to as "specific intent") is generally ambiguous,[54] the interpretation most consistent with the case law is the traditional understanding, namely, that "one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts."[55]

The DCCA's robust but conflicting body of case law on the culpable mental state requirement applicable to the results of an attempt stands in contrast with the small, but essentially uniform, body of District authority on circumstances. In this context, the relevant authorities indicate that a principle of culpable mental state equivalency applies to the circumstances of an attempt.

For example, the DCCA's recent decision in *Hailstock v. United States* clarifies that the culpable mental state requirement governing the circumstance of attempted

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[47] *Id.* at 1193.
[48] *Id.*
[49] *Id.* at 1192.
[50] *Id.* at 1194.
[51] *Id.*
[52] *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 445 (1978); *see Tison v. Arizona*, 481 U.S. 137, 150 (1987).
[53] *See* LAFAVE, *supra* note 16, at 1 SUBST. CRIM. L. § 5.2.
[54] *See, e.g.*, *Wormsley*, 526 A.2d at 1375; *Brawner*, 979 A.2d at 1194 (discussing *United States v. Bailey*, 444 U.S. 394, 405 (1980) and Model Penal Code § 2.02, cmt. at 125); *Wilson-Bey v. United States*, 903 A.2d 818, 833-34 (D.C. 2006) (*en banc*); *Logan v. United States*, 483 A.2d 664, 671 (D.C. 1984); *Perry v. United States*, 36 A.3d 799, 816-17 (D.C. 2011).
[55] *Tison*, 481 U.S. at 150.

misdemeanor sexual abuse (MSA), absence of permission, is no different than that applicable to the completed version of the offense—both can be satisfied by proof of something akin to negligence[56]

Likewise, the DCCA's recent decision in *Fatumabahirtu v. United States* suggests the same is true with respect to the circumstance of illegal use under the District's sale of drug paraphernalia (SDP) offense—whether charged as an attempt or as a completed offense, the relevant circumstance can be satisfied by proof of something akin to negligence regarding the relevant circumstance.[57]

The District's statutory scheme applicable to child sex abuse offenses similarly support the conclusion that circumstances are not subject to a rule of culpable mental state elevation.[58] For example, whether prosecuted as an attempt or as a completed offense, "mistake of age" is not a defense to sex crimes involving children.[59] In practical effect, this means that the circumstance of age remains a matter of strict liability even when an attempt to commit a child sex abuse offense is charged.[60]

In accordance with the above analysis of District law, RCC § 22E-301(a) and (b) codify the culpable mental state requirement of attempt as follows. RCC § 22E-301(a) establishes that the culpable mental state requirement governing an attempt necessarily incorporates "the culpability required by the target offense." Pursuant to this principle, a defendant may not be convicted of a criminal attempt absent proof that he or she acted with, at minimum, the culpable mental state(s)—in addition to any other broader aspect of culpability—governing the results and circumstances required to establish that offense.

Thereafter, RCC § 22E-301(b) codifies a general principle of culpable mental state elevation, rooted in the *Wormsley-Brawner-Dauphine* line of cases, applicable to results.[61] At the same time, RCC § 22E-301(b) also fills in a key ambiguity left unresolved by the *Wormsley-Brawner-Dauphine* line of cases—what level of elevation is required for results. This provision establishes that acting with the intent to cause any results will suffice.

Finally, the absence of a comparable provision governing circumstances, when viewed in light of RCC § 22E-301(a), clarifies that circumstances are *not* subject to a comparable principle of culpable mental state elevation, but rather, are subject to the principle of culpable mental state equivalency reflected in pertinent District authorities.

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[56] *Hailstock v. United States*, 85 A.3d 1277, 1282 (D.C. 2014). That is, both MSA and attempted MSA can be satisfied by proof that the defendant "knew or should have known that he did not have the complainant's permission to engage in the sexual act or sexual contact." *Id.*

[57] *Fatumabahirtu v. United States*, 26 A.3d 322, 336 (D.C. 2011). That is, both SDP and attempted SDP can be satisfied by proof that the defendant "knew or reasonably should have known that the buyer would use these items to inject, ingest, or inhale a controlled substance." *Id.*

[58] D.C. Code §§ 22-3008 to 22-3010.01.

[59] D.C. Code § 22-3011(a) ("Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403.");

[60] *See In re E.F.*, 740 A.2d 547, 550 (D.C. 1999) ("Nothing in the present statutory scheme implies that the Council of the District of Columbia, in revising the definition of sexual crimes against children, meant to impose a knowledge requirement not theretofore in existence.").

[61] The primary concern addressed by the *Evans-Smith* line of cases—avoiding "the anomalous result that appellant could be convicted of the completed crime . . . but, on the same facts, could not be convicted of an attempt to commit that same crime," *Smith*, 813 A.2d at 219—is explicitly addressed by RCC § 22E-301(c), discussed *infra.*

RCC § 22E-301(a)(3)(A): Relation to Current District Law on Incomplete Attempts. Subparagraph (a)(3)(A) codifies, clarifies, and fills in gaps reflected in District law governing incomplete attempts.

It is well-established under District law that a person who plans to commit an offense must do more than "mere[ly] prepar[e]" to commit an offense; further progress toward a criminal objective is required to prove an attempt.[62] It is also clear, moreover, that once a person has carried out her criminal plans and all that remains to be seen is whether her efforts were successful (i.e., engaged in a complete attempt), liability may attach.[63] Less clear, however, is the point at which the line between mere preparation and actual perpetration has been crossed, such that police intervention prior to completion may lead to an attempt charge. On this issue of an incomplete attempt, the DCCA has, over the years, articulated a variety of standards. However, viewed as a whole and in relevant context, DCCA case law indicates that the dangerous proximity standard reflects current District law. Paragraph (a)(3) incorporates that standard into the RCC.

The earliest incomplete attempt standard endorsed by a local District court is the so-called probable desistance test. Originally adopted in the Municipal Court of Appeals for the District of Columbia's decision in *Sellers v. United States*, this test requires proof of conduct which, "*except for the interference of some cause preventing the carrying out of the intent,* would have resulted in the commission of the crime."[64]

Although the *Sellers* decision predates the creation of the DCCA, the probable desistance standard enunciated has been referenced by the DCCA on multiple occasions.[65] At the same time, the DCCA has also "often noted [that the probable desistance] formulation . . . is imperfect."[66] The DCCA's critique of this standard is understandable when viewed in relevant context: not only does the probable desistance test improperly suggest that "failure is . . . an essential element of criminal attempt,"[67] but, as a variety of legal authorities have observed, there simply "exists no basis for making . . . judgments [of] when desistance is no longer probable or when the normal citizen would stop."[68] In practice, then, the closeness of the actor's conduct to completion is ultimately the only foundation for making the threshold determination of the likelihood of desistance.[69]

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[62] *See, e.g., Johnson v. United States*, 756 A.2d 458, 463 n.3 (D.C. 2000); *Dauphine v. United States*, 73 A.3d 1029, 1033 (D.C. 2013).

[63] *See, e.g., Washington v. United States*, 965 A.2d 35, 43 n.24 (D.C. 2009); *Riley v. United States*, 647 A.2d 1165, 1172 (D.C. 1994).

[64] *Sellers v. United States*, 131 A.2d 300, 301-02 (D.C. 1957) (emphasis added). At issue in *Sellers* was whether the defendant had committed an attempt to arrange prostitution services on the following facts: (1) the defendant had "originated [a] proposition" to two MPD officers; (2) "specified the price per girl and the amount of [the defendant's] commission": and (3) "secured an acceptance" on that commission. *Id.* The *Sellers* court further noted, in setting forth the probable desistance standard, that whether "preparation . . . progress[es] to the point of attempt . . . is a question of degree which can only be resolved on the basis of the facts in each individual case." *Id.* at 301.

[65] *See, e.g., Wormsley v. United States*, 526 A.2d 1373, 1375 (D.C. 1987) (quoting *Sellers*, 131 A.2d at 301).

[66] *In re Doe*, 855 A.2d 1100, 1107 n.11 (D.C. 2004). This may explain the fact that the standard is omitted from the District's jury instructions on criminal attempts. *See* D.C. Crim. Jur. Instr. § 7.101.

[67] *In re Doe*, 855 A.2d at 1107 n.11 (citing *Evans*, 779 A.2d at 894).

[68] LAFAVE, *supra* note 16, at 2 SUBST. CRIM. L. § 11.4 (collecting authorities).

[69] *See id.* As the drafters of the Model Penal Code observe: "[I]n actual operation the probable desistance test is linked entirely to the nearness of the actor's conduct to completion, this being the sole basis of

Proximity of this nature is, in turn, more explicitly addressed by the second incomplete attempt standard reflected in District authorities, the dangerous proximity test. Originally adopted by the DCCA in *Jones v. United States*, this standard requires proof of an "act [that goes] beyond mere preparation and [which carries] the criminal venture forward to within dangerous proximity of the criminal end sought to be attained."[70]

Since *Jones*, the dangerous proximity test seems to have become the most authoritative standard reflected in District law. For example, this standard is routinely relied upon by the DCCA.[71] And it is also central to the District's jury instructions on criminal attempts, which, apart from the general statement that the accused "must have done more than prepare to commit" the target offense, makes the dangerous proximity standard the District's sole approach to dealing with incomplete attempts.[72]

Jury instructions aside, there is one additional conduct requirement that is occasionally referenced in District case law, the substantial step test. Originally developed by the drafters of the Model Penal Code to expand attempt liability beyond that provided for under the proximity-based standards, this test would allow for an

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unsubstantiated judicial appraisals of the probabilities of desistance. The test as applied appears to be little more than the physical proximity approach." 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, 589 (1961).

[70] *Jones*, 386 A.2d at 312 (quoting D.C. Crim. Jur. Instr. § 4.04 (2d ed. 1978)). At issue in *Jones* was whether to uphold an attempted robbery conviction against multiple defendants that had planned a bank robbery, but were stopped by police prior to execution of their plan. The defendants in the case "had made careful plans as to the role of each in the robbery, including the nature of each of their disguises, and had conducted a dry run on the preceding day." *Id* Thereafter, they "launched their plans [at the appointed time], going their respective ways toward the location of the bank in three cars[,] . . . armed with shotguns and other weapons as they entered a busy downtown area in the middle of a business day, and had disguised themselves as construction workers." *Id.* at 312-13. At the point in which the defendants were apprehended, one defendant was "approaching the target bank and was but a block away when the police intervened," while another "was proceeding toward the bank according to plan and was no further than four blocks away, turning back only when he heard police sirens and concluded that something had gone wrong." *Id.* at 313. Applying the dangerous proximity test, the DCCA determined that an attempt had occurred. *See id*. The *Jones* court further clarified that this test "does not require that appellants have commenced the last act sufficient to produce the crime but focuses instead on the proximity of appellants' behavior to the crime intended." *Id.* at 312.

[71] *See, e.g.*, *Robinson v. United States*, 608 A.2d 115, 116 (D.C. 1992); *Frye v. United States*, 926 A.2d 1085, 1099 (D.C. 2005); *Nkop v. United States*, 945 A.2d 617, 620 (D.C. 2008); *Johnson*, 756 A.2d at 463 n.3; *Euceda v. United States*, 66 A.3d 994, 1000 (D.C. 2013); *Fortune v. United States*, 59 A.3d 949, 960 (D.C. 2013); *Gee v. United States*, 54 A.3d 1249, 1271 (D.C. 2012).

[72] As section 7.101 of the District's criminal jury instructions reads:

> The elements of the crime of attempted [specify crime], each of which the government must prove beyond a reasonable doubt, are that . . . . [Name of defendant] did an act reasonably adapted to accomplishing the crime of [specify crime]. [Name of defendant] must have done more than prepare to commit [specify crime]. **His/her act must have come dangerously close to committing the crime.** [You may convict the defendant of an attempt to commit a crime even if the evidence shows the crime was completed.]

For discussion of the requirement of reasonable adaptation, see *infra*, Relation to Current District Law on Impossibility.

attempt conviction to rest upon proof of a "substantial step in a course of conduct planned to culminate in his commission of the crime."[73]

The earliest reference to the substantial step test was made in the 2004 case of *In Re Doe*, where the DCCA observed by way of dicta in a footnote that "the day may come when we reexamine and, perhaps, reformulate, the way we speak of the kind of 'act' that is required for a criminal attempt," in adherence to "the formulation favored by the Model Penal Code and adopted in a number of jurisdictions . . . ."[74] Thereafter, a decade later, the DCCA specifically referenced the substantial step test in the course of formulating the standard governing an incomplete attempt in a pair of 2014 decisions, *Hailstock v. United States*[75] and *Mobley v. United States.*[76] However, neither of these references appears to have changed District law's reliance on the dangerous proximity test.

Perhaps most notable is the fact that both of these decisions reference the substantial step test in the context of *defining the dangerous proximity test*. For example, in *Hailstock*, the DCCA explained that:

> [t]he test of dangerous proximity of completing a crime is met where, except for some interference, a defendant's overt acts would have resulted in commission of the completed crime . . . or where the defendant has taken a substantial step toward commission of the crime[.][77]

Thereafter, the DCCA in *Mobley* articulated precisely the same standard quoting from *Hailstock.*[78]

The intended meaning of the hybrid formulation announced in *Hailstock* and *Mobley*—which appears to be a novelty both inside and outside of the District—is far from clear. Traditionally, for example, the dangerous proximity test and substantial step test are understood to constitute distinct and competing approaches to resolving the same issue.[79]

At minimum, it is unlikely that either decision intended to supplant the dangerous proximity test with the substantial step test. It is well established under District law, for example, that the DCCA does not "give opinions upon moot questions or abstract propositions, or . . . declare principles or rules of law which cannot affect the matter in issue in the case before it."[80] Yet the relevant conduct in both *Hailstock*[81] and *Mobley*[82]

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[73] Model Penal Code § 5.01(1)(c).
[74] 855 A.2d at 1107 n.11.
[75] *Hailstock v. United States*, 85 A.3d 1277, 1283 (D.C. 2014).
[76] *Mobley v. United States*, 101 A.3d 406, 425 (D.C. 2014).
[77] *Hailstock*, 85 A.3d at 1282-83.
[78] *Mobley*, 101 A.3d at 424-25.
[79] *See, e.g.*, Model Penal Code § 5.01 cmt. at 329; PETER W. LOW, CRIMINAL LAW 459 (3d ed. 2009).
[80] *In re D.T.*, 977 A.2d 346, 352 (D.C. 2009) (quoting *Alpert v. Wolf*, 73 A.2d 525, 528 (D.C. 1950)).
[81] At issue in *Hailstock* was, *inter alia*, whether the evidence supported a finding of attempted sexual contact in a situation where "[a]ppellant entered the bedroom where [the victim] was resting and got onto the bed with her," and, "[e]ven after [the victim] said 'no' to appellant's expressed intent to 'get down' with her and even after she pushed him away, appellant continued in his efforts, pulling on her robe and touching her breast in the process." 85 A.3d at 1283. On these facts, the defendant came dangerously close to "engag[ing] in a sexual act or sexual contact" with the victim under circumstances in which the defendant "should have [had] knowledge or reason to know that the act was committed without [the

appears to easily satisfy the traditional understanding of the dangerous proximity test reflected in prior case law. Therefore, neither decision seems appropriately situated to supplant that test with a broader standard.

Finally, any inference that the foregoing references to the substantial step test were intended to change District law is belied by more recent decisions, which clearly endorse the standard articulation of dangerous proximity test—without reference to the substantial step test—as reflecting current District law.[83]

Consistent with the foregoing analysis of District authorities, the dangerous proximity test appears to most accurately reflect current District law. It is directly codified by paragraph (a)(3).

RCC § 22E-301(a)(3)(A) and (B): Relation to Current District Law on Impossibility. Subparagraphs (a)(3)(A) and (B) codify, clarify, and fill in gaps reflected in District law governing impossible attempts.

Under District law, two basic propositions concerning the limits of attempt liability seem clear. First, impossibility is generally not a defense to an attempt charge—i.e., the fact that a criminal undertaking fails because of a defendant's mistaken beliefs concerning the situation in which he or she acts is generally irrelevant for purposes of attempt liability. Second, there is a requirement that a person's conduct must be

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victim's] permission," D.C. Code § 22-3006. *See Hailstock*, 85 A.3d at 1283 ("The evidence in this case satisfied these tests.").

[82] At issue is *Mobley* was, *inter alia*, whether the evidence supported a finding of attempted tampering in a situation where appellant, after speaking with a co-defendant spoke over the phone about the specific location of a gun that had been used in the commission of multiple crimes and was thereafter tossed away in the vicinity of a housing complex, went to the spot and expended significant effort searching for the gun with the intent of disposing of it. 101 A.3d at 424-25. On these facts, the defendant was dangerously close to "alter[ing], destroy[ing], mutilat[ing], conceal[ing], or remov[ing]" the gun "with intent to impair its integrity or its availability for use in the official proceeding," D.C. Code § 22-723—assuming, at least, the situation was as the person perceived it, see *Mobley*, 101 A.3d at 425 ("[R]easonable jurors could infer that except for Mr. Bartlett finding a gun, Mr. Thompkins's act of searching for it in the spot where it was thrown would have been successful.")

[83] For example, the DCCA in *Corbin v. United States* recently explained that the court has "adopted the 'dangerous proximity' theory of attempt," summarizing the current state of District law as follows:

> An attempt consists of an act which is done with the intent to commit a particular crime and is reasonably adapted to the accomplishment of that end. The act must go beyond mere preparation and must carry the criminal venture forward to within dangerous proximity of the criminal end sought to be attained. This "dangerous proximity" test, formulated by Justice Holmes, does not require that appellants have commenced the last act sufficient to produce the crime but focuses instead on the proximity of appellants' behavior to the crime intended. *Jones v. United States*, 386 A.2d 308, 312 (D.C. 1978) (footnote omitted). "[M]ere preparation is not an attempt, but preparation may progress to the point of attempt. Whether it has is a question of degree which can only be resolved on the basis of the facts in each individual case." *Id.* at 313 n.2. It is sufficient for the government to prove that "except for some interference," defendant's "overt act done with the intent to commit a crime . . . would have resulted in the commission of the crime." *Evans v. United States*, 779 A.2d 891, 894 (D.C. 2001).

120 A.3d 588, 602 n.20 (D.C. 2015).

reasonably adapted to completion of the target offense in order to support attempt liability. Subparagraphs (a)(3)(A) and (B) codify both of these principles.

The most significant decision on impossibility is the DCCA's opinion in the 2004 case of *In re Doe*, where the court rejected the applicability of an impossibility defense to the offense of attempted enticement of a child through an exceptionally circuitous route.[84] Procedural issues aside, at the heart of the case is the defendant's argument that it is "legally impossible" to commit attempted enticement of a child under District law where the intended victim is (unbeknownst to the perpetrator) not a child.[85]

In resolving the appellant's claim, the *In re Doe* court was careful to distinguish, at the outset, between "factual impossibility," which arises where "the intended substantive crime is impossible of accomplishment merely because of some physical impossibility unknown to the defendant," and "legal impossibility," which "arises only when the defendant's objective is to do something that is not a crime."[86] Whereas the former claim is "not a defense" to an attempt charge, the latter claim "remains a defense to an attempt offense."[87] (It is important to point out, however, that this narrow construal of legal impossibility does little more than protect defendants from being convicted of attempts to commit imaginary crimes.[88])

Consistent with the foregoing classification scheme, the *In re Doe* court noted that the defendant's argument raised an issue of factual impossibility (albeit one with a legal dimension): where the actor intends to commit enticement of a child, but commission of the offense is impossible due to a *factual mistake* regarding the *legal status* of some attendant circumstance (here, the age of the victim), should that mistake provide grounds for exoneration?

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[84] 855 A.2d 1100, 1101 (D.C. 2004). At issue in *In re Doe* was whether the trial court's determination that the accused had to register as a sex offender under the District of Columbia's Sex Offender Registration Act of 1999 ("SORA") was appropriate. *Id.* at 1106. This determination, in turn, was based upon the court's assessment that the accused's earlier conviction in federal court for violating 18 U.S.C. § 2423(b) by traveling in interstate commerce for the purpose of engaging in a sexual act with a person under eighteen years of age "involved conduct that would constitute" or was "substantially similar" to District offense that would require registration under SORA. *Id.* at 1102; *see* D.C. Code § 22-4001(6) & (8). Notably, however, the accused's prior federal conviction arose from a sting operation: he sought to rendezvous with an undercover officer posing as a fourteen-year-old girl. *In re Doe*, 855 A.2d at 1102. Notwithstanding this wrinkle, CSOSA and the Superior Court nevertheless determined that the federal offense involved conduct that was "substantially similar" to the conduct described by, *inter alia*, the registration offense of attempted enticement of a child in violation of D.C. Code § 22-3010 and D.C. Code § 22-3018. *Id.* at 1104. Under that District offense, a person attempts to entice a "child"—defined as "a person who has not yet attained the age of 16 years," D.C. Code § 22-3001(3)—when that person, "being at least 4 years older than a child, [attempts to] take[] that child to any place, or entices, allures, or persuade[] a child to go to any place for the purpose of committing" an act of sexual abuse, D.C. Code § 22-3010.

[85] *In re Doe*, 855 A.2d at 1106.

[86] *Id.* (citing *German v. United States*, 525 A.2d 596, 606 n.20 (D.C. 1987) and LAFAVE, *supra* note 16, at 2 SUBST. CRIM. L. § 11.5).

[87] *In re Doe*, 855 A.2d at 1106. These principles are also recognized in the commentary to § 7.101 of the District's criminal jury instructions, which observes that "factual impossibility, where the intended substantive crime is impossible of accomplishment merely because of some physical impossibility unknown to the defendant, is not a defense" under District law, while "legal impossibility"—that is, "where a defendant's objective 'is to do something that is not a crime'"—is the only form of impossibility that may constitute an offense under District law.

[88] *See supra* notes 16-21 and accompanying text.

The DCCA answered this question in the negative, stating that—consistent with the general rule governing factual impossibility—the court had "no reason to think that it would be a defense in the District of Columbia to a charge of attempted enticement of a child that the defendant was fooled because his target was in reality an undercover law enforcement officer."[89] After all, as the *In re Doe* court reasoned, "[w]hether the targeted victim is a child or an undercover agent, the defendant's conduct, intent, culpability, and dangerousness are all exactly the same."[90]

The broad rejection of an impossibility defense reflected in *In re Doe* is similarly in accordance with older DCCA case law construing drug statutes. For example, in *Seeney v. United States*, the DCCA clarified that "the defense of impossibility is not available to one charged with the crime of attempted [narcotics offenses] under the District of Columbia Code."[91] Which is to say, as the DCCA further clarified in *Fields v. United States*, that proof of "the defendant's belief that he was dealing in controlled substances," rather than proof that the substances implicated are in fact controlled substances, will suffice to establish an attempt conviction in this context.[92]

Also consistent with a broad rejection of an impossibility defense under District law are two District statutes, trafficking in stolen property (TSP) and receiving stolen property (RSP), which seem to legislatively endorse a similar approach to that reflected in the foregoing cases.[93] More specifically, under each statute, convictions for the completed offenses of TSP and RSP may rest on a mistaken belief that property at issue was stolen, even if it wasn't stolen (as is the case in sting operations), and, therefore, consummation of the target harm was practically impossible. This is articulated, *inter alia*, through identical provisions clarifying that for each offense "[i]t shall not be a defense . . . [that] the property was not in fact stolen, if the accused engages in conduct which would constitute the crime if the attendant circumstances were as the accused believed them to be." [94]

It's important to note that while the foregoing authorities indicate that District law reflects what the DCCA has deemed "[t]he modern and better rule . . . [that] impossibility is not a defense when the defendant's actual intent (not limited by the true facts unknown to him) was to do an act or bring about a result proscribed by law,"[95] there is one aspect of District law that potentially complicates the foregoing analysis. This is the well-established requirement of reasonable adaptation.

Originally articulated by the DCCA in *Jones v. United States* alongside the court's endorsement of the dangerous proximity test, this requirement entails proof that

[89] *In re Doe*, 855 A.2d at 1106.
[90] *Id.*
[91] 563 A.2d 1081, 1083 (D.C. 1989).
[92] 952 A.2d 859, 865 (D.C. 2008).
[93] *See* D.C. Code § 22-3231(b) ("A person commits the offense of trafficking in stolen property if, on 2 or more separate occasions, that person traffics in stolen property, knowing or having reason to believe that the property has been stolen"); D.C. Code § 22-3232(a) ("A person commits the offense of receiving stolen property if that person buys, receives, possesses, or obtains control of stolen property, knowing or having reason to believe that the property was stolen.").
[94] D.C. Code § 22-3231(c); D.C. Code § 22-3232(b); *see also German*, 525 A.2d at 607 (noting that, with respect to RSP, the "same acts could be punished under [the District's general] attempt statute" even without the foregoing subjective specification reflected in D.C. Code § 22-3232(b), on the grounds that impossibility is not a defense to an attempt charge).
[95] *In re Doe*, 855 A.2d at 1106 (quoting LAFAVE, *supra* note 16, at 2 SUBST. CRIM. L. § 11.5).

the defendant's conduct have been "reasonably adapted to the accomplishment of [the target offense]."[96] Since *Jones*, this "reasonably adapted" language has been recited in many DCCA attempt opinions.[97] And it is also a central part of the District's jury instructions on attempts.[98]

Notwithstanding its pervasiveness, however, neither any published DCCA opinion nor the commentary to the District's criminal jury instructions appears to explain the significance of the requirement. Instead, all that District authority reveals is that: (1) the reasonable adaptation requirement seems to be part of the conduct requirement of an attempt; and (2) that it is most important where impossibility—such as, for example, attempted drug prosecutions premised upon the defendant's belief that the object possessed was a controlled substance—is at issue.[99]

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[96] More specifically, the DCCA in *Jones v. United States* endorsed the formulation provided in "Criminal Jury Instructions for the District of Columbia, No. 4.04 (2d ed. 1972)" which read:

> An attempt consists of an act which is done with the intent to commit a particular crime and is reasonably adapted to the accomplishment of that end. The act must go beyond mere preparation and must carry the criminal venture forward to within dangerous proximity of the criminal end sought to be attained.

386 A.2d 308, 312 (D.C. 1978).

[97] *See, e.g.*, *Seeney v. United States*, 563 A.2d 1081, 1083 (D.C. 1989); *Robinson*, 608 A.2d at 116; *Johnson*, 756 A.2d at 464; *Thompson v. United States*, 678 A.2d 24, 27 (D.C. 1996); *Williams v. United States*, 966 A.2d 844, 848 (D.C. 2009); *Doreus v. United States*, 964 A.2d 154, 158 (D.C. 2009); *Corbin v. United States*, 120 A.3d 588, 602 n.20 (D.C. 2015)

[98] As section 7.101 of the District's criminal jury instructions reads:

> The elements of the crime of attempted [specify crime], each of which the government must prove beyond a reasonable doubt, are that . . . . **[Name of defendant] did an act reasonably adapted to accomplishing the crime of [specify crime].**

[99] For example, in *Seeney v. United States*, the DCCA determined that the "defense of impossibility is not available to one charged with the crime of attempted possession with intent to distribute controlled substances under the District of Columbia Code." 563 A.2d at 1083. Which in turn led the court to hold the following:

> With respect to the offense of *attempted* possession with intent to distribute . . . it is not necessary to establish that the substance a defendant attempted to possess was the proscribed substance. The government must establish conduct by the defendant that is reasonably adapted to the accomplishment of the crime of possession of the proscribed substance, and the requisite criminal intent.

Id. Thereafter, in *Thompson v. United States* the DCCA held that:

> [The foregoing] rule, applied in *Seeney* to attempted PWID, is equally applicable to a case involving attempted distribution . . . In an attempt case involving a purported illegal drug, what *Seeney* teaches is that the government is not required to prove the identity of the substance in question, but rather conduct by the defendant that is reasonably adapted to the accomplishment of the crime of [distribution] and the requisite criminal intent . . . This is no different from what must be proved in any case in which the defendant is charged with an attempt to commit a crime: an intent to commit the crime and the performance of some act toward its commission.

Both of the foregoing general propositions are consistent with common law authorities, which more clearly describe the requirement as a limitation on the general rejection of a factual impossibility defense to an attempt charge. As one commentator summarizes the common law approach: where "the means employed are not reasonably adapted to carry out" the actor's intent to commit a crime, an attempt conviction is not justified "for in such case there can be no damage or danger of damage."[100] This means, for example, that if a person attempts to kill another by "invok[ing] witchcraft, charms, incantations, maledictions, hexing or voodoo," such conduct "cannot constitute an attempt to murder since the means employed are not in any way adapted to accomplish the intended result."[101] Nor, according to the same reasoning, can "[s]triking a man with a small switch [] constitute an attempt to murder him."[102]

To be sure, there's no DCCA case law specifically addressing these kinds of issues. However, this is not surprising since attempt prosecutions premised upon "inherently impossible" attempts of this nature "seldom confront the courts."[103] Nevertheless, the DCCA has affirmatively upheld attempt convictions in impossibility cases based upon the premise that the defendant's conduct *was* reasonably adapted to completion of an offense.[104] The implication, then, is that where a defendant's conduct is *not* reasonably adapted to completion of an offense—as would be the case with attempted murder by means of witchcraft—attempt liability could not attach.[105]

Paragraph (a)(3) codifies the foregoing District authorities in a manner that better clarifies the interrelationship of the relevant principles. First, subparagraph (a)(3)(A) incorporates what the DCCA has deemed "[t]he modern and better" approach to impossibility, namely, to recognize that "impossibility is not a defense [to a charge of criminal attempt] when the defendant's actual intent (not limited by the true facts unknown to him) was to do an act or bring about a result proscribed by law."[106] It does so, however, in an accessible and simple manner: rather than relying on confusing classification-based distinctions between legal and factual impossibility, the critical issue is whether the person's conduct satisfied the dangerous proximity standard when the situation is viewed as the actor perceived it.

Second, subparagraph (a)(3)(B) places an important, if narrow, limitation on the dangerous proximity requirement: the person's conduct must, at minimum, be "reasonably adapted to completion of the offense." Consistent with relevant DCCA case law and the common law underpinnings of the reasonable adaptation requirement, this

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678 A.2d at 27.

[100] Edwin R. Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 469 (1954).

[101] *Id.* at 470 (collecting citations).

[102] *Id.*

[103] LAFAVE, *supra* note 16, at 2 SUBST. CRIM. L. § 11.5.

[104] *See, e.g.*, *Seeney*, 563 A.2d at 1083; *Thompson*, 678 A.2d at 27.

[105] This conclusion is also consistent with the DCCA's policy rationale for generally rejecting impossibility defenses. For example, in *In re Doe*, the DCCA rejected an impossibility defense on the rationale that "[w]hether the targeted victim is a child or an undercover agent, the defendant's conduct, intent, culpability, and dangerousness are all exactly the same." 855 A.2d at 1106. Where, however, a person attempts to commit a crime by means not otherwise reasonably adapted to commission of the target offense—for example, where the defendant's sole means of enticing a child is by performing a witchcraft ceremony in his own home—this rationale does not hold since the person's conduct and dangerousness seem qualitatively different.

[106] *In re Doe*, 855 A.2d at 1106 (quoting LAFAVE, *supra* note 16, at 2 SUBST. CRIM. L. § 11.5).

language demands that there exist some minimum correspondence between the accused's criminal plans and the objective sought to be achieved. Where, in contrast, this correspondence is lacking—such as where the defendant has engaged in an inherently impossible attempt—liability cannot attach.

RCC § 22E-301(c): Relation to Current District Law on Relationship Between Completed Offense and Attempt. Subsection (c) codifies, clarifies, and fills in a gap reflected in District law governing the relationship between a completed offense and a criminal attempt.

The D.C. Code is silent on the relationship between the elements of an attempt and the elements of a completed offense, which has effectively submitted the topic to the discretion of the DCCA.[107] The relevant case law establishes that the government may secure an attempt conviction based upon proof that the target offense was actually completed. Subsection (c) expressly codifies this legal proposition.

Under DCCA case law, it is well-established that "a person charged with an attempt to commit a crime may be convicted even though the evidence shows a completed offense, not merely an attempt.'"[108] This policy, as promulgated by the DCCA, is understood to rest on two basic underlying principles: (1) "failure is not an essential element of criminal attempt"[109]; and (2) "[a]n attempt is a lesser-included offense of the completed crime."[110]

The DCCA's general policy of allowing proof of a completed offense to substitute for proof of an attempt is widely accepted in other jurisdictions.[111] So too is the first rationale offered by the DCCA in support of this policy; it is well established that proof of failure is not a necessary element of an attempt.[112] More problematic, however, is the DCCA's second rationale: that proof of a completed offense may substitute for proof of an attempt *because* an attempt is a lesser-included offense (LIO) of the completed crime

At the heart of the issue is the legal standard by which the DCCA determines when one offense is an LIO of another offense, the so-called elements test. [113] Under the elements test, the DCCA analyzes "whether the statutory elements of the lesser offense are contained within those of the greater charged offense."[114] Which is to say that one offense is an LIO of another offense when (and only when) "the greater offense cannot be

[107] Note, however, that D.C. Super. Ct. R. Crim. P. 31(c) establishes that: "A defendant may be found guilty of any of the following: (1) an offense necessarily included in the offense charged; (2) an attempt to commit the offense charged; or (3) an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right."
[108] *Evans v. United States*, 779 A.2d 891, 894 (D.C. 2001); *see, e.g., United States v. Fleming*, 215 A.2d 839 (D.C. 1966); *Ray v. United States*, 575 A.2d 1196, 1199–200 (D.C. 1990).
[109] *Evans*, 779 A.2d at 894; *see, e.g., In re Doe*, 855 A.2d 1100, 1107 (D.C. 2004); *Ray*, 575 A.2d at 1199–200 (citing *United States v. Dupree*, 544 F.2d 1050, 1052 (9th Cir.1976) and *United States v. Jacobs*, 632 F.2d 695, 697 (7th Cir. 1980)).
[110] *Evans*, 779 A.2d at 894; *see, e.g., Ray*, 575 A.2d at 1199; *Washington v. United States*, 965 A.2d 35, 42 (D.C. 2009).
[111] *See* authorities cited *supra* note 27.
[112] *See* authorities cited *supra* note 27.
[113] *See, e.g., Mungo v. United States*, 772 A.2d 240, 245 (D.C. 2001); *Pixley v. United States*, 692 A.2d 438, 440 (D.C. 1997); *see Schmuck v. United States*, 489 U.S. 705, 716 (1989).
[114] *Mungo*, 772 A.2d at 245.

committed without also committing the lesser."[115] In practice, "the determination [of] whether an offense is a 'lesser included' offense of an allegedly 'greater' offense is made by comparing the statutory elements of the two offenses," without regard to the facts of a case.[116]

Viewed through the elements test, an attempt often will be an LIO of the completed offense, but not always, assuming it is subject to a principle of culpable mental state elevation. Under this principle, the government must prove that the accused acted with the intent to cause any result required by the target offense, regardless of whether a lower culpable mental state, such as recklessness or negligence, will suffice to establish the completed offense.[117] Based solely on a comparison of statutory elements, then, it is not always the case that an attempt—occasionally subject to a higher culpable mental state—is an LIO of the completed offense under a principle of culpable mental state elevation.[118]

In accordance with the following analysis, the DCCA's reliance on the elements test has produced a line of cases that appear to reject a principle of culpable mental state elevation applicable to attempts in the interests of ensuring that proof of a completed offense can substitute for proof of an attempt.[119]

Illustrative is *United States v. Smith*.[120] The defendant in *Smith* was prosecuted for attempted second-degree child cruelty on a theory that the defendant recklessly committed the *completed* offense.[121] On appeal, the defendant argued that, in light of the fact that an attempt was charged, "the government was required, but failed, to prove that he specifically intended to injure his child" pursuant to a principle of culpable mental state elevation.[122] The DCCA ultimately rejected this argument, deeming that "the intent required to commit the crime of attempt can be no greater than the intent required to commit the completed crime."[123] "To hold otherwise," after all, would "create the anomalous result that appellant could be convicted of the completed crime . . . but, on the same facts, could not be convicted of an attempt to commit that same crime."[124]

Viewed in context, the holding in *Smith* (and comparable cases) is not surprising.[125] Assuming the practice of allowing proof of the completed offense to suffice for an attempt rests upon a strict comparison of the statutory elements alone, then

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[115] *Warner v. United States*, 124 A.3d 79, 85 (D.C. 2015).
[116] *Id.*; *see also Mungo*, 772 A.2d at 245 ("Although simple assault is not defined by the statute, analysis under the 'elements" test for lesser-included offenses is still appropriate and the elements to be examined are those found in the common law definition of assault.")
[117] *See supra* Commentary on RCC §§ 301(a)(1)-(2): Explanatory Note.
[118] *See, e.g.*, WAYNE R. LAFAVE & GERALD ISRAEL, 6 CRIM. PROC. § 24.8(e) (4th ed. Westlaw 2017).
[119] *See supra* RCC §§ 301(a) and (b): Relation to Current District Law on Culpable Mental State Requirement.
[120] 813 A.2d 216, 219 (D.C. 2002).
[121] *See id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] The DCCA has likewise relied on similar reasoning to uphold convictions for attempts to commit so-called general intent crimes, such as simple assault and threats, based upon facts indicating that the completed offense had been committed—but in the absence of proof of an elevated mental state beyond the "general intent" necessary for the underlying offense. *See Ray v. United States*, 575 A.2d 1196, 199 (D.C. 1990); *Jones v. United States*, 124 A.3d 127, 129-31 (D.C. 2015).

application of a principle of culpable mental state elevation would indeed be problematic. At the same time, however, application of the principle of *culpable mental state* equivalency implied in these cases in a broader context is even more problematic. Were it true, for example, that "the intent required to commit the crime of attempt can be no greater than the intent required to commit the completed crime,"[126] regardless of the situation, then attempt charges premised on theories of recklessness, negligence, or even strict liability would be viable in the District. And this in turn would provide for expansive liability in derogation of both DCCA case law and nearly universal national legal trends.[127]

Fortunately, the foregoing tension is easily resolvable by adopting a statutory provision clarifying that proof of the completed offense is an explicitly authorized means of proving an attempt. By establishing that the elements of the completed offense constitute a viable alternative basis for establishing attempt liability, this kind of legislative statement obviates the relevant LIO-related complications arising in cases where the government seeks to prove an attempt—otherwise subject to a generally applicable principle of culpable mental state elevation, see RCC § 22E-301(b)—with evidence of the completed offense. Consistent with the interests of clarity, consistency, and the preservation of current District law, then, subsection (c) provides this legislative statement.

RCC § 22E-301(d): Relation to Current District Law on Attempt Penalties. Subsection (d) establishes a uniform and proportionate grading scheme for criminal attempts, which clarifies, simplifies, and changes District law.

The D.C. Code's general attempt penalty statute, D.C. Code § 22-1803, establishes a default penalty framework for attempt offenses comprised of two basic rules.[128] First, attempts to commit offenses other than "crimes of violence" are punishable by a maximum of 180 days incarceration, $1000 fine, or both.[129] And second, attempts to commit "crimes of violence"[130] are punishable by a maximum of 5 years incarceration, $12,500 fine, or both.[131]

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[126] *Evans*, 779 A.2d at 894.

[127] *See, e.g.*, Model Penal Code § 5.01, cmt. at 304 ("[T]he scope of the criminal law would be unduly extended if one could be liable for an attempt whenever he recklessly or negligently created a risk of any result whose actual occurrence would lead to criminal responsibility."); Michaels, *supra* note 25, at 1033 (observing that such treatment would open the "floodgates to attempt liability"); LAFAVE, *supra* note 16, at 2 SUBST. CRIM. L. § 11.3 ("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."); Commentary on Haw. Rev. Stat. § 705-500 ("Reckless driving . . . does not constitute attempted manslaughter."); *State v. Holbron*, 904 P.2d 912, 920, 930 (Haw. 1995) ("We agree with the rest of the Anglo-American jurisprudential world that there can be no attempt to commit involuntary manslaughter.").

[128] D.C. Code § 22-1803 ("Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both.").

[129] *See* D.C. Code § 22-3571.01(4) (setting fines at "$1,000 if the offense is punishable by imprisonment for 180 days, or 6 months, or less but more than 90 days").

[130] D.C. Code § 23-1331(4) ("The term 'crime of violence' means aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill,

The District's general attempt penalty statute also explicitly recognizes an exception to these two default rules: any attempt offense "made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901" (hereafter, "1901 Code") is subject to the penalties specified in the relevant statutory provisions.[132] This reflects the fact that the 1901 Code explicitly made several kinds of attempts punishable in a manner different from the default penalty, which at the time was set at one-year imprisonment or a $1,000 fine, or both.[133]

For example, two common felonies in the 1901 Code were defined in a manner that effectively punished attempted versions of the offense the same as completed versions of the offense, namely, attempted arson,[134] and attempted malicious destruction of property.[135] And attempted robbery had its own statutory provision subject to a penalty in derogation from the default rule.[136] Accompanying these three explicit exceptions to the 1901 Code's default penalty rule for criminal attempts were three implicit exceptions: "assault-with-intent to" (AWI) crimes,[137] which were enacted to

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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.").

[131] *See* D.C. Code § 22-3571.01(6) (setting fines at "$12,500 if the offense is punishable by imprisonment for 5 years or less but more than one year").

[132] D.C. Code § 22-1803.

[133] *See* D.C. Code § 906 (1901); Act of March 3, 1901, ch. 19, § 906, 31 Stat. 1321, 1337 ("Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by this chapter [Chapter 19], shall be punished by a fine not exceeding one thousand dollars or by imprisonment for not more than one year, or both."). Since being enacted in 1901, the District's general attempt penalty statute has undergone two substantive policy revisions. Most importantly, in 1994, the D.C. Council amended it to establish separate default penalty rules for attempts to commit non-violent crimes—subject to a maximum of 180 days incarceration and/or a $1000 fine—and for attempts to commit violent crimes—subject to a maximum 5 years incarceration and/or a $5,000 fine. *See* OMNIBUS CRIMINAL JUSTICE REFORM AMENDMENT ACT OF 1994, 1994 District of Columbia Laws 10-151 (Act 10–238), sec. 105, § 906 (1994). These changes occurred as part of a larger effort to increase judicial case processing by reducing the penalties for more than 40 offenses to make them non-jury demandable (i.e., subject only to a bench trial by a judge rather than a jury) under D.C. Code § 22-705. *See* CHAIRMAN OF THE COMMITTEE ON THE JUDICIARY, JAMES E. NATHANSON, *Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994*, at 3-4 (January 26, 1994) [hereinafter *Judiciary Committee Report*]. Supported by both the D.C. Superior Court and Office of the United States Attorney, the 1994 Act was intended to "relieve pressure on current misdemeanor calendars, allow for more cases to be heard by hearing commissioners, and allow for more felony cases to be scheduled at an earlier date." *Id.* Subsequently, in 2012, the D.C. Council raised the maximum fine for attempts to commit violent crimes from $5,000 to $12,500 consistent with the Criminal Fine Proportionality Amendment Act. *See* CRIMINAL FINE PROPORTIONALITY AMENDMENT ACT of 2012, 2012 District of Columbia Laws 19-317 (Act 19-641), sec. 101 (2012); *see also* D.C. Code § 22-1803; D.C. Code § 22-3571.01.

[134] D.C. Code § 820 (1901); Act of March 3, 1901, ch. 19, § 820.

[135] D.C. Code § 848 (1901); Act of March 3, 1901, ch. 19, § 848; *see also* D.C. Code § 824 (1901); Act of March 3, 1901, ch. 19, § 824 (unlawful entry of property).

[136] D.C. Code § 811 (1901); Act of March 3, 1901, ch. 19, § 811.

[137] *See* D.C. Code §§ 804-06 (1901); Act of March 3, 1901, ch. 19, §§ 804-06.

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."[138]

The 1901 Code's explicit and implicit statutory exceptions to the default penalty for attempts have undergone little or no change to date.[139] At the same time, many other offense-specific exceptions to the general attempt penalty statute have been added to the D.C. Code over the last century.

Some of these exceptions are communicated through the penalty provisions governing attempts to commit individual or certain groupings of offenses. Illustrative provisions include the D.C. Code provisions setting forth penalties for attempts to commit: (1) various human trafficking related offenses[140]; (2) various sexual abuse-related offenses[141]; (3) various drug-related offenses[142]; (4) manufacture or possession of a weapon of mass destruction[143]; and (5) use, dissemination, or detonation of a weapon of mass destruction.[144]

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[138] *Perry v. United States*, 36 A.3d 799, 809 (D.C. 2011). These AWI offenses effectively created a complementary form of attempt liability, which subjected actors to greater punishment for unconsummated conduct that reached the point of an assault. Both AWIs and criminal attempts punish an unconsummated intent to commit a criminal offense; the only difference is that, whereas a criminal attempt requires proof of conduct that is dangerously close to committing that offense, an AWI offense requires proof of a simple assault.

[139] Like the 1901 Code's attempted arson, malicious destruction of property, and robbery provisions, the 1901 Code's AWI offenses also still "remain on the books to this day" in essentially the same form. *Perry*, 36 A.3d at 810-11. First, there is D.C. Code § 22-401—the current version of § 803 of the 1901 Code—which subjects "any assault with intent to kill or to commit first degree sexual abuse, second degree sexual abuse, or child sexual abuse, or to commit robbery . . . . to imprisonment for not less than 2 years or more than 15 years." Second, there is D.C. Code § 22-402—the current version of § 804 of the 1901 Code—which subjects any "assault with intent to commit mayhem . . . . to imprisonment for not more than 10 years." And third, there is D.C. Code § 22-403—the current version of § 805 of the 1901 Code—which subjects an "assault[] with intent to commit any other offense . . . . [to] not more than 5 years." Only minor modifications have been made to these offenses since their enactment. For example, §§ 804 and 805 of the 1901 Code are essentially identical to §§ 22-402 and 403 of the current D.C. Code. And § 803 of the 1901 Code, currently reflected in D.C. Code § 22-401, has only been lightly revised: the offense of assault with intent to commit "rape" has been replaced with the related offenses of assault with intent to commit first degree sexual abuse, assault with intent to commit second degree sexual abuse, and assault with intent to commit child sexual abuse. Other than that, the AWI offenses currently contained in Title 22 are substantively the same as those enacted in 1901.

[140] *See* D.C. Code § 22-1837(d) ("Whoever attempts to violate § 22-1832, § 22-1833, § 22-1834, § 22-1835 or § 22-1836 shall be fined not more than 1/2 the maximum fine otherwise authorized for the offense, imprisoned for not more than 1/2 the maximum term otherwise authorized for the offense, or both.")

[141] *See* D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.")

[142] *See* D.C. Code § 48-904.09 ("Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

[143] *See* D.C. Code § 22-3154(b) ("A person who attempts or conspires to manufacture or possess a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries to multiple persons, or massive destruction of property may, upon conviction, be punished by imprisonment for not more than 30 years.")

[144] *See* D.C. Code Ann. § 22-3155(b) ("A person who attempts or conspires to use, disseminate, or detonate a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries to multiple

Other exceptions to the general attempt penalty statute are communicated through incorporation of the term "attempts" into the definition of a given offense, effectively providing that an attempt to commit that offense is subject to the same punishment as the completed offense.[145] Illustrative provisions in the D.C. Code include the statutory definitions of (1) enticing a child or minor,[146] (2) voter fraud,[147] and (3) public assistance fraud.[148]

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persons, or massive destruction of property may, upon conviction, be punished by imprisonment for not more than 30 years.").

[145] These fully inchoate attempt offenses are to be distinguished from the District's partially inchoate attempt offenses, which incorporate the term "attempt" into a statutory definition, but apply it to only some of the elements in that offense, such as the District's carjacking statute. *See* D.C. Code § 22-2803 (a)(1) ("A person commits the offense of carjacking if, by any means, that person knowingly or recklessly by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, or attempts to do so, shall take from another person immediate actual possession of a person's motor vehicle."); *see also Corbin v. United States*, 120 A.3d 588 (D.C. 2015) (interpreting the phrase "or attempts to do so" to apply only to the force or violence requirement, such that proof that the defendant actually took the vehicle is necessary for a conviction brought under this statute (rather than attempted carjacking, brought under the District's general attempt statute)). Other statutes potentially subject to this kind of partially inchoate reading include: D.C. Code § 22-851 (Protection of district public officials); D.C. Code § 22-1211 (Tampering with a detection device); D.C. Code § 22-1404 (Falsely impersonating public officer or minister); D.C. Code § 22-1409 (Use of official insignia; penalty for unauthorized use); D.C. Code § 22-1713 (Corrupt influence in connection with athletic contests); D.C. Code § 22-1835 (Unlawful conduct with respect to documents in furtherance of human trafficking); D.C. Code § 22-1836 (Benefitting financially from human trafficking); D.C. Code § 22-2707 (Procuring; receiving money or other valuable thing for arranging assignation); D.C. Code § 22-3237.02 (Identity theft); D.C. Code § 22-3251 (Extortion); D.C. Code § 22-3535(f) (Voyeurism); and D.C. Code § 50-2201.05b (Fleeing from law enforcement).

[146] *See* D.C. Code § 22-3010(a) ("Whoever, being at least 4 years older than a child or being in a significant relationship with a minor . . . 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 shall be imprisoned for not more than 5 years or may be fined not more than the amount set forth in § 22-3571.01, or both."); D.C. Code § 22-3010(b)("Whoever, being at least 4 years older than the purported age of a person who represents himself or herself to be a child, attempts (1) to seduce, entice, allure, convince, or persuade any person who represents himself or herself to be a child to engage in a sexual act or contact . . . shall be imprisoned for not more than 5 years or may be fined not more than the amount set forth in § 22-3571.01, or both.").

[147] *See* D.C. Code § 1-1001.14(a) ("Any person who shall register, or attempt to register, or vote or attempt to vote under the provisions of this subchapter and make any false representations as to his or her qualifications for registering or voting or for holding elective office, or be guilty of violating § 1-1001.07(d)(2)(D), § 1-1001.09, § 1-1001.12, or § 1-1001.13 or be guilty of bribery or intimidation of any voter at an election, or being registered, shall vote or attempt to vote more than once in any election so held, or shall purloin or secrete any of the votes cast in an election, or attempt to vote in an election held by a political party other than that to which he or she has declared himself or herself to be affiliated, or, if employed in the counting of votes in any election held pursuant to this subchapter, knowingly make a false report in regard thereto, and every candidate, person, or official of any political committee who shall knowingly make any expenditure or contribution in violation of subchapter I of Chapter 11 of this title, shall, upon conviction, be fined not more than $10,000 or be imprisoned not more than 5 years, or both.").

[148] *See* D.C. Code § 4-218.01(a) ("Any person who, with the intent to defraud, by means of false statement, failure to disclose information, or impersonation, or by other fraudulent device, obtains or attempts to obtain or any person who knowingly aids or abets such person in the obtaining or attempting to obtain: (1) any grant or payment of public assistance to which he is not entitled; (2) a larger amount of public assistance than that to which he or she is entitled; (3) payment of any forfeited grant of public assistance; or (4) a public assistance identification card; or any person who with intent to defraud the District aids or abets in the buying or in any way disposing of the real property of a recipient of public assistance shall be

Collectively, the District's "patchwork of attempt statutes"[149] presents two main problems: (1) it lacks a consistent grading principle; and (2) it is confusingly communicated. With respect to the first problem, at least three fundamentally different grading patterns appear to be reflected in the penalties governing attempts to commit both crimes of violence and non-violent crimes under the D.C. Code.

The first grading pattern, which might be referred to as a "substantial punishment discount," is reflected in the numerous District attempt offenses subject to statutory maxima that are many orders of magnitude below the statutory maxima governing the completed offense. Most often, this kind of substantial punishment discount is produced by a straightforward application of the general attempt penalty statute's default rules.[150]

A substantial penalty discount is perhaps most clearly reflected in the grading of attempts to commit various non-violent crimes. For example, whereas the statutory maxima for felony property offenses such as first degree theft,[151] first[152] and second degree[153] fraud, first degree receiving stolen property,[154] first degree financial exploitation of a vulnerable adult or elderly person,[155] unauthorized use of a motor

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guilty of a misdemeanor and shall be sentenced to pay a fine of not more than $500, or to imprisonment not to exceed one year, or both.").

[149] 1978 D.C. Code Rev. § 22-201 cmt. at 113.

[150] As noted above, the relevant legislative history underlying the Omnibus Criminal Justice Reform Amendment Act of 1994 indicates that the default rule for non-crimes of violence was set at 180 days to ensure they were non-jury demandable, and, therefore, to increase judicial efficiency. *See Judiciary Committee Report*, *supra* note 133, at 3-4 (noting that the act was intended to "relieve pressure on current misdemeanor calendars, allow for more cases to be heard by hearing commissioners, and allow for more felony cases to be scheduled at an earlier date"). At first glance, this seems to explain the substantial punishment discount applied to grade attempts to commit non-crimes of violence. As discussed below, however, the penalties governing many attempts to commit non-crimes of violence under the D.C. Code reflect fundamentally different grading patterns—namely, a proportionate punishment variance or equalized punishment. Likewise, the penalties governing attempts to commit crimes of violence under the D.C. Code also reflect all three of these fundamentally different grading patterns.

[151] D.C. Code § 22-3212(a) ("Any person convicted of theft in the first degree shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 10 years, or both, if the value of the property obtained or used is $1,000 or more.").

[152] D.C. Code § 22-3221(a)(1) ("Any person convicted of fraud in the first degree shall be fined not more than the amount set forth in § 22-3571.01 or twice the value of the property obtained or lost, whichever is greater, or imprisoned for not more than 10 years, or both, if the value of the property obtained or lost is $1,000 or more . . . .").

[153] D.C. Code § 22-3221(b)(1) ("Any person convicted of fraud in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or twice the value of the property which was the object of the scheme or systematic course of conduct, whichever is greater, or imprisoned for not more than 3 years, or both, if the value of the property which was the object of the scheme or systematic course of conduct is $1,000 or more . . . .").

[154] D.C. Code § 22-3232(c)(1) ("Any person convicted of receiving stolen property shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 7 years, or both, if the value of the stolen property is $1,000 or more.").

[155] D.C. Code § 22-936.01(a) ("Any person who commits the offense of financial exploitation of a vulnerable adult or elderly person in violation of § 22-933.01 shall be subject to the following criminal penalties . . . When the value of the property or legal obligation is $1,000 or more, a fine of not more than the amount set forth in § 22-3571.01, or imprisonment for not more than 10 years, or both.").

vehicle,[156] and blackmail[157] (not involving a threat of violence[158]) range between 5 and 10 years, an attempt to commit any of those offenses is subject to the 180 day default rule governing attempts to commit non-crimes of violence under the general attempt penalty statute.[159] Likewise, the 10 year statutory maxima applicable to second degree cruelty to children[160] as well as the 20 year statutory maximum applicable to felony threats[161] are also reduced to 180 days under the first default rule.[162] (Neither of these offenses is a crime of violence.[163])

A pattern of substantial punishment discounting also can be seen in the penalties governing a wide range of attempts to commit crimes of violence. For example, whereas first-degree murder[164] and second-degree murder[165] are both potentially subject to a sentence of life in prison under the D.C. Code, an attempt to commit either of those offenses is subject to 5 year default rule governing attempts to commit crimes of violence under the general attempt penalty statute.[166] Likewise, the 30 year statutory maxima applicable to kidnapping[167] and first degree burglary,[168] as well as the 15 year statutory maxima applicable to first degree cruelty to children[169] and second degree burglary[170] are

[156] D.C. Code § 22-3215(d)(1) ("[A] person convicted of unauthorized use of a motor vehicle under subsection (b) of this section shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 5 years, or both.").
[157] D.C. Code § 22-3252 (b) ("Any person convicted of blackmail shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 5 years, or both.").
[158] *See* D.C. Code § 23-1331(4).
[159] D.C. Code § 22-1803.
[160] D.C. Code § 22-1101(b)(2) ("Any person convicted of cruelty to children in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 10 years, or both.").
[161] D.C. Code § 22-1810 ("Whoever threatens within the District of Columbia to kidnap any person or to injure the person of another or physically damage the property of any person or of another person, in whole or in part, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 20 years, or both.").
[162] *See* D.C. Code § 22-1803.
[163] *See* D.C. Code § 23-1331(4).
[164] D.C. Code § 22-2104(a)("The punishment for murder in the first degree shall be not less than 30 years nor more than life imprisonment without release . . . .").
[165] D.C. Code § 22-2104(c) ("Whoever is guilty of murder in the second degree shall be sentenced to a period of incarceration of not more than life . . . .").
[166] *See* D.C. Code § 22-1803. Note, however, that the District's most severe AWI statute partially softens this discount by applying a 15 year statutory maximum to attempted murders that progress to the point of an assault. *See* D.C. Code § 22-401.
[167] D.C. Code § 22-2001 ("Whoever shall be guilty of, or of aiding or abetting in, seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever, and holding or detaining, or with the intent to hold or detain, such individual for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction thereof, be punished by imprisonment for not more than 30 years.").
[168] D.C. Code § 22-801(a) ("Burglary in the first degree shall be punished by imprisonment for not less than 5 years nor more than 30 years.").
[169] D.C. Code § 22-1101(c)(1) ("Any person convicted of cruelty to children in the first degree shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 15 years, or both.").
[170] D.C. Code § 22-801(b) ("Burglary in the second degree shall be punished by imprisonment for not less than 2 years nor more than 15 years.").

also reduced to 5 years under the second default rule.[171] And the District's stand-alone attempted robbery statute effectively reduces the 15 year statutory maximum applicable to the completed offense[172] to 3 years for an attempt.[173]

These substantially discounted attempt penalties are to be contrasted with those that reflect a grading pattern that might be referred as "equal punishment," namely, they subject attempts to the same statutory maximum governing the completed offense. The D.C. Code is comprised of numerous attempt offenses that effectively equalize the sanction for attempts, though the D.C. Council has authorized this outcome in a variety of ways.

Most explicit is the District's semi-general penalty provision for drug crimes, D.C. Code § 48-904.09, which broadly states that all attempted drug crimes may be punished as seriously as completed drug crimes.[174] In practical effect, this means that, *inter alia*, an attempt to manufacture, distribute, or possess, with intent to manufacture or distribute, a Schedule I or II controlled substance is subject to the same 30 statutory maximum governing the completed offense.[175]

A pattern of equal punishment is also apparent in those District offenses that statutorily incorporate the term "attempts" into their statutory definition. This includes property offenses such as arson[176] malicious destruction of property,[177] and extortion[178]

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[171] *See* D.C. Code § 22-1803.

[172] D.C. Code § 22-2801 ("Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than 2 years nor more than 15 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[173] D.C. Code § 22-2802 ("Whoever attempts to commit robbery, as defined in § 22-2801, by an overt act, shall be imprisoned for not more than 3 years or be fined not more than the amount set forth in § 22-3571.01, or both.").

[174] D.C. Code § 48-904.09 ("Any person who attempts . . . to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt . . . .")

[175] *See* D.C. Code § 48-904.01(2)(A) ("Any person who violates this subsection with respect to . . . A controlled substance classified in Schedule I or II that is a narcotic or abusive drug shall be imprisoned for not more than 30 years or fined not more than the amount set forth in § 22-3571.01, or both.").

[176] D.C. Code § 22-301 ("Whoever shall maliciously burn or attempt to burn any dwelling, or house, barn, or stable adjoining thereto, or any store, barn, or outhouse, or any shop, office, stable, store, warehouse, or any other building, or any steamboat, vessel, canal boat, or other watercraft, or any railroad car, the property, in whole or in part, of another person, or any church, meetinghouse, schoolhouse, or any of the public buildings in the District, belonging to the United States or to the District of Columbia, shall suffer imprisonment for not less than 1 year nor more than 10 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[177] D.C. Code § 22-303 ("Whoever maliciously injures or breaks or destroys, or attempts to injure or break or destroy, by fire or otherwise, any public or private property, whether real or personal, not his or her own, of the value of $1,000 or more, shall be fined not more than the amount set forth in § 22-3571.01 or shall be imprisoned for not more than 10 years, or both, and if the property has some value shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both.").

[178] D.C. Code §§ 22-3251(a)-(b) ("A person commits the offense of extortion if . . . That person obtains or attempts to obtain the property of another with the other's consent which was induced by wrongful use of actual or threatened force or violence or by wrongful threat of economic injury; or . . . That person obtains or attempts to obtain property of another with the other's consent which was obtained under color or pretense of official right . . . Any person convicted of extortion shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 10 years, or both.").

all of which, by virtue of incorporating the term attempts into their offense definition, subject attempts to the same 10 year statutory maximum applicable to the completed offense.[179] It also includes prison escape[180] and enticing a child[181] which ensure, through similar means, that attempts to commit those offenses are subject to the same 5 year statutory maxima governing the completed versions of those offenses.[182]

A great many other District attempt offenses exhibit a pattern of equal punishment through more convoluted means. For example, the District's while armed enhancement applies the same flat 30 year statutory maximum add-on to numerous crimes, without regard to whether the underlying crime is completed or merely attempted, through the D.C. Code's definition of "crimes of violence" and "dangerous crimes."[183] In addition,

[179] Arson is a crime of violence, MDP is not a crime of violence, and extortion is sometimes a crime of violence. *See* D.C. Code § 23-1331(4).

[180] D.C. Code §§ 22-2601(a)-(b) ("No person shall escape or attempt to escape from [specified institutions] . . . . 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 . . . .").

[181] D.C. Code § 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 shall be imprisoned for not more than 5 years or may be fined not more than the amount set forth in § 22-3571.01, or both."); D.C. Code § 22-3010(b) ("Whoever, being at least 4 years older than the purported age of a person who represents himself or herself to be a child, attempts (1) to seduce, entice, allure, convince, or persuade any person who represents himself or herself to be a child to engage in a sexual act or contact, or (2) to entice, allure, convince, or persuade any person who represents himself or herself to be a child to go to any place for the purpose of engaging in a sexual act or contact shall be imprisoned for not more than 5 years or may be fined not more than the amount set forth in § 22-3571.01, or both.").

[182] *See also* D.C. Code § 22-3302(a)(1) ("Any person who, without lawful authority, shall enter, or attempt to enter, any private dwelling, building, or other property, or part of such dwelling, building, or other property, against the will of the lawful occupant or of the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on the demand of the lawful occupant, or of the person lawfully in charge thereof, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than the amount set forth in § 22-3571.01, imprisonment for not more than 180 days, or both.").

[183] More specifically, D.C. Code § 22–4502(a)(1) establishes that anyone who commits a violent or dangerous crime:

> May, if such person is convicted for the first time of having so committed a crime of violence, or a dangerous crime in the District of Columbia, be sentenced, in addition to the penalty provided for such crime, to a period of imprisonment which may be up to, and including, 30 years for all offenses . . . and shall, if convicted of such offenses while armed with any pistol or firearm, be imprisoned for a mandatory-minimum term of not less than 5 years . . . .

See also D.C. Code § 22-2803(b)(1) ("A person commits the offense of armed carjacking if that person, while armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, dirk, bowie knife, butcher knife, switch-blade knife, razor, blackjack, billy, or metallic or other false knuckles), commits or attempts to commit the offense of carjacking.").

attempts to commit the least severe forms of theft,[184] fraud,[185] receiving stolen property,[186] financial exploitation of a vulnerable adult or elderly person,[187] and assault[188] are all subject to the same penalty as the completed offense by virtue of the default 180 day rule applicable to non-violent crimes in the general attempt statute.[189] And similarly, an attempt to commit blackmail[190]—when committed in a manner so as to render it a crime of violence[191]—is subject to the same statutory maximum applicable to the completed offense pursuant to the 5 year default rule governing crimes of violence under the general attempt statute.[192]

Perhaps most confusingly and contradictory, however, is that equal punishment appears in a handful of District statutes which, textually speaking, authorize attempts to be punished *more severely* than the completed offense. For example, whereas the completed version of assault with significant bodily injury is subject to a 3 year statutory maximum,[193] an attempt to commit that offense appears to be subject to a statutory maxima of 5 years pursuant to the general attempt penalty statute's default rule for crimes of violence.[194] And whereas the completed versions of unlawful entry of a motor vehicle[195] and taking property without right[196] are subject to 90 days in prison, an attempt

[184] D.C. Code § 22-3212(b) ("Any person convicted of theft in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both, if the property obtained or used has some value.").

[185] D.C. Code § 22-3222(b)(2) ("Any person convicted of fraud in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both, if the property that was the object of the scheme or systematic course of conduct has some value.").

[186] D.C. Code § 22-3232(c)(2) ("Any person convicted of receiving stolen property shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both, if the stolen property has some value.").

[187] D.C. Code § 22-936.01(a)("Any person who commits the offense of financial exploitation of a vulnerable adult or elderly person in violation of § 22-933.01 shall be subject to the following criminal penalties . . . .

When the property or legal obligation has some value, a fine of not more than the amount set forth in § 22-3571.01, or imprisonment for not more than 180 days, or both.").

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

[189] *See* D.C. Code § 22-1803.

[190] D.C. Code §§ 22-3252(a)-(b) ("A person commits the offense of blackmail, if, with intent to obtain property of another or to cause another to do or refrain from doing any act, that person threatens [to do one of three kinds of acts] . . . . Any person convicted of blackmail shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 5 years, or both.").

[191] *See* D.C. Code § 23-1331(4).

[192] *See* D.C. Code § 22-1803.

[193] DC. Code § 22-404(a)(2) ("Whoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 3 years, or both.").

[194] *See* D.C. Code § 22-1803.

[195] D.C. Code § 22-1341 ("It is unlawful to enter or be inside of the motor vehicle of another person without the permission of the owner or person lawfully in charge of the motor vehicle. A person who violates this subsection shall, upon conviction, be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 90 days, or both.").

[196] D.C. Code § 22-3216 ("A person commits the offense of taking property without right if that person takes and carries away the property of another without right to do so. A person convicted of taking property

to commit either of those offenses appears to be subject to the 180 day default rule for non-violent crimes under the general attempt penalty statute.[197] Notwithstanding these textual anachronisms, however, District case law appears to preclude a defendant from receiving a sentence for an attempt greater than that authorized for the completed offense.[198] Consequently, these statutes also reflect a pattern of equal punishment.

The District's attempt statutes manifest one other important grading pattern, which is both harsher than a substantial punishment discount but more lenient than equal punishment—what might be referred to as a "proportionate punishment discount." This pattern is reflected in many of the District's more recent attempt offenses, which are subject to a statutory maximum that is pegged to, and is half as severe as, the statutory maximum applicable to the completed offense.

One illustrative example is the semi-general attempt penalty provision incorporated into the Anti-Sexual Abuse Act of 1994,[199] which sets attempt penalties at "1/2 of the maximum prison sentence authorized for the [completed] offense."[200] In practical effect, this applies a proportionate punishment discount to a wide range of sex offenses, including second,[201] third,[202] and fourth degree sexual abuse,[203] second degree child sexual abuse,[204] first[205] and second degree[206] sexual abuse of a minor, and first[207] and second degree[208] sexual abuse of a secondary education student.

Another illustrative example is the similar semi-general attempt penalty provision incorporated into the Prohibition Against Human Trafficking Amendment Act of 2010.[209] That provision also sets attempt penalties at "1/2 the maximum term otherwise authorized

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without right shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 90 days, or both.").

[197] *See* D.C. Code § 22-1803.

[198] In *United States v. Pearson*, the D.C. Municipal Court of Appeals indicated that where the maximum statutory penalty for attempt is higher than the penalty for the completed crime, the court cannot *sentence* the defendant to a penalty higher than the statutory maximum penalty for the completed offense. *United States v. Pearson*, 202 A.2d 392, 393-94 (D.C. 1964). Specifically, the court held that a defendant convicted of attempted petit larceny could not be sentenced to a higher penalty than the maximum penalty for the completed offense. The court declined to declare the attempt statute invalid but suggested that Congress may want to rewrite the penalties and suggested the statute's validity may come into question only where, unlike in *Pearson*, a defendant is sentenced to a greater penalty than the maximum for the completed offense. *Id.*

[199] *See* ANTI-SEXUAL ABUSE OF 1994, D.C. Law 10-257, § 217, 42 DCR 53 (May 23, 1995).

[200] *See* D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.")

[201] *See* D.C. Code § 22–3003.

[202] *See* D.C. Code § 22–3004.

[203] *See* D.C. Code § 22–3005.

[204] *See* D.C. Code § 22–3009.

[205] *See* D.C. Code § 22–3009.01.

[206] *See* D.C. Code § 22–3009.02.

[207] *See* D.C. Code § 22–3009.03.

[208] *See* D.C. Code § 22–3009.04.

[209] *See* PROHIBITION AGAINST HUMAN TRAFFICKING AMENDMENT ACT of 2010, D.C. Law 18-239, § 107, 57 DCR 5405 (October 23, 2010).

for the [completed] offense."[210] In practical effect, this applies a proportionate penalty discount to a wide range of human trafficking offenses, including attempts to commit forced labor,[211] trafficking in labor or commercial sex acts,[212] sex trafficking of children,[213] unlawful conduct with respect to documents in furtherance of human trafficking,[214] and benefitting financially from human trafficking.[215]

The D.C. Council has also, on occasion, applied a proportionate punishment discount to individual offenses through specific attempt penalty provisions. For example, the District's aggravated assault statute—enacted in 1994 as part of the Omnibus Criminal Justice Reform Amendment Act[216]—contains a specific attempt penalty provision halving the 10 year statutory maximum governing the completed offense to 5 years.[217]

Viewed as a whole, then, the District's approach to grading criminal attempts does not reflect any consistent principle of punishment: the D.C. Code manifests at least three fundamentally different patterns in how it grades attempts, without any discernible rationale for the variances. In practical effect, this produces a penalty scheme which authorizes the imposition of sentences that are, at least in relation to one another, quite disproportionate.

At the same time, these potential disproportionalities are not immediately apparent given the second fundamental flaw reflected in the District law of attempts, namely, its disorganized approach to codification. For example, notwithstanding the fact that the District's general attempt statute is worded in a way which suggests that the 1901 attempt penalty exceptions remain the only exceptions to the current default penalty rules, the reality is that the D.C. Code is littered with statutory attempt provisions that establish penalties in derogation from these rules. Further, the manner in which these exceptions are communicated is quite inconsistent: some are communicated through individual penalty provisions incorporated into a single offense; others are communicated through semi-general attempt penalty provisions that apply to groups of offenses; and still other exceptions are communicated by including the word "attempt" in the definition of the offense. And on top of all of this complexity rests the District's AWI offenses, which

[210] *Compare* D.C. Code § 22-1837(a)(1) ("[W]hoever violates § 22-1832, § 22-1833, or § 22-1834 shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 20 years, or both.") *with* D.C. Code § 22-1837(d) ("Whoever attempts to violate § 22-1832, § 22-1833, § 22-1834, § 22-1835 or § 22-1836 shall be fined not more than 1/2 the maximum fine otherwise authorized for the offense, imprisoned for not more than 1/2 the maximum term otherwise authorized for the offense, or both.")
[211] *See* D.C. Code § 22–1832.
[212] *See* D.C. Code § 22–1833.
[213] *See* D.C. Code § 22–1833.
[214] *See* D.C. Code § 22–1835.
[215] *See* D.C. Code § 22–1836.
[216] *See Perry v. United States*, 36 A.3d 799, 814 (D.C. 2011) (citing OMNIBUS CRIMINAL JUSTICE REFORM AMENDMENT ACT OF 1994, D.C. Law 10–151 (Aug. 20, 1994)).
[217] *Compare* D.C. Code § 22-404.01(b) ("Any person convicted of aggravated assault shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned for not more than 10 years, or both.") *with* D.C. Code § 22-404.01(c) ("Any person convicted of attempted aggravated assault shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned for not more than 5 years, or both.").

add yet another "unnecessary" layer of confusion to the grading of criminal attempts provided by the D.C. Code.[218]

RCC § 22E-301(d) endeavors to remedy these issues by establishing a clear and consistent approach to grading attempts, which renders offense penalties more proportionate. First, paragraph (d)(1) adopts a single generally applicable grading principle: a proportionate penalty discount under which the statutory maximum and fine for an attempt is set at one-half of the statutory maximum and fine of the completed offense.[219] This general principle is supplemented by paragraph (d)(2), which expressly recognizes the possibility of offense-specific exceptions to be clearly articulated in a single general provision incorporated into the General Part.

The effect of this penalty scheme on current District law varies depending on the scope, gradations, and classifications applied to individual revised offenses. In some instances, the attempt penalties reflected in the RCC are more severe than those applied by the current D.C. Code for comparable conduct.[220] In other instances, however, the penalties are less severe.[221] And in still other offenses, the penalties are approximately similar.[222]

For those current District attempt offenses subject to a substantial punishment discount, the RCC penalty scheme allows for the imposition of sentences for criminal attempts that are significantly greater than those presently authorized under current District law. Illustrative are attempts to commit various non-violent offenses such as first degree theft, first and second degree fraud, first degree receiving stolen property, first degree financial exploitation of a vulnerable adult or elderly person which are, under current District law, misdemeanors subject to statutory maxima of 180 days. Under RCC § 22E-301(d)(1), in contrast, the authorized sentence must be measured in years, particularly where the target property is valuable.[223]

This increase in authorized punishment will also apply to attempts to commit various violent offenses that are currently subject to a substantial punishment discount under District law. Illustrative are attempts to commit first-degree murder and second-degree murder, which, under current District law, are subject to a statutory maxima of 5 years under D.C. Code § 22-1803.[224] Under RCC § 22E-301(d)(1), in contrast, the

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[218] As the DCCA observed in *Perry v. United States*, AWI offenses have been rendered "unnecessary" by the "[m]odern grading of attempt according to the gravity of the underlying offense." *Perry*, 36 A.3d at 825 (citation and quotation omitted). As discussed below, AWI offenses were originally created to supplement the "relatively trivial sanctions" afforded by criminal attempt offenses employed at common law. Model Penal Code § 211.1 cmt. at 181-82. Since then, however, the District, along with every other jurisdiction in America, has come to realize that attempts can themselves be graded more seriously, contingent upon the severity of the target offense. LAFAVE, *supra* note 16, at 2 SUBST. CRIM. L. § 16.2.

[219] The Explanatory Notes, *supra*, further clarify that, for purposes of paragraph (d)(1) 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."

[220] [RESERVED].

[221] [RESERVED].

[222] [RESERVED]. Notably, under both D.C. Code § 22-3571.01 and RCC § 22E-804, fines are generally cut in half whenever penalties are cut in half. Therefore, the halving of fines provided for in RCC § 22E-301(c)(1) is consistent with, and generally reflects, current District law.

[223] [RESERVED].

[224] [RESERVED]. Note, however, that the District's most severe AWI statute partially fills this gap by applying a 15 year statutory maximum to attempted murders that progress to the point of an assault. *See*

authorized punishments for attempts to commit these offenses will be increased significantly.[225]

By contrast, the penalties for current District attempt offenses subject to equal punishment would be lower under RCC § 22E-301(d)(1). This decrease in punishment applies to attempts to commit various non-violent offenses, such as malicious destruction of property and simple assault, which now penalize attempts the same as completed offenses.[226] And it also applies to attempts to commit various violent offenses, such as attempted arson and assault with significant bodily injury. Under RCC § 22E-301(d)(1), in contrast, the maximum authorized punishment for these attempt offenses is effectively cut in half.

To the extent the RCC penalty scheme changes current District law, the changes enhance the proportionality of the District's statutorily authorized punishments. These changes also generally accord with nationwide legal trends.[227] And to the extent that the D.C. Council has, in many of its more recently enacted statutes, applied a proportionate punishment discount, they are supported by current District law. Finally, under RCC § 22E-301(d)(2), exceptions to the consistent punishment of criminal attempts are clearly stated.[228]

D.C. Code § 22-401. Importantly, though, many attempted murders may not reach that level of progress. As the Maryland Court of Appeals has observed:

> Because the overt act necessary for an attempt is frequently an assault, the two crimes have a significant overlap. But the overlap is not complete, because an overt act can qualify as an attempt and yet not rise to the level of an assault. For example, an attempted poisoning would qualify as attempted murder, but it would not be an assault, especially if the poison did not come in contact with the victim. The law of assault crystallizing at a much earlier day than the law of criminal attempt in general, is much more literal in its requirement of "dangerous proximity to success" (actual or apparent) than is the law in regard to an attempt to commit an offense other than battery.

Hardy v. State, 482 A.2d 474, 477 (1984).

[225] [RESERVED]. Practically speaking, the severity of this increase would be mitigated by the repeal of AWI offenses, which afford a more serious penalty to what practically amounts to an attempt to commit some of these offenses.

[226] [RESERVED].

[227] *See supra* note 29.

[228] Which is also consistent with national legal trends. *See supra* note 30.

RCC § 22E-302. Criminal Solicitation.

Explanatory Notes. Section 302 provides a comprehensive statement of general solicitation liability under the RCC.[1] This statement: (1) establishes the culpable mental state requirement and conduct requirement of a criminal solicitation; (2) addresses the import of an uncommunicated solicitation; and (3) specifies the penalties applicable to a criminal solicitation. Section 302 replaces the District's current general solicitation statute, D.C. Code § 22-2107.

The prefatory clause of subsection (a) establishes that a criminal solicitation necessarily incorporates "the culpability required by [the target] offense."[2] Pursuant to this principle, a defendant may not be convicted of a criminal solicitation absent proof that he or she acted with, at minimum, the culpable mental state(s)—in addition to any broader aspect of culpability[3]—required to establish that offense.[4]

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[1] Many of the same conceptual and policy issues addressed in this commentary entry are also discussed—sometimes more comprehensively—in the commentary accompanying criminal conspiracy, RCC § 22E-303.

[2] *See, e.g.*, Model Penal Code § 5.02(1) (government must prove that the defendant "acted with the kind of culpability otherwise required for commission of the crime"); *Mizrahi v. Gonzales*, 492 F.3d 156, 160–61 (2d Cir. 2007) ("[Culpability] of solicitation cannot be determined . . . except by reference to the statutory definition of the object crime."); WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.3(a) (3d ed. Westlaw 2019) ("[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.") (citing *Porter v. State*, 455 Md. 220, 166 A.3d 1044 (2017) (because murder requires proof of malice, solicitation of murder also requires proof of malice)).

[3] The term "culpability" includes, but also goes beyond, the culpable mental state requirement governing an offense. *See* RCC § 22E-201(d) (culpability requirement defined). For example, if the target offense requires proof of premeditation, deliberation, or the absence of any mitigating circumstances, the government is still required to prove these broader aspects of culpability to secure a conviction. *See* RCC § 22E-201(d)(3) ("'Culpability requirement' includes . . . Any other aspect of culpability specifically required by an offense."); *id.*, at Explanatory Notes (noting that "premeditation, deliberation, and absence of mitigating circumstances" would so qualify). And, of course, solicitation liability is subject to the same voluntariness requirement governing all offenses under RCC § 22E-203(a). *See* RCC § 22E-201(d)(1) (voluntariness requirement also part of culpability requirement).

[4] This derivative culpable mental state requirement, which is drawn from the target offense, is to be distinguished from the independent culpable mental state requirement governing the command, request, or efforts at persuasion (hereinafter, "request") at issue in all solicitation prosecutions. *See infra* notes 18-24 and accompanying text.

Generally speaking, solicitation liability entails proof that the accused: (1) "intended," by his or her request, to have the solicitee engage in conduct planned to culminate in an offense; and (2) "intended," through that request, to bring about any result elements or circumstance elements that comprise the target offense. *See, e.g.*, Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 754–55 (1983); *State v. Garrison*, 40 S.W.3d 426, 432-34 (Tenn. 2000) (discussing dual intent requirements of solicitation).

To illustrate how these "dual intent" requirements fit together, consider the following scenario. Police receive a report that a janitor working at a District of Columbia government building, S, intends to murder a plain-clothes police officer, V, who is standing immediately outside the building's uncovered loading dock area conducting investigative work. According to this tip, S's plan is to have a large object thrown off the back end of the thirtieth floor balcony, thereby killing V upon impact. Soon thereafter, two officers arrive at the thirtieth floor balcony, at which point they hear S instruct a more junior janitor, X, to drop an old, out-of-use television off the right side of the balcony. Given that V is, in fact, located immediately below the right side of the balcony, the police immediately intercede, thereby preventing X from engaging in conduct that would result in death to V. If S later finds himself in D.C. Superior Court

Paragraph (a)(1) establishes the nature of the act required for general solicitation liability.[5] In so doing, it recognizes three types of attempted influence, each of which may satisfy section 302.[6] The first, and strongest, is a "command,"[7] which implies an order or direction, commonly by one with some authority over the other.[8] Less strong, but just as direct, is a "request,"[9] which occurs when one person explicitly asks another

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charged with soliciting the murder of a police officer, can he be convicted? The answer to this question depends upon whether S's state of mind fulfills both of the dual intent requirements governing general solicitation liability.

For example, if S had misspoken, and meant to instruct X to drop the old, out-of-use television off the *left* (rather than *right*) side of the balcony, below which there is an unaccompanied trash receptacle, then neither requirement is met: S did not intentionally request that X engage in conduct, which, if carried out, would have resulted in V's death; nor did S act with the intent that, through his request, anyone be killed, let alone a police officer.

Alternatively, if S did mean to ask X to drop the TV off the right side of the balcony, but was completely unaware that V (or any other person) was located below the drop point (e.g., because S believed another unaccompanied trash receptacle was located below the right side, too), then the first requirement is met: S intentionally requested that X engage in conduct, which, if carried out, would have resulted in V's death. But the second requirement is not met: S did not intend, through his request, to cause the death of anyone, let alone a police officer.

Lastly, if S had asked X to drop the TV off the right side of the balcony, while aware of V's presence below, in order to seek retribution against the same officer responsible for disrupting a drug conspiracy S was involved with years ago, then S fulfills both requirements: S intentionally requested that X engage in conduct, which, if carried out, would have resulted in V's death; and S also intended, through that request, to actually kill a police officer. (Note: if S intended to kill V but lacked awareness that V was a police officer, then the second intent requirement would not be met—although S intended to kill someone, S did not intend to kill a *police officer*.)

[5] Over the years, "[c]ourts, legislatures and commentators have utilized a great variety of words to describe the required acts for solicitation." LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1; *see, e.g.*, Model Penal Code § 5.02, cmt. at 372 n.25 (collecting different statutory formulations). That said, the essence of the crime is "trying to persuade another to commit a crime that the solicitor desires and intends to have committed." Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 29 (1989); *see* LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1 ("[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.").

[6] These varying forms of influence may, in turn, be communicated directly or by an intermediary, through words or gestures, via threats or promises, and occur either before or at the actual time the crime is being committed. It is therefore, immaterial, for purposes of solicitation liability, whether the rational or emotional support is communicated orally, in writing, or through other means of expression. *E,g.*, LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11 (well-established that "solicitation c[an] be committed by speech, writing, or nonverbal conduct); *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)"). Nor is proof of a "quid pro quo" between the solicitor and the party solicited necessary. *E,g.*, LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1; *Johnson*, 202 Or. App. at 483-84 (2005) (rejecting "the proposition that the state must prove that the solicitor offered the solicitee a quid pro quo").

[7] *See, e.g*, Model Penal Code § 5.02(1) (basing solicitation liability on a "command[]"); LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1(c) n.88 (collecting statutes in accordance).

[8] Such as, for example, where S, the mob boss, orders X, the loyal lieutenant, to kill V for his failure to make good on an outstanding debt owed to S. Note that "command" does not entail any actual influence on the recipient, so it would be immaterial for purposes of section 302 that X declined to follow through on the order to kill V. *See also* RCC § 22E-302(c) (addressing uncommunicated solicitations).

[9] *See, e.g*, Model Penal Code § 5.02(1) (basing solicitation liability on a "request[]"); LAFAVE, *supra* note 2, , at 2 SUBST. CRIM. L. § 11.1(c) n.88 (collecting statutes in accordance).

person to engage in specified conduct.[10] The third form of influence contemplated in paragraph (a)(1) is "tr[ying] to persuade,"[11] which covers less direct means of communication.[12]

Importantly, none of these forms of attempted influence entail proof that the solicitee *actually* agreed, consented, or was persuaded to engage in the solicited conduct,[13] let alone that any of the relevant parties (i.e., solicitor or solicitee) engaged in an overt act (or any other conduct) in furtherance of the solicitation.[14] Rather, under

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[10] Such as, for example, where S, the loyal lieutenant, asks X, the mob boss, to order a hit on V for his failure to make good on an outstanding debt to S. Note that "request" does not entail any actual influence on the recipient, so it would be immaterial for purposes of section 302 that X declined to grant S's request to kill V. *See also* RCC § 22E-302(c) (addressing uncommunicated solicitations).

[11] *See, e.g.*, Colo. Rev. Stat. § 18-2-301(1) (basing solicitation liability on an "attempt[] to persuade another person"); *State v. Jensen*, 164 Wash. 2d 943, 951 (2008) ([T]he *actus reus* . . . solicitation is an *attempt* to persuade another to commit a specific offense."); 1 NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 371 (1970) (attempt to persuade formulation should avoid liability in "equivocal situations too close to casual remarks or even to free speech"); *compare* Model Penal Code § 5.02(1) (basing solicitation liability on "encourage[ment]"); Model Penal Code § 5.02(1), cmt. at 372 ("'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."); *id.* at 372 n.25 (collecting statutes in support of both formulations).

[12] Such as, for example, where S, the cousin of mob boss X, sends X a letter with a comprehensive and detailed list of reasons of why X should order a hit on V, but which does not expressly request or command X to do so. Note that "trying to persuade" (in contrast to "persuades") does not entail any actual influence on the recipient, so it would be immaterial for purposes of section 302 that X was not, in fact, persuaded by S's case for killing V. *See also* RCC § 22E-302(c) (addressing uncommunicated solicitations).

[13] It is therefore immaterial under section 302 that the solicitee rejects the solicitation, 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. *E.g.*, LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 28.01 (6th ed. 2012). This is to be contrasted with the bilateral understanding of conspiracy reflected in section 303, which requires proof that the defendant "and at least one other person" actually agree to commit a crime. RCC § 22E-303(a). For example, if S asks X to engage in or aid the planning or commission of criminal conduct, and X agrees, then a criminal conspiracy has been formed under section 303. But if X doesn't agree, then there's no conspiracy between S and X under the RCC's bilateral approach. However, S is guilty of solicitation under section 302. *Compare Allen v. State*, 91 Md.App. 705, 605 A.2d 960 (1992) (observing that a "solicitee's acquiescence to a solicitation, even if lawfully made by an undercover agent, does not make the *solicitee* guilty of solicitation").

[14] *See, e.g., People v. Cheathem*, 658 N.Y.S.2d 84, 85 (1997); *People v. Burt*, 288 P.2d 503, 505 (Cal. 1955). For this reason, a criminal solicitation is "the most inchoate of the anticipatory offenses." LAFAVE, *supra* note 2, 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. The following analysis is illustrative:

> 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.

section 302, a solicitation is complete the moment the request, command, or efforts at persuasion has been expressed by the defendant.[15]

Paragraph (a)(1) also addresses three fundamental issues concerning the scope and applicability of general solicitation liability. The first relates to the relationship between solicitation and complicity, namely, whether soliciting another person to act as an accomplice provides the basis for general solicitation liability. Paragraph (a)(1) establishes, in relevant part, that general solicitation liability is appropriate under the RCC where the defendant asks another person to "aid the planning or commission" of criminal conduct.[16] This alternative formulation clarifies that solicitations to assist with or otherwise facilitate the planning or commission of a crime, no less than solicitations to directly engage in the requisite criminal conduct, provide an adequate basis for general solicitation liability, provided that the other requirements of section 302 are met.[17]

The second issue focuses on the relationship between the defendant's state of mind and the conduct being solicited.[18] Paragraph (a)(1) establishes, in relevant part, that general solicitation liability only applies to those who act with the purpose of bringing

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LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1.

[15] *See infra* notes 39-42 and accompanying text (discussing treatment of uncommunicated solicitations under subsection (c)).

[16] *See, e.g.*, Model Penal Code § 5.02(1)("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*.") (italics added); LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1 (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.").

[17] In this sense, solicitation liability runs parallel with conspiracy liability under section 303, which similarly criminalizes agreements to aid in the planning or commission of a crime. RCC § 22E-303(a)(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") (italics added); *see, e.g.*, Model Penal Code § 5.03(1)(b) (conspiracy liability where one person "agrees to *aid* [an]other person or persons in the planning or commission of [a] crime") (italics added); *Salinas v. United States*, 522 U.S. 52, 65 (1997) ("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.") (italics added).

[18] The nature of this relationship "is crucial to the resolution of the difficult problems presented when a charge of [solicitation or conspiracy] is leveled against a person whose relationship to a criminal plan is essentially peripheral":

> Typical is the case of the person who sells sugar to the producers of illicit whiskey. He 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. To be criminally liable, of course, he must at least have knowledge of the use to which the materials are being put, but 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. In this case conflicting interests are involved: 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.

Model Penal Code § 5.03, cmt. at 404.

about conduct planned to culminate in an offense.[19] This "purposive attitude" also constitutes the foundation of the culpability requirement governing both accomplice liability and the general inchoate crime of conspiracy.[20] It can be said to exist when a person, through his or her request, *consciously desires* to facilitate or promote conduct planned to culminate in an offense.[21]

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[19] *See, e.g.*, Model Penal Code § 5.02(1) (solicitation liability entails proof of must "the purpose of promoting or facilitating the commission of the crime"); *Id.*, Explanatory Note ("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 . . . "); LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1 ("Virtually 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).

This purpose requirement *does not* extend to whether the solicited conduct is, in fact, illegal or otherwise constitutes an offense. *See also* LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 13.2(c) (accomplice cannot "escape liability by showing he did not [*desire*] to aid a crime in the sense that he was unaware that the criminal law covered the conduct of the person he aided. Such is not the case, for here as well the general principle that ignorance of the law is no excuse prevails.").

[20] *See, e.g., United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (Hand, J.) ("[Every definition of complicity requires that the defendant in] some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used-even the most colorless, 'abet,' carry an implication of *purposive attitude* towards it.") (italics added); *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.), aff'd, 311 U.S. 205, 61 S. Ct. 204, 85 L. Ed. 128 (1940) (Hand, J.) ("There are indeed instances . . . where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; *but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive.* It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome.") (italics added); Model Penal Code § 5.02 cmt. at 371 (noting that the same purpose requirement governing complicity and conspiracy is also applicable to solicitation).

[21] *See generally* RCC § 22E-206(a) (purposely defined). The following scenario is illustrative. X is considering whether to rob a bank on his own, which would require a fast car and a small firearm, both of which X lacks. X relays his conundrum over the phone to his friend, S, who happens to own a vehicle and firearm of this nature. Having been informed of this, S proposes the following arrangement: S will lend X his car and gun in return for a ten percent stake in the profits from the bank robbery. X is initially uncertain about whether the robbery or arrangement is good idea, but S makes a very persuasive case for both positions. X asks for a few days to think about S's proposal, but soon thereafter the police—who had tapped A's phone, and thus overheard the conversation—arrest both S and X. On these facts, S may be held liable for solicitation because S, through his efforts at persuasion, consciously desired to facilitate and promote specific conduct, which, if carried out, would have constituted robbery.

That a solicitor must have the purpose to facilitate or promote conduct planned to culminate in an offense does not preclude convictions for knowledge-based theories of liability concerning the result elements of the target offense. The following example involving environmental activists S and X is illustrative. S asks X to help him blow up a coal-processing facility during the evening/afterhours when only a single person, the on-duty night guard, V, will be present. S is practically certain that V will die from the blast, though S would very much prefer that V not be injured. The police intercede soon after S communicates the request, thereby saving V's life. On these facts, S may be convicted of solicitation to commit (knowing) murder, premised on the fact that S's request was accompanied by: (1) a *desire* for X to aid conduct, which, if carried out, would have culminated in murder; and (2) S's *awareness as to a practical certainty* that such conduct would result in V's death. *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, 758 (1983) ("When causing a particular result is an element of the object offense and such result does not occur, the actor, to be liable for conspiracy under Subsection (1), must have the purpose or belief that the conduct contemplated by the agreement will cause such result."); Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 926 (1959)) ("[A] person may be held to intend that which is the *anticipated consequence* of a particular action to which he agrees[.]"); *but see also* Model Penal Code §

The corollary to this purpose requirement is that general solicitation liability is not supported under section 302 where a defendant's primary motive in making a request is to achieve some other, non-criminal objective (e.g., "conduct[ing] an otherwise lawful business in a profitable manner").[22] And this is so even if the defendant knew that his or her solicitation was likely to facilitate or promote a criminal scheme.[23] Neither awareness of, nor indifference towards, another person's criminal plans are sufficient to satisfy the purpose requirement incorporated into paragraph (a)(1).[24]

The third issue is the relevance of impossibility to general solicitation liability—i.e., the fact that the target offense cannot be consummated under the circumstances due

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5.03 cmt. at 408 ("[I]t would not be sufficient [for conspiracy], 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.").

[22] *See, e.g.*, *Falcone*, 109 F.2d at 581 (Hand, J.) ("[T]he law should not be broadened to punish those whose primary motive is to conduct an otherwise lawful business in a profitable manner" because this would "seriously undermin[e] lawful commerce."); Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 353 (1985) (absent a purpose requirement, the criminal law would "cast a pall on ordinary activity" by giving us reason to "fear criminal liability for what others might do simply because our actions made their acts more probable"); Model Penal Code § 5.03 cmt. at 406 (observing that "the complicity provisions of the Code" require "a purpose to advance the criminal end," and deeming "the case" for this resolution to be an "even stronger one" in the context of conspiracy, such that "[a] conspiracy does not exist [under the Code] if a provider of goods or services is aware of, but fails to share, another person's criminal purpose").

[23] The commentary accompanying 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.

Model Penal Code § 5.02 cmt. at 371.

[24] To illustrate, consider the following modified version of the scenario presented *supra* note 21. S is in dire need of money to pay for his sick child's medical bills, so he decides to sell his expensive sports car. S begins calling friends to see if anyone has interest in purchasing it, which would save S the time of listing it. S subsequently calls X. At the start of the conversation, X tells S that he is considering robbing a bank on his own, and will need a fast car to carry out the plan. S says that he thinks the envisioned robbery would be a terrible idea, but that, as it turns out, he was actually calling X to see if X had any interest in purchasing S's sports car, which would likely serve as an excellent get-away vehicle. S offers to sell X the car for market value, and X tentatively accepts subject to a later inspection. Soon thereafter, however, the police—who had tapped X's phone, and thus overheard the proposal—arrest both S and X. On these facts, S cannot be held liable for soliciting to commit robbery because, *inter alia*, A did not consciously desire to facilitate or promote X's criminal conduct. Instead, S's purpose was to raise money for his child's medical bills, and to save himself the hassle of having to list and sell the vehicle on his own. That S knew the sale of his car to X would facilitate the bank robbery, and was arguably indifferent as to X's criminal conduct, would not support liability under section 302.

to a mistake on behalf of the defendant.[25] Paragraph (a)(1) establishes, in relevant part, that solicitations to directly engage in or provide accessorial support to conduct that, if carried out, would merely constitute an "*attempt* to commit an offense" can also provide the basis for general solicitation liability.[26] This reference to attempts imports the broad

[25] The defendant in this kind of situation may admit that he or she possessed the requisite intent to commit that target offense and engaged in significant conduct, but nevertheless argue that impossibility of completion should by itself preclude the imposition of solicitation liability. *See, e.g.*, LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 13, at § 27.07. In resolving this claim, there are four general categories of impossibility that might be considered for evaluative purposes (i.e., these are not analytically perfect distinctions).

The first category is *pure factual impossibility*, which arises where the object of the solicitation cannot be consummated because of circumstances unknown to the solicitor or beyond his or her control. The following situations are illustrative: (1) S asks X to pickpocket V's jacket, believing it to contain valuable items, when it is actually empty; and (2) S asks X to shoot into the bedroom where V customarily sleeps, believing V to be there, when V is, in fact, on vacation.

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). The following situation is illustrative. S, a 50 year-old male, asks X to arrange a sexual encounter with Z, a 20 year-old woman. S knows X is 20; however, X also believes that the age of consent is 21—when, in fact, it is 18. Therefore, X believes himself to be soliciting aid for a statutory rape.

The third category is *hybrid impossibility*, which arises where the object of the solicitation constitutes a crime, 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. The following situations are illustrative: (1) S asks X to purchase property on the black market, believing it to be stolen, when, in fact, the property is part of a sting operation; and (2) S asks X to arrange consensual sexual relations with V, believing V to be a nine year-old child, when, in fact, V is an undercover police officer posing as a young child.

The fourth category of impossibility is *inherent impossibility*, which arises where one person solicits another to commit a crime by "employing means which a reasonable man would view as totally inappropriate to the objective sought." LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.5(a)(4). The following situations are illustrative: (1) S asks X to kill V via incantation or voodoo; (2) S asks X to perform sex acts with V, a manikin that S believes to be a 9 year-old child. *See* Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237, 244-45 (1995) (common denominator underlying inherent impossibility is that the defendant's "actions are so absurd or patently ineffective that the completion of the crime would always be impossible under the same set of circumstances").

It should be noted that the law of impossibility is relatively underdeveloped in the context of solicitation liability. *See, e.g.*, PAUL H. ROBINSON, 1 CRIM. L. DEF. § 85 (Westlaw 2019). 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 characterize attempt jurisprudence. LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.5. 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. *United States v. Williams*, 553 U.S. 285, 300 (2008).

[26] *See, e.g.*, Model Penal Code § 5.02(1) (solicitation liability where one person asks "another person to engage in specific conduct that would constitute such crime or *an attempt to commit such crime*") (italics added). Here's how the drafters of the Model Penal Code explain the significance of this language:

> It ordinarily should not be necessary to charge an actor with soliciting another to attempt to commit a crime, since a rational solicitation would seek not an unsuccessful effort but the completed crime; the charge, therefore, should be one of solicitation to commit the completed crime. But 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

abolition of impossibility claims employed in the RCC's general attempt provision into the solicitation context.[27] Under this approach, it is generally immaterial that the proposed criminal scheme could never have succeeded under the circumstances.[28] So long as the solicitor sought to bring about conduct that would have culminated in the target offense if "the situation was as [solicitor] perceived it" then solicitation liability may attach,[29] provided that the requested course of conduct was at least "reasonably adapted" to commission of the target offense.[30]

> 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.

Model Penal Code § 5.02, cmt. at 373-74; *see also* Model Penal Code § 5.03 cmt. at 421 ("[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 [the MPC's general attempt provision] if the contemplated conduct had occurred.").

[27] Under RCC § 22E-301(a)(3)(A)(ii), a person commits an attempt if, *inter alia*, he or she "engages in conduct that . . . [w]ould have come dangerously close to completing that offense if the situation was as the person perceived it." Subparagraph (a)(3)(B) thereafter adds that the person's conduct must have been "reasonably adapted to completion of that offense."

[28] *See* RCC § 22E-301(a), Explanatory Notes ("Reliance on the defendant's perspective renders the vast majority of impossibility claims immaterial by authorizing an attempt conviction under circumstances in which the person's conduct *would have been* dangerously close to committing an offense *had* the person's view of the situation been accurate.").

[29] RCC § 22E-301(a)(3)(A)(ii). Specifically, the subjective approach incorporated into subparagraph (a)(1)(B) renders pure factual and hybrid impossibility claims immaterial. *See supra* note 25 (defining these categories). For example, under the RCC it would not be a defense to solicitation to commit murder that: (1) the intended victim was already dead, provided that the solicitor mistakenly believed the person to be alive; or that (2) the murder weapon provided by the solicitor to the hit man was inoperable, provided that the solicitor mistakenly believed it be operable. Nor would it preclude liability for solicitation to commit murder under the RCC that: (1) the solicitee is *unable* to commit the target offense—such as, for example, when S sends a letter to a well-regarded hit man, X, soliciting the murder of V, only to discover that X is in a coma due to a near-fatal car accident; or that (2) the solicitee is *unwilling* to commit the target offense—such as, for example, when S asks X to commit a murder for hire, only to discover that X is an undercover officer merely posing as a willing participant in a criminal offense. *See, e.g.*, ROBINSON, *supra* note 25, at 1 CRIM. L. DEF. § 85 ("The modern trend, evident in most jurisdictions, is to reject both [forms of] impossibility as defenses."); *United States v. Devorkin*, 159 F.3d 465, 468 (9th Cir. 1998) ("It is not a defense" to solicitation that "the person solicited *could not commit the crime*, or . . . *would [not] have* committed the crime solicited.") (quoting LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1).

In contrast, pure legal impossibility remains a viable theory of defense under the RCC. *See supra* note 25 (defining this category). However, this does not hinge on RCC § 22E-301(a)(3)(A)(ii), or any other provision in section 301. Rather, the "underlying basis for acquittal is the principle of legality," which "provides that we should not punish people—no matter culpable or dangerous they are—for conduct that does not constitute the charged offense at the time of the action." DRESSLER, *supra* note 13, at § 27.07; *see* Model Penal Code § 5.01 cmt. at 318 ("[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.").

For example, "it is not a crime to throw even a [District of Columbia] steak into a garbage can." JEROME HALL, GENERAL PRINCIPLES OF THE CRIMINAL LAW 595 (2d ed. 1960). So if after losses against the Washington Nationals, the Oriole Bird, the Baltimore Orioles mascot, and Phillie Phanatic, the Philadelphia Phillies mascot, together place a local District steak in the garbage, neither is guilty of committing any offense. Nor could the Oriole Bird be convicted of soliciting an imaginary offense for asking the Phillie Phanatic to place a District steak in the garbage, although the Oriole Bird honestly

Paragraph (a)(2) addresses the target offenses subject to general solicitation liability. It establishes that only a "crime of violence," as defined elsewhere in the RCC, may provide the basis for general solicitation liability.[31] Solicitations that involve other forms of prohibited conduct (e.g., prostitution) may be criminalized under specific provisions in the RCC. But the general inchoate crime of solicitation codified in section 302 only applies to crimes of violence.[32] It should be noted, however, that whether the

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believed such conduct to be prohibited by the D.C. Code. *E.g.*, DRESSLER, *supra* note 13, at § 27.07 ("Just as a person may not ordinarily escape punishment on the ground that she is ignorant of a law's existence, it is also true that we cannot punish people under laws that are purely the figments of their guilty imaginations.").

Inherent impossibility also remains a viable (if exceedingly limited) theory of defense under the reasonable adaptation standard codified in paragraph (a)(2) of section 301. *See infra* note 30.

[30] RCC § 22E-301(a)(3)(B). As the Explanatory Notes accompanying subparagraph (a)(3)(B) of section 301 explain:

> This reasonable adaptation requirement is intended to limit attempt liability to those situations where there exists a basic correspondence between the defendant's conduct and the criminal objective sought to be achieved. Requiring the government to establish this basic correspondence both limits the risk that innocent conduct will be misconstrued as criminal and precludes convictions for inherently impossible attempts.

Id. (collecting District case law and national legal authority in support of this approach).

Inherent impossibility is an issue in solicitation prosecutions where S asks X to commit an offense by "employing means which a reasonable man would view as totally inappropriate to the objective sought." LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.5(a)(4); *see, e.g.*, John F. Preis, *Witch Doctors and Battleship Stalkers: The Edges of Exculpation in Entrapment Cases*, 52 VAND. L. REV. 1869, 1904 (1999) (recognition of inherent impossibility defense to attempt most strongly supported by relevant case law, statutes, and commentary); *compare* Model Penal Code § 5.05(2) (providing sentencing mitigation for a solicitation that "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 under this Section"). Conduct of this nature would not be "reasonably adapted" to completion of the target offense under subparagraph (a)(3)(B) of section 301, and, therefore, could constitute a (failure of proof) defense to solicitation liability under the RCC.

For example, the fact that the defendant in a solicitation to murder prosecution asked another person to kill the victim by pulling the trigger on a broken firearm that the defendant mistakenly believed to be operable would not call into question whether the defendant's conduct was reasonably adapted to the completion of murder. In contrast, the fact that the defendant in a solicitation to murder prosecution asked another person to kill the victim by shooting a fully functional firearm at a voodoo doll with the victim's picture attached to it would be relevant to evaluating the reasonable adaptation standard—and ultimately preclude the attachment of solicitation liability under section 302. *See, e.g.*, Edwin R. Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 470 (1954) (where the defendant "invokes witchcraft, charms, incantations, maledictions, hexing or voodoo," such conduct "cannot constitute an attempt to murder since the means employed are not in any way adapted to accomplish the intended result.") (collecting authorities).

[31] {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).}

[32] That section 302 only applies to crimes of violence is to be contrasted with sections 301 and 303 of the RCC, which respectively criminalize attempts and conspiracies to commit *any* criminal offense. *See* RCC §§ 22E-301(a), 303(a).

This limitation on general solicitation liability corresponds with the District's prior general solicitation statute, which similarly only applies to crimes of violence. *See Omnibus Public Safety Act of 2006*, 2006 DISTRICT OF COLUMBIA LAWS 16-306 (Act 16–482), as added Apr. 24, 2007, D.C. Law 16-306, § 209, 53 DCR 8610 ("Whoever is guilty of soliciting a crime of violence as defined by § 23-1331(4),

conduct solicited actually qualifies as a crime of violence under the RCC is a matter of fact for which an actor is strictly liable (i.e., without regard to his or her awareness).

Subsection (b) provides additional clarity concerning the culpable mental state requirement governing a criminal solicitation as it relates to the results and circumstances of the target offense.[33] Whereas the prefatory clause of subsection (a) generally clarifies

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whether or not such crime occurs, shall be sentenced to a period of imprisonment not exceeding 10 years, a fine not more than the amount set forth in § 22-3571.01, or both."). The limitation also respects the fact that solicitation is, given its status as the "most inchoate of the anticipatory offenses," a particularly "controversial offense." *E.g.*, LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1 (quoting *State v. Jensen*, 164 Wash.2d 943, 195 P.3d 512 (2008); DRESSLER, *supra* note 13, at § 28.01.

Some have argued, 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." LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1(b); *see* Robbins, *supra* note 5, at 116 ("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."). The "extremely inchoate nature of the crime" has also lead others to question general solicitation liability on the basis that it essentially "punish[es] evil intent alone." Robbins, *supra* note 5, at 116; *see* DRESSLER, *supra* note 13, at § 28.01 ("According to Glanville Williams, the purpose of the offense is to enable police to 'nip criminal tendencies in the bud.' In fact, however, his metaphor would be more accurate if he had stated that its purpose is to nip criminal tendencies at the stem."). And finally, even those who generally support expansive 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 even more pronounced in the solicitation context given that "the crime may be committed merely by speaking." LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1(b); *see, e.g.*, *People v. Lubow*, 29 N.Y.2d 58, 66, 272 N.E.2d 331 (1971) ("[T]here are dangers in the misinterpretation of innuendos or remarks which could be taken as invitations to commit sexual offenses."); WORKING PAPERS, *supra* note 11, 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.").

The controversial nature of solicitation liability is also reflected in national legal trends. Although the drafters of the Model Penal Code recommended criminalizing solicitations to commit "any offense" under section 5.02(1) of the MPC, "[t]he majority of jurisdictions only regard as criminal the solicitation of the more serious crimes." Commentary on Haw. Rev. Stat. Ann. § 705-510. More broadly, there remains considerable variation in American criminal codes concerning the scope and availability of general solicitation liability.

> Even in those jurisdictions with modern recodifications, it is not uncommon for there to be no statute making solicitation a crime, [and in] those states with solicitation statutes, there is considerable variation in their coverage. Some extend to the solicitation of all crimes, some only the solicitation of felonies, particular classes of felonies, or all felonies plus particular classes of misdemeanors, and one only the solicitation of certain specified offenses.

LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1(a); *see id.* ("This suggests, as does language in some of the reported cases, that there is not a uniformity of opinion on the necessity of declaring criminal the soliciting of others to commit offenses.").

Limiting general solicitation liability to crimes of violence, as was previously the case under District law, sensibly reconciles these policy considerations and diverse national legal trends.

[33] It should be noted that "[c]ase law is almost nonexistent" on the culpable mental state issues addressed by subsection (b), while their treatment by modern criminal statutes is almost always unclear. Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1166 (1997). This is due, at least in part, to the fact that the Model Penal Code's general solicitation provision "deliberately le[aves] open" the relevant culpability issues addressed by subsection (b) for

that a solicitation conviction entails proof that the defendant acted with a level of culpability that is no less demanding than that required by the target offense, subsection (b) specifically establishes that the defendant must: (1) "[i]ntend to cause any result element required by that offense"[34]; and (2) "[i]ntend for any circumstance element required by that offense to exist."[35] In effect, subsection (b) incorporates dual principles

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judicial resolution. Model Penal Code § 5.02(1), cmt. at 371 n.23. As the Model Penal Code commentary highlights:

> 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. [The Model Penal Code does not resolve these issues in either context.]

Id.

In the absence of much legal authority on these issues in the context of solicitation, the best indicator of national legal trends is the more ample legal authority on these issues in the context of conspiracy, which is a very similar form of general inchoate liability. *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."); *State v. Carr*, 110 A.3d 829, 835 (N.H. 2015) (criminal solicitation constitutes an "attempted conspiracy"). That said, legal authority on complicity is also relevant given that solicitation provides one of two bases (abetting) for holding someone criminally responsible as an accomplice. *E.g.*, LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1. Some of these legal authorities are cited *infra* notes 34-35; however, a more extensive overview and analysis can be found in the Explanatory Notes accompanying RCC §§ 22E-303(b) and 210(b).

[34] LAFAVE, *supra* note 2, 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."); *see generally, e.g.*, DRESSLER, *supra* note 13, at § 28.01 ("A person is not guilty of solicitation unless he intentionally commits the *actus reus* of the inchoate offense—he intentionally invites, requests, commands, hires, or encourages another to commit a crime—with the specific intent that the other person consummate the solicited crime."); *Mizrahi v. Gonzales*, 492 F.3d 156 (2d Cir. 2007) ("[T]he specific intent element of solicitation cannot be determined . . . except by reference to the statutory definition of the object crime."); *see also, e.g.*, RCC § 22E-303(b) (applying same culpability principle general conspiracy liability); LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 12.2(c) ("[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."); *State v. Donohue*, 150 N.H. 180, 184, 834 A.2d 253, 256 (2003) (deeming this position to be well-established, and collecting authorities in accordance).

To illustrate, suppose that S asks X 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. S is not guilty of solicitation to commit murder, however, because he only intended to destroy the building, rather than the death of another person. DRESSLER, *supra* note 13, at § 29.05(B) (providing similar illustration in the context of conspiracy liability) (citing *State v. Beccia*, 505 A.2d 683, 684 (Conn. 1986) (holding that conspiracy to commit reckless arson is not a cognizable offense)); *see, e.g.*, LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1 ("[I]f B were to engage in criminally negligent conduct which caused the death of C, then B would be guilty of manslaughter; but it would not be a criminal solicitation to commit murder or manslaughter for A to request B to engage in such conduct unless A did so for the purpose of causing C's death.").

[35] Commentary on Haw. Rev. Stat. Ann. §§ 705-510, 520 ("[The general solicitation statute] makes clear that, with respect to the culpability of the defendant, the defendant must act with the intent to promote or facilitate the commission of a crime," which language in the conspiracy context "requires an awareness on

of culpable mental state elevation[36] applicable whenever the target offense is comprised of a result or circumstance element that may be satisfied by proof of a non-intentional mental state (i.e., recklessness or negligence), or none at all (i.e., strict liability).[37]

To satisfy the first principle, codified in paragraph (b)(1), the government must prove that the defendant's purposeful solicitation was accompanied by a *practically certain belief* that the requested course of conduct would cause the result element(s) required by the target offense, or, alternatively, by a *conscious desire* for that course of conduct to cause the result(s). Similarly, to satisfy the second principle, codified in paragraph (b)(2), the government must prove that the defendant's purposeful solicitation was accompanied by a *practically certain belief* that the circumstance element(s) incorporated into the target offense exist, or, alternatively, by a *conscious desire* for the requisite circumstance(s) to exist.[38]

Subsection (c) addresses the import of an uncommunicated solicitation, which arises when the intended recipient of the defendant's command, request, or efforts at

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the part of the conspirator that the circumstances exist"); *see generally, e.g.*, DRESSLER, *supra* note 13, at § 28.01 ("A person is not guilty of solicitation unless he intentionally commits the *actus reus* of the inchoate offense—he intentionally invites, requests, commands, hires, or encourages another to commit a crime—with the specific intent that the other person consummate the solicited crime."); *Mizrahi*, 492 F.3d at 156 ("[T]he specific intent element of solicitation cannot be determined . . . except by reference to the statutory definition of the object crime."); *see also, e.g.*, RCC §§ 22E-210(b), 303(b) (applying same culpability principle to accomplice liability and general conspiracy liability); *Rosemond v. United States*, 134 S. Ct. 1240, 1242 (2014) ("[A]iding and abetting requires intent extending to the whole crime . . . . That requirement is satisfied when a person actively participates in a criminal venture with *full knowledge of the circumstances* constituting the charged offense.") (italics added); *State v. Pond*, 315 Conn. 451, 484, 108 A.3d 1083, 1102 (2015) (deeming intent elevation as to circumstances to be well-established in the context of conspiracy liability, and collecting authorities in accordance).

To illustrate how this principle operates in the context of a strict liability crime, consider the following scenario involving two twenty one year-old male college students, S and X. One evening, X tells S that he met a girl, V, at a sorority party who, after being shown a picture of S, expressed interest in having sexual intercourse. In response, S asks X if he'd be willing to call the girl over, and lend S his college dorm to facilitate the sexual engagement. Both S and X reasonably believe that V is a 20 year-old college student; however, V is actually a fourteen year-old minor visiting her older (of age) sister. If S actually has sex with V, and is subsequently prosecuted for a strict liability sexual abuse offense applicable to fourteen year-old victims, S can be convicted notwithstanding his mistake of fact. However, if S does not have sex with her, and is instead prosecuted for soliciting X to aid in S's commission of statutory rape, the same mistake of fact would exonerate S under subsection (b) notwithstanding the strict liability nature of the target offense. Although S purposely asked X to aid S in his sexual rendezvous with V (a minor), S lacked the *intent* for X to aid sex with *a fourteen year old*, which would be required by the principle of culpable mental state elevation codified by subsection (b).

[36] Note that for those target offenses that already require proof of intent, knowledge, or purpose as to any result or circumstance element, subsection (b) does not elevate the applicable culpable mental state for a solicitation charge.

[37] Importantly, neither of these principles of culpable mental state elevation precludes the government from charging solicitations to commit target offenses comprised of result or circumstance elements subject to recklessness, negligence, or strict liability. However, to secure a solicitation conviction for such offenses, proof that the solicitor acted with the intent to cause every result and circumstance element that constitutes the target offense is necessary.

[38] When formulating jury instructions for a solicitation to commit a target offense subject to a culpable mental state of knowledge (whether as to a result or circumstance element), the term "intent," as defined in RCC § 22E-206(b), should instead be substituted for the term knowledge. This substitution is appropriate given that the term "knowledge" can be misleading in the context of inchoate offenses—whereas the substantively identical term "intent" is not. *See* RCC § 22E-206(b), Explanatory Notes.

persuasion never receives the message due to external factors (e.g., police interference or carrier malfeasance).[39] Under subsection (c), the fact that the message is never received is generally "immaterial" for purposes of solicitation liability.[40] There is, however, one important limitation placed on this principle: the person must have "done everything he or she plans to do to transmit the message."[41] The latter proviso requires proof that, where an uncommunicated solicitation is at issue, the defendant engaged in the last proximate act necessary to transmit the message.[42]

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[39] Note 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. Or, 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—that is, 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—that is, the person was unable to carry out the entirety of his criminal plans due to external interference. Subsection (c) authorizes solicitation liability in the first, but not the second, situation. *See infra* notes 41-42 and accompanying text.

[40] *See, e.g.*, LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1(c) ("What if 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? The act is nonetheless criminal . . . .").

[41] *See, e.g.*, Model Penal Code § 5.02(2) ("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."). In support of this approach, the drafters of the Model Penal Code argue: that:

> [T]he last proximate act to effect communication with the party whom the actor intends to solicit should be required before liability attaches on this ground. Conduct falling short of the last act should be excluded because it is too remote from the completed crime to manifest sufficient firmness of purpose by the actor. The crucial manifestation of dangerousness lies in the endeavor to communicate the incriminating message to another person, it being wholly fortuitous whether the message was actually received. Liability should attach, therefore, even though the message is not received by the contemplated recipient, and should also attach even though further conduct might be required on the solicitor's part before the party solicited could proceed to the crime.

Model Penal Code § 5.02, cmt. at 381; *see* LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1(c) ("Liability properly attaches under these circumstances, as the solicitor has manifested his dangerousness and should not escape punishment because of a fortuitous event beyond his control."); *compare infra* note 43 (critiquing this dangerousness rationale in the grading context).

The Model Penal Code approach to uncommunicated solicitations has been adopted by various state codes. *See, e.g.*, Haw. Rev. Stat. § 705-510; Utah Code Ann. §§ 76-4-203. However, there are also numerous jurisdictions that, "while not specifically addressing the uncommunicated solicitation situation, might also permit a conviction in such circumstances . . . because the solicitation statute itself includes, in the alternative, the defendant's "attempt" to [solicit]." LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1(c) n.98 (collecting statutes and case law); *see, e.g.*, N.Y. Penal Law § 100.05 (solicitation liability where a person "solicits, requests, commands, importunes or *otherwise attempts to cause such other person to engage in such conduct*") (italics added); *People v. Lubow*, 29 N.Y.2d 58, 62, 272 N.E.2d 331 (1971) (italicized language in NY statute "would seem literally to embrace as an attempt an undelivered letter or message initiated with the necessary intent.").

[42] Consistent with this principle of liability, a solicitation conviction would be appropriate where: (1) S mails a written request for murder to X, but where the letter is then lost by the mail carrier (and thereafter handed over to the police) before A ever has an opportunity to read it; and where (2) S places a written

Subsection (d) establishes the penalties for criminal solicitations. Paragraph (d)(1) states the default rule governing the punishment of criminal solicitations under the RCC: a fifty percent decrease in the maximum "punishment" applicable to the target offense.[43] "Punishment," for purposes of this paragraph, 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; and (3) fine only if imprisonment is not applicable to the target offense. Paragraph (d)(2) thereafter lists those offenses that are exempt from this default rule and specifies the punishment for each exception.[44]

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request for murder to X in the mail, but where the letter is then immediately intercepted by the police before X ever has an opportunity to read it. In both situations, solicitation liability is supported by subsection (c) because S has done everything he plans to do to transmit the message.

If, in contrast, S, intending to mail a written request for murder to X, is arrested by the police *on his way to the post office* with the letter in hand, subsection (c) would not support liability in light of the fact that S has not engaged in the last proximate act necessary to effect such communication (e.g., placing the letter in the mail).

[43] *See, e.g.*, Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?*, 1994 J. CONTEMP. LEGAL ISSUES 299, 305 (1994) ("Adhering to an objective view of grading, a majority of jurisdictions reduce the grade of inchoate conduct below that of the corresponding substantive offense."); LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1(a) ("[Modern] solicitation statutes typically provide that the solicitation constitutes a grade of crime one level below the offense which was solicited," though "[s]ome . . . generally authorize punishment equivalent to that which is provided for the solicited crime"). This penalty reduction is to be contrasted with the Model Penal Code, which grades most criminal solicitations as "crimes of the same grade and degree as the most serious offense which is attempted." Model Penal Code § 5.05(1); *but see id.* ("[A] solicitation . . . to commit a [capital crime or a] felony of the first degree is a felony of the second degree.").

The drafters of the Model Penal Code adopted this policy of solicitation penalty equalization on the basis of the same dangerousness-based rationale that motivated their endorsement of equalizing the penalty for attempt and conspiracy. *See, e.g.*, Model Penal Code § 5.05, cmt. at 490 ("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."). However, as discussed in the Explanatory Notes accompanying RCC § 22E-301(d), this rationale for punishment has been called into question by many on empirical grounds, including, perhaps most notably, by the drafters of the recent Model Penal Code Sentencing Project. *See, e.g.*, Model Penal Code: Sentencing § 6.06 PFD (2017) ("There are undenied elements of inefficacy and injustice in the Code's endorsement of incapacitation as a ground for incarceration, particularly when authorities misapprehend the dangerousness of individual offenders.").

The (original) Model Penal Code's equalization of solicitation penalties also conflicts with a strong intuitive sense, captured by public opinion surveys, that resultant harm should matter for grading purposes. *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, 429-30 (1998) (failure to consummate an offense generates, at minimum, "a reduction in liability of about 1.7 grades" by lay jurors, while the earlier the defendant's plans are frustrated, the greater this "no harm" discount). This may explain why, "[i]n the United States, three-quarters of the jurisdictions reject the notion of grading inchoate offenses the same as the completed offense." Robinson, *supra* note 43, at 320 ("Nearly two-thirds of American jurisdictions have adopted codes that have been heavily influenced by the Model Penal Code, but less than 30% of these have adopted the Code's inchoate grading provision or something akin to.").

[44] Many jurisdictions that subject solicitation liability to generally applicable grading principles statutorily recognize exceptions for particular solicitation offenses or categories of solicitation offenses. *See, e.g.*, Model Penal Code § 5.05(1) ("[S]olicitation . . . to commit a [capital crime or a] felony of the first degree is a felony of the second degree."); Robinson, *supra* note 43, at 320 n.67 (nearly all jurisdictions that statutorily equalize punishment for general inchoate crimes recognize some exceptions); Utah Code Ann. §

Section 302 has been drafted in light of, and should be construed in accordance with, prevailing free speech principles. Given the centrality of speech to encouragement, solicitation liability directly implicates a criminal defendant's First Amendment rights.[45] And while the U.S. Supreme Court recently clarified that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection,"[46] it also reaffirmed the "important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality."[47] The RCC respects this distinction by requiring that the defendant solicit another person to engage in "*specific* conduct" constituting an offense under paragraph (a)(1).[48] To meet this requirement, it is not necessary that the defendant have gone into great detail as to the manner in which the crime encouraged is to be committed. At the very least, though, 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 course of conduct that, if carried to completion, would constitute a criminal offense.[49]

Relation to Current District Law. RCC § 22E-302 clarifies, improves the proportionality of, and fill in gaps in the District law of criminal solicitations.

The District's general solicitation statute is codified by D.C. Code § 22-2107.[50] Subsection (a) of this statute broadly prohibits "soliciting a murder," whether or not a

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76-4-204(1) ("Criminal solicitation to commit . . . *except as provided in Subsection (1)(c) or (d)* . . . a first degree felony is a second degree felony[.]") (italics added).

[45] *See, e.g.*, DRESSLER, *supra* note 13, at § 28.01 (citing Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645); Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981 (2016); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005).

[46] *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)).

[47] *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)).

[48] *See, e.g.*, Model Penal Code § 5.02(1) ("A person is guilty of solicitation to commit a crime if," *inter alia*, he or she "commands, encourages, or requests another person to engage in *specific conduct* that would constitute such crime . . .") (italics added). This is consistent with accomplice liability under section 210, which similarly employs a "specific conduct" standard where complicity is based on encouragement. RCC § 22E-210(a)(2) ("Purposely encourages another person to engage in specific conduct constituting that offense."); *see, e.g.*, Model Penal Code § 2.06(3)(a)(i) ("A person is an accomplice of another person in the commission of an offense if," *inter alia*, he or she "*solicits* such other person to commit it[.]") (italics added).

[49] *E.g.*, Model Penal Code § 5.02 cmt. at 376; LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1. So, for example, general, equivocal remarks—such as the espousal of a political philosophy recognizing the purported necessity of violence—would not be sufficiently concrete to satisfy section 302. Commentary on Haw. Rev. Stat. Ann. § 705-510. Nor would a general exhortation to "go out and revolt." *State v. Johnson*, 202 Or. App. 478, 483 (2005); *see generally Williams*, 553 U.S. at 300 (distinguishing statements such as "I believe that child pornography should be legal" or even "I encourage you to obtain child pornography" with the recommendation of a particular piece of purported child pornography).

[50] Enacted as part of the *Omnibus Public Safety Act of 2006*, the relevant provisions reads:

> (a) Whoever is guilty of soliciting a murder, whether or not such murder occurs, shall be sentenced to a period of imprisonment not exceeding 20 years, a fine not more than the amount set forth in § 22-3571.01, or both.

murder actually "occurs," and is subject to a 20-year statutory maximum.[51] Likewise, subsection (b) of this statute broadly prohibits "soliciting a crime of violence," whether or not that crime of violence actually "occurs," and is subject to a 10-year statutory maximum.[52]

Aside from these general prohibitions and penalties, D.C. Code § 22-2107 provides no further information concerning the contours of general solicitation liability under District law. Nor, for that matter, does the legislative history underling these code provisions, which is essentially non-existent.[53] And the same is also true of DCCA case law, which, as the commentary to the District's criminal jury instructions observes, does not appear to contain a single reported decision "involving this statute."[54]

The D.C. Code also contains a variety of more narrowly tailored solicitation statutes, which individually provide for solicitation liability in particular contexts by incorporating the term "solicits" as an element of the offense. However, these kinds of context-specific solicitation statutes provide little, if any, clarity on the contours of general solicitation liability under current District law.

For example, the District's contributing to the delinquency of a minor offense, D.C. Code § 22-811, prohibits, among other acts, "an adult, being 4 or more years older than a minor" from "solicit[ing]" that minor to commit a crime.[55] Likewise, D.C. Code § 22-2701 makes it "unlawful for any person to . . . solicit for prostitution," while D.C. Code § 22-951 makes it "unlawful for a person to solicit . . . another individual to become

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> (b) Whoever is guilty of soliciting a crime of violence as defined by § 23-1331(4), whether or not such crime occurs, shall be sentenced to a period of imprisonment not exceeding 10 years, a fine not more than the amount set forth in § 22-3571.01, or both.

2006 DISTRICT OF COLUMBIA LAWS 16-306 (Act 16–482), as added Apr. 24, 2007, D.C. Law 16-306, § 209, 53 DCR 8610.

[51] *Id.*

[52] The phrase "crime of violence," in turn, is defined in D.C. Code § 23-1331(4) to encompass the following offenses:

> 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.

[53] *See generally* COUNCIL OF THE DISTRICT OF COLUMBIA, *Judiciary Committee Report on Bill 16-247, "Omnibus Public Safety Act of 2006"* (April 28, 2006).

[54] Commentary on D.C. Crim. Jur. Instr. § 4.500.

[55] *See also* D.C. Code § 22-3010(b)(1) ("Whoever, being at least 4 years older than the purported age of a person who represents himself or herself to be a child, attempts . . . to seduce, entice, allure, convince, or persuade any person who represents himself or herself to be a child to engage in a sexual act or contact . . . .")

a member of, remain in, or actively participate in what the person knows to be a criminal street gang."[56]

Most of these specific solicitation statutes, like D.C. Code § 22-2107, are completely silent on the meaning of solicitation in the relevant contexts.[57] And case law interpreting these statutes is sparse, though that which does exist establishes that solicitation liability is constitutional, at least insofar as it entails proof of a criminal intent.[58]

In practice, it appears that the elements of the general solicitation liability, as codified by D.C. Code § 22-2107, are determined in the District by reference to the criminal jury instructions.[59] The relevant instruction states, in its entirety, that:

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[56] Relatedly, D.C. Code § 22-1312 criminalizes an "indecent sexual proposal," which, as the DCCA has explained, "connotes virtually the same conduct or speech-conduct as a sexual solicitation." *Pinckney v. United States*, 906 A.2d 301, 307 (D.C. 2006) (quoting *D.C. v. Garcia*, 335 A.2d 217, 221 (D.C. 1975)); *see D.C. v. Garcia*, 335 A.2d 217, 221 (D.C. 1975) (noting that a "sexual proposal," as used in the statute, "connotes virtually the same conduct or speech-conduct as a sexual solicitation; the term clearly implies a personal importunity addressed to a particular individual to do some sexual act.").

[57] There is, however, one exception: the District's statute criminalizing solicitation of prostitution, D.C. Code § 22-2701. That statute is accompanied by a general definition of "[s]olicit for prostitution," which, pursuant to D.C. Code § 22-2701.01, "means to invite, entice, offer, persuade, or agree to engage in prostitution or address for the purpose of inviting, enticing, offering, persuading, or agreeing to engage in prostitution." *See* SAFE STREETS FORFEITURE AMENDMENT ACT OF 1992, 1992 District of Columbia Laws 9-267 (Act 9–250).

[58] More specifically, the DCCA, in *Ford v. United States*, upheld the constitutionality of the District's solicitation of prostitution statute on the basis that it "prohibits specified conduct for the purpose of prostitution," thereby "clearly" affording District residents "notice of the illegality" of such conduct. 498 A.2d 1135, 1139–40 (D.C. 1985) ("Such a 'scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed") (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982)).

Likewise, in *D.C. v. Garcia*, the DCCA upheld the constitutionality of D.C. Code § 22-1312, which criminalizes an "indecent sexual proposal," observing that

> It is important to emphasize the precise nature of the speech which the sexual proposal clause . . . proscribes. The principle is well established that the 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. However, there is a significant distinction between advocacy and solicitation of law violation in the context of freedom of expression. Advocacy is the act of pleading for, supporting, or recommending; active espousal and, as an act of public expression, is not readily disassociated from the arena of ideas and causes, whether political or academic. Solicitation, on the other hand, implies no ideological motivation but rather is the act of enticing or importuning on a personal basis for personal benefit or gain. Thus advocacy of sodomy as socially beneficial and solicitation to commit sodomy present entirely distinguishable threshold questions in terms of the First Amendment freedom of speech. The latter, we hold, is not protected speech.

335 A.2d 217, 224 (D.C. 1975).

[59] *Cf.* Commentary on D.C. Crim. Jur. Instr. § 4.500 (failing to reference any of the District's specific solicitation statutes as relevant legal authority for the elements of the general inchoate crime of solicitation).

> The elements of solicitation of [insert crime of violence], each of which the government must prove beyond a reasonable doubt, are that:
>
> 1. [Name of defendant] solicited [another person] [insert name of other person] to commit [insert crime of violence]; and,
>
> 2. [Name of defendant] did so voluntarily, on purpose, and not by mistake or accident.
>
> "Solicit" means to request, command, or attempt to persuade.
>
> It is not necessary that [insert crime of violence] actually occur in order to find [name of defendant] guilty of solicitation.[60]

Three aspects of above statement of the elements of a criminal solicitation provided by this instruction bear notice. First, it leaves ambiguous the culpable mental state requirement governing the offense. This is because the jury instruction fails to respect the admonition that, as the DCCA observed in *Ortberg v. United States*, "clear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime."[61] To say, for example, that a person must solicit another person "voluntarily, on purpose, and not by mistake or accident" does not specify whether the requisite culpability requirement applies to the (1) the *conduct* planned to culminate in that offense; (2) the *circumstances* surrounding that conduct; or (3) the *results*, if any, that conduct would cause if carried out.[62]

Second, it is unclear what the third prong of the conduct requirement, described as "attempt[ing] to persuade," actually entails given the various meanings of the term attempts. Generally speaking, for example, there are two main categories of attempts: (1) complete attempts, which are attempts that fail to achieve the actor's criminal objectives notwithstanding the fact that he or she carried out the entirety of his or her criminal plans (i.e., shoot and miss); and (2) incomplete attempts, which are attempts that fail to achieve the actor's criminal objectives because he or she is frustrated by outside forces (e.g., police interception). Incomplete attempts, in turn, can be further differentiated according to the extent of the progress an actor makes before his or her plans are disrupted (e.g., taking a substantial step towards completion vs. being dangerously close to completion). With these variances in mind, it is unclear just how far along an actor must be in his efforts to convince another to commit a crime to be deemed to have engaged in "attempt[ed] persua[sion]."[63]

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[60] D.C. Crim. Jur. Instr. § 4.500.

[61] *Ortberg v. United States*, 81 A.3d 303, 307 (D.C. 2013) (citations, quotations, and alterations omitted).

[62] For example, to secure a conviction for solicitation to commit robbery against a senior citizen, must the government (merely) prove that the solicitor consciously desired to bring about conduct planned to culminate in the offense (e.g., knocking down and taking the wallet of victim X, who is over the age of 65)? Or, alternatively, must the government also prove that the solicitor consciously desired the relevant circumstance to exist (e.g., that victim X actually be over the age of 65)?

[63] For example, it seems clear that where D1 mails a written request for murder to D2, but where the letter is intercepted by the police (or lost by the mail carrier and thereafter handed over to the policy) before D2

Third, and more generally, the criminal jury instruction is silent on a variety of corollary issues relevant to understanding the scope of general solicitation liability. To take just one example, consider that of impossibility. In the solicitation context, impossibility issues arise where one party asks another to engage in or facilitate conduct that would culminate in a consummate criminal offense if—but only if—the conditions were as the solicitor perceived them. In this kind of situation, the solicitor might argue that criminal liability should not attach due to the fact that, by virtue of a mistake concerning the surrounding conditions, completion of the target offense was impossible. If presented with such a claim, District judges would have to determine whether the particular kind of mistake rendering the criminal objective at the heart of a solicitation prosecution impossible constitutes a defense. On this issue, among others, the District's jury instruction (and accompanying commentary) is silent.

Aside from this silence on the elements of solicitation, another aspect of District law that is problematic relates to grading. This is reflected in the fact that solicitations to commit all "crimes of violence"[64] other than murder are subjected to the same 10-year statutory maxima under D.C. Code § 22-2107, notwithstanding significant distinctions between the relevant underlying offenses. For example, an assault with significant bodily injury[65] is distinct from an aggravated assault,[66] which is distinct from first degree sexual abuse[67] or child sexual abuse.[68] These crimes of violence are, based on their elements and the varying penalties afforded to them, offenses of quite differential seriousness. At the same time, however, D.C. Code § 22-2107 effectively treats solicitations to commit each of them as an offense of the same seriousness given the flat 10-year statutory maximum provided to them under subsection (b).

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ever has an opportunity to read it, this constitutes attempted persuasion. But what about where D1, intending to mail a written request for murder to D2, is arrested by the police on his way to the post office with the letter in hand?

[64] D.C. Code § 23-1331(4) ("The term 'crime of violence' means aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.").

[65] D.C. Code § 22-404(a)(2) ("Whoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 3 years, or both.").

[66] D.C. Code § 22-404.01(b) ("Any person convicted of aggravated assault shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned for not more than 10 years, or both.")

[67] D.C. Code § 22-3002 ("A person shall be imprisoned for any term of years or for life, and in addition, may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner . . . .").

[68] D.C. Code § 22-3008 ("Whoever, being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act shall be imprisoned for any term of years or for life and, in addition, may be fined not more than the amount set forth in § 22-3571.01. However, the court may impose a prison sentence in excess of 30 years only in accordance with § 22-3020 or § 24-403.01(b-2). For purposes of imprisonment following revocation of release authorized by § 24-403.01(b)(7), the offense defined by this section is a Class A felony.").

Another way to appreciate the comparative disproportionality presented by the District's current approach to grading solicitations is reflected in the impact that the flat 10 year statutory maximum has on particular crimes of violence. For example, the 3-year statutory maximum governing the consummated version of assault with significant bodily injury is *multiplied many times* over by the flat 10-year statutory maximum under subsection (b).[69] In contrast, this same flat 10-year statutory maximum effectively treats solicitations to commit aggravated assault *as equivalent in seriousness* to consummated aggravated assaults, which are similarly subject to a 10-year statutory maximum.[70] And solicitations to commit first degree sexual abuse[71] or child sexual abuse[72] are treated as *significantly less serious* than the completed versions of such offenses under subsection (b) given that the completed version of these offenses are subject to potential life sentences.

Viewed as a whole, then, the District's approach to grading criminal solicitations does not reflect any consistent principle of punishment. And this, in turn, produces a penalty scheme which authorizes the imposition of sentences that are, at least in relation to one another, quite disproportionate.

RCC § 22E-302 addresses the above-described problems as follows. First, subsections (a), (b), and (c) provide a full description of the elements of a general criminal solicitation, which is consistent with element analysis and resolves the ambiguities surrounding the diverse set of liability issues mentioned above. When viewed collectively, this statement will improve the clarity, consistency, and comprehensiveness of the revised statutes. Second, subsection (d) establishes a principled and consistent approach to punishing solicitations (i.e., a fifty percent penalty discount[73]), which renders offense penalties more proportionate.[74]

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[69] D.C. Code § 22-404(a)(2) ("Whoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 3 years, or both.").

[70] D.C. Code § 22-404.01(b) ("Any person convicted of aggravated assault shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned for not more than 10 years, or both."). Note also that attempted aggravated assault is only subject to a 5-year statutory maximum. D.C. Code § 22-404.01(c) ("Any person convicted of attempted aggravated assault shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned for not more than 5 years, or both.").

[71] D.C. Code § 22-3002 ("A person shall be imprisoned for any term of years or for life, and in addition, may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner . . . .").

[72] D.C. Code § 22-3008 ("Whoever, being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act shall be imprisoned for any term of years or for life and, in addition, may be fined not more than the amount set forth in § 22-3571.01. However, the court may impose a prison sentence in excess of 30 years only in accordance with § 22-3020 or § 24-403.01(b-2). For purposes of imprisonment following revocation of release authorized by § 24-403.01(b)(7), the offense defined by this section is a Class A felony.").

[73] This general principle in paragraph (d)(1), which is similarly applicable to criminal attempts and criminal conspiracies under the RCC, is supplemented by paragraph (d)(2), which expressly recognizes the possibility of offense-specific exceptions to be clearly articulated in a single general provision incorporated into the General Part.

[74] The effect of this penalty scheme on current District law varies depending on the scope, gradations, and classifications applied to individual revised offenses. For a detailed analysis of this nature in the context of attempt penalties, which is broadly applicable here, see RCC § 22E-301(d), Relation to Current District Law on Attempt Penalties.

RCC § 22E-303. Criminal Conspiracy.

Explanatory Notes. Section 303 provides a comprehensive statement of general conspiracy liability under the RCC.[1] This statement: (1) establishes the culpable mental state requirement and conduct requirement of a criminal conspiracy; (2) specifies the penalties applicable to a criminal conspiracy; and (3) addresses particular jurisdictional issues relevant to general conspiracy liability in the District of Columbia. Section 303 replaces the District's current general conspiracy statute, D.C. Code § 22-1805a.

The prefatory clause of subsection (a) establishes three basic principles governing general conspiracy liability. The first principle is that section 303 solely prohibits conspiracies to "commit an offense." This dictates that only *criminal* objectives fall within the scope of general conspiracy liability under the RCC.[2]

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[1] 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).

Today, the crime of conspiracy is widely understood to serve "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." WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.3(a) (3d ed. Westlaw 2019). At the same time, however, conspiracy is also an "extremely controversial crime." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.01 (6th ed. 2012). This is so for two basic reasons.

First, conspiracy "is so vague that it almost defies definition." *Krulewitch v. United States*, 336 U.S. 440, 446 (1949) (Jackson, J., concurring); *id.* at 477 (describing the crime as "chameleon-like."). This vagueness, it is argued, provides prosecutors with "a powerful tool . . . to suppress inchoate conduct that they consider potentially dangerous or morally undesirable." DRESSLER, *supra* note 1, at § 29.01; *see Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925) (describing the offense as the "darling of the modern prosecutor's nursery.") (Hand, J.). "Historically," for example, "conspiracy laws have been used to suppress controversial activity, such as strikes by workers and public dissent against governmental policies." DRESSLER, *supra* note 1, at § 29.01

Second, conspiracy is "predominantly mental in composition, because it consists primarily of a meeting of minds and an intent"—very little conduct is required. *Krulewitch*, 336 U.S. at 447–48 (Jackson, J., concurring). In light of the offense's "highly inchoate nature," a "few courts and more scholars" have questioned whether conspiracies merit punishment at all. DRESSLER, *supra* note 1, at § 29.01 (collecting authorities). More often, though, it is argued that, because of conspiracy's focus on *mens rea* and concomitant disregard of *actus reus*, "persons will be punished for what they say rather than for what they do, or [simply] for associating with others who are found culpable." Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137 (1973).

[2] *See, e.g.*, Model Penal Code § 5.03(1) (limiting general conspiracy liability to agreements to commit "crime[s]"); WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.3(a) (3d ed. Westlaw 2019) ("[M]ost states" and all of the "most recent recodifications" follow the "far better" approach of "provid[ing] that the object of a criminal conspiracy must be some crime or some felony"); *see also* DRESSLER, *supra* note 1, at § 29.04(c) (6th ed. 2012) ("People are entitled to fair notice that their planned conduct is subject to criminal sanction . . . 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.").

The second principle is that a criminal conspiracy necessarily incorporates "the culpability required by [the target] offense."[3] Pursuant to this principle, a defendant may not be convicted of a criminal conspiracy under section 303 absent proof that he or she acted with, at minimum, the culpable mental state(s)—in addition to any broader aspect of culpability[4]—required to establish that offense.[5]

The third principle is that both the defendant "and at least one other person" must actually conspire in order for criminal liability to attach under section 303.[6] This establishes a bilateral approach to conspiracy, which excludes unilateral agreements to engage in or aid crimes from the scope of general conspiracy liability.[7] Absent proof that

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[3] *See, e.g.*, Model Penal Code § 5.03(1) (government must prove that the defendant "acted with the kind of culpability otherwise required for commission of the crime"); LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.2(c)(2) ("Clearly, a 'conspiracy to commit a particular substantive offense cannot exist *without at least* the degree of criminal intent necessary for the substantive offense itself.'") (quoting *Ingram v. United States*, 360 U.S. 672, 678 (1959)) (italics added).

[4] The term "culpability" includes, but also goes beyond, the culpable mental state requirement governing an offense. *See* RCC § 22E-201(d) (culpability requirement defined). For example, if the target offense requires proof of premeditation, deliberation, or the absence of any mitigating circumstances, the government is still required to prove these broader aspects of culpability to secure a conviction. *See* RCC § 22E-201(d)(3) ("'Culpability requirement' includes . . . Any other aspect of culpability specifically required by an offense."); *id.*, at Explanatory Notes (noting that "premeditation, deliberation, and absence of mitigating circumstances" would so qualify). And, of course, conspiracy liability is subject to the same voluntariness requirement governing all offenses under RCC § 22E-203(a). *See* RCC § 22E-201(d)(1) (voluntariness requirement also part of culpability requirement).

[5] This derivative culpable mental state requirement, which is drawn from the target offense, is to be distinguished from the independent culpable mental state requirement governing the agreement at issue in all conspiracy prosecutions. *See infra* notes 16-22 and accompanying text.

Generally speaking, conspiracy liability entails proof that the accused: (1) "intended," by his or her agreement, to assist or directly engage in conduct planned to culminate in an offense; and (2) "intended," through that agreement, to bring about any result elements or circumstance elements that comprise the target offense. *See, e.g.*, Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 754–55 (1983); *State v. Maldonado*, 114 P.3d 379, 382 (N.M. 2005) (discussing "twin intent requirements of conspiracy").

"One of these intents may exist without the other," such as, for example, "where A and B agree to burn certain property and A knows the property belongs to C but B (perhaps because he has been misled by A) believes that the property belongs to A." LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.2(c)(1). Here, B intends, through his agreement with A, to facilitate the destruction of another person's property. However, B does not intend the property destruction to occur *against the will of the owner*, a key circumstance element of a destruction of property offense. *See infra* note 1 (providing more detailed illustration of how these dual intent requirements operate).

[6] *E.g.*, D.C. Code § 22-1805a (defining conspiracy in terms of "two or more persons"); 18 U.S.C.A. § 371 (same). *Compare, e.g.*, Model Penal Code § 5.03(1)(a) ("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[.]") (italics added); *id.*, Explanatory Note (it is sufficient under the Model Penal Code approach that the defendant "believe that he is agreeing[] with another that they will engage in the criminal offense or in solicitation to commit it").

"Most modern codes, as does the Model Penal Code, define conspiracy in terms of a single actor agreeing with another, rather than as an agreement between two or more persons." LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.2(c)(6) n.30 (collecting statutes). That said, numerous state courts in the jurisdictions with these unilateral formulations have interpreted their general conspiracy statutes in bilateral terms. *Id.* (collecting cases); *see infra* notes 7-9 (discussing import of bilateral and unilateral approaches).

[7] The difference between the bilateral and unilateral views of conspiracy is most significant in cases in which one person, committed to furthering a criminal enterprise, approaches another seeking to enlist his or her cooperation. Marianne Wesson, *Mens Rea and the Colorado Criminal Code*, 52 U. COLO. L. REV. 167,

"two or more persons" [8] satisfy both the culpable mental state requirement[9] and conduct requirement[10] stated in subsections (a) and (b), no single person is subject to general conspiracy liability under section 303.[11]

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220 (1981). If the other party *seems* to agree, but secretly withholds agreement (perhaps even resolving to notify the authorities), the initiating person is not guilty of conspiracy under the bilateral approach, but would be guilty under the unilateral approach. *Id.*; *see* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.2(c)(6) (bilateral approach also rejects conspiracy liability where the only other party to an alleged conspiracy is mentally incapable of agreeing) (citing *Regle v. State*, 9 Md. App. 346 (1970)).

In support of the bilateral approach, and concomitant rejection of the unilateral approach, various courts and commentators have argued that:

> 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 legal commentary); *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 to conspiracy).

[8] D.C. Code § 22-1805a; 18 U.S.C.A. § 371.

[9] *See, e.g.*, DRESSLER, *supra* note 1, at § 29.06 (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."); LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.2(c)(6) ("[B]ecause of the plurality requirement it must be shown that the requisite intent existed as to at least two persons. That is, there must be a common design, so that if only one party to the agreement has the necessary mental state then even that person may not be convicted of conspiracy."). The following scenario illustrates the intersection between the bilateral agreement requirement and dual intent requirements governing conspiracy liability.

Police receive a report that someone posing as a janitor in a District of Columbia government building, P, intends to murder a plain-clothes police officer sitting in the lobby to the entrance, V. According to this reliable tip, P's plan is to quickly unhinge a large television that stands high above V, with the hopes that it will kill V upon impact. Soon thereafter, two officers arrive at the front of the building, and find P engaged in a conversation with another individual, A, a real janitor employed by the District, who is in control of a large cart of cleaning supplies. The police overhear P asking A if she'd be willing to park her cart of supplies right in front of the entrance immediately after P enters so as to block other people from entering the building. A agrees to do so, at which point both A and P begin to make their way towards the building's entrance with A's supply cart in tow. Moments later, however, the police intercede, and arrest both A and P.

If P later finds himself in D.C. Superior Court charged with conspiracy to murder a police officer based upon his agreement with A, can he be convicted? The answer to this question depends upon whether *A's* state of mind fulfills both of the dual intent requirements governing conspiracy liability, so that it can be said that P and "at least one other person" agreed to murder a police officer. (Note: there's little question that P possesses the requisite dual intents.)

Paragraph (a)(1) codifies the agreement requirement at the heart of the general inchoate crime of conspiracy.[12] In so doing, this paragraph broadly clarifies that a conspiracy is comprised of a joint criminal agreement to commit the same offense.[13]

For example, if A had agreed to block the entrance to the building with her cart of supplies because P had asked her to help facilitate P's *cleaning of the lobby windows*, then neither requirement is met: A did not intentionally agree to facilitate P's conduct, which, if carried out, would have resulted in the death of a police officer (the unhinging of the large television); nor did A act with the intent that, through her agreement, a police officer be killed. Alternatively, if A had agreed to block the entrance to the building with her cart of supplies because P had asked her to help facilitate P's *removal of the television*, then the first requirement is met: A intentionally agreed to facilitate the conduct of P which, if carried out, would have resulted in the death of a police officer. But the second requirement is not met: A did not intend, through her agreed-upon participation, to cause the death of anyone, let alone a police officer. Because, in both of the above sets of circumstances, A does not satisfy the dual intent requirements of conspiracy, P cannot be convicted of conspiracy to murder a police officer. (Which is not to say that P would escape liability entirely; on these facts P likely can be convicted of attempted murder of a police officer, on the basis that he intended to kill police officer V, and came dangerously close to doing so. *See* RCC § 22E-301(a).)

If, in contrast, A had agreed to block the entrance to the building because P had approached her with an opportunity to seek retribution against the same officer responsible for disrupting a drug conspiracy A was involved with years ago, then A fulfills both requirements: A acted with both the intent to facilitate P's planned course of conduct and the intent that, through her agreed-upon assistance, a police officer would be killed. Because, in this last scenario, A possesses both of the necessary dual intents—as well as the fact that the other elements of conspiracy are met, e.g., the presence of an "overt act," RCC § 22E-303(a)(2)—P can be convicted of conspiracy to murder a police officer.

[10] That is, engage in the necessary mutual agreement. *See infra* notes 13-28 and accompanying text (discussing agreement requirement). The plurality requirement does not apply to the overt act requirement, which only needs to be met by one party to a conspiracy. *See infra* notes 29-33 and accompanying text (discussing plurality requirement).

[11] It is important to note that while two or more persons must satisfy the culpability and conduct requirements of conspiracy under section 303, it is not necessary for two or more persons to be prosecuted and/or convicted of conspiracy in order to support a conviction as to any one person. *E.g.*, DRESSLER, *supra* note 1, at § 29.06 ("The plurality rule does not require, however, that two persons be prosecuted and convicted of conspiracy . . . Thus, the conviction of a conspirator is not in jeopardy simply because the other person involved in the arrangement is unapprehended, dead, or unknown, or cannot be prosecuted because he has been granted immunity.") (collecting cases). In this sense, the general inchoate crime of conspiracy under section 303 is similar to the legal accountability as an accomplice under section 210, which requires proof that another person satisfies the elements of the offense for which the defendant is being prosecuted, yet does not preclude liability "although the other person claimed to have committed the offense . . . [h]as not been prosecuted or convicted[.]" RCC § 22E-210(d); *compare United States v. Bell*, 651 F.2d 1255, 1258 (8th Cir. 1981) (Where "all other alleged coconspirators are acquitted, the conviction of one person for conspiracy will not be upheld.").

[12] *See, e.g., United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003) (agreement is "essence" of a conspiracy is the agreement); 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.").

[13] Specifically, paragraph (a)(1) requires that two or more parties to a conspiracy "*agree* to engage in or aid the planning or commission of conduct which, if carried out, will constitute *that [same] offense* or an attempt to commit *that [same] offense*[.]" The necessary correspondence inherent in the italicized language effectively precludes conspiracy liability where each participant intended to commit a different offense. 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

And it also more specifically addresses three fundamental issues concerning the scope and applicability of general conspiracy liability.

The first issue relates to the nature of the agreed-upon participation in a criminal scheme that will support a conspiracy conviction. Paragraph (a)(1) establishes, in relevant part, that general conspiracy liability is appropriate under the RCC where two or more parties agree to "engage in" or "aid the planning or commission" of criminal conduct.[14] This two-part formulation clarifies that agreements to assist with or otherwise facilitate the planning or commission of a crime, no less than agreements to directly engage in the requisite criminal conduct, provide an adequate basis for a conspiracy conviction, provided that the other requirements of section 303 are met.[15]

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conspiracy to commit robbery cannot be sustained against X or Y due to the lack of mutual agreement concerning the taking-related element of robbery.

[14] *See, e.g.*, Model Penal Code § 5.03(1)(b) (conspiracy liability where one person "agrees to *aid* [an]other person or persons in the planning or commission of [a] crime") (italics added); *Salinas v. United States*, 522 U.S. 52, 65 (1997) ("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.") (italics added).

[15] *See, e.g., Ocasio v. United States*, 136 S. Ct. 1423, 1430 (2016) ("[A] specific intent to distribute drugs oneself is not required to secure a conviction for participating in a drug-trafficking conspiracy. Agreeing to store drugs at one's house in support of the conspiracy may be sufficient."); DRESSLER, *supra* note 1, at § 29.04 n.77 (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.").

That an agreement to aid provides an appropriate basis for liability under section 303 reflects the well-established idea that complicity and conspiracy "normally go hand-in-hand." ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 703 (3d ed. 1982)). Indeed, "in most cases an accomplice is a co-conspirator, and vice-versa." DRESSLER, *supra* note 1, at § 30.08(a). For example, if A purposely agrees to aid P in the commission of a robbery, and that agreement to aid either materializes or simply solidifies P's resolve to commit the robbery (even in the absence of such assistance), then A is responsible for P's robbery as an accomplice under section 210. On these same facts, however, A and P also appear to satisfy the requirements for general conspiracy liability (to commit robbery) under section 303.

Nevertheless, there are important differences between these two legal concepts. For example, "[a]n agreement between two or more persons to participate in the commission of a crime is the key to a conspiracy and, therefore, to conspiratorial liability." DRESSLER, *supra* note 1, at § 30.08(a). Importantly, "[a]ctual assistance in the crime is not required." *Id.* In contrast, "[a]ccomplice liability requires proof that an actor at least indirectly participated (assisted) in the crime; an agreement to do so is not needed." *Id.*

In light of these conceptual distinctions, it is possible for one person to conspire with another person to commit an offense without also being an accomplice (i.e., in the event that the other person commits that offense on his or her own). For example, if, in the above illustration, A's purposeful agreement to aid P in the commission of a crime had gone unfulfilled, and more generally failed to encourage P to commit that crime (e.g., it didn't bolster P's resolve), yet P nevertheless proceeded to commit the robbery by himself, then A (and P) would likely satisfy the requirements for general conspiracy liability under section 303. At the same time, however, A would not satisfy the requirements for accomplice liability under section 210.

Conversely, it also is possible one person to be an accomplice in the commission of an offense committed by another person without also having conspired to commit it. The following situation is illustrative. P enters a bank to rob it, at which point, A, an unaffiliated customer, observes P's actions and silently assists in the crime by disabling a bank security camera. Because P and A never agreed to commit the robbery together, they do not satisfy the requirements of section 303. That said, because A purposely assisted P with the commission of the robbery, A may be held liable for the robbery under section 210.

The second issue focuses on the relationship between the defendant's state of mind and his or her agreed-upon facilitation of a criminal scheme.[16] Paragraph (a)(1) establishes, in relevant part, that general conspiracy liability only applies to those who act with the purpose of bringing about conduct planned to culminate in an offense.[17] This "purposive attitude" constitutes the foundation of the culpability requirement governing both accomplice liability as well as the general inchoate crime of conspiracy.[18] It can be said to exist when a person, through his or her agreement, *consciously desires* to facilitate conduct planned to culminate in an offense.[19]

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[16] The nature of this relationship issue "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":

> Typical is the case of the person who sells sugar to the producers of illicit whiskey. He 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. To be criminally liable, of course, he must at least have knowledge of the use to which the materials are being put, but 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. In this case conflicting interests are involved: 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.

Model Penal Code § 5.03, cmt. at 404.

[17] *See, e.g.*, Model Penal Code § 5.03(1) (agreement must be accompanied by "the purpose of promoting or facilitating the commission of the crime"); *Id.*, Explanatory Note ("The purpose requirement is meant to extend to [the] conduct elements of the offense that is the object of the conspiracy."); LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.2(c)(3) (purpose requirement is strong majority approach); Peter Buscemi, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1145-46 (1975) (same). This purpose requirement *does not* extend to whether the requisite conduct is, in fact, illegal or otherwise constitutes an offense. *See also* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.2(c) (accomplice cannot "escape liability by showing he did not [*desire*] to aid a crime in the sense that he was unaware that the criminal law covered the conduct of the person he aided. Such is not the case, for here as well the general principle that ignorance of the law is no excuse prevails.").

[18] *See, e.g.*, *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (Hand, J.) ("[Every definition of complicity requires that the defendant in] some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used-even the most colorless, 'abet,' carry an implication of *purposive attitude* towards it.") (italics added); *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.), aff'd, 311 U.S. 205, 61 S. Ct. 204, 85 L. Ed. 128 (1940) (Hand, J.) ("There are indeed instances . . . where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; *but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive.* It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome.") (italics added); Model Penal Code § 5.03 cmt. at 406 ("Under the conspiracy provision, the same purpose requirement that governs complicity is essential for conspiracy; the actor must have 'the purpose of promoting or facilitating' the commission of the crime").

[19] *See generally* RCC § 22E-206(a) (purposely defined). The following scenario is illustrative. P seeks to rob a bank on his own, but needs a fast car to implement his plan. P relays his conundrum to his friend, A, who happens to own a vehicle of this nature, over the phone. Having been informed of this, P offers to purchase A's car for market value. A rejects the offer, but counters with an arrangement wherein A will give P his car in return for a ten percent stake in the profits. P agrees to this arrangement, and begins his initial preparations for the robbery. Soon thereafter, however, the police—who had tapped A's phone, and

The corollary to this purpose requirement is that general conspiracy liability is not supported under section 303 where a defendant's primary motive in agreeing to facilitate a criminal scheme is to achieve some other, non-criminal objective (e.g., "conduct[ing] an otherwise lawful business in a profitable manner").[20] And this is so even if the defendant knew that his or her agreement was likely to facilitate that scheme.[21] Neither awareness of, nor indifference towards, the success of another person's criminal scheme is sufficient to satisfy the purpose requirement incorporated into paragraph (a)(1).[22]

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thus overheard the agreement—arrest both A and P. On these facts, A (and P) can be held liable for conspiring to commit robbery because A, through his agreement with P, consciously desired to facilitate and promote P's criminal conduct.

That a conspirator must have the purpose to facilitate or promote conduct planned to culminate in an offense does not preclude convictions for knowledge-based theories of liability concerning the result elements of the target offense. The following example is illustrative. Environmental activists X and Y agree to blow up a coal-processing facility during the evening/afterhours when only a single person, the on-duty night guard, V, will be present. Both X and Y are practically certain that V will die from the blast, though they'd very much prefer that V not be injured. The police intercede right before X and Y are able to set off the explosives, thereby saving V's life. On these facts, both X and Y can be convicted of conspiracy to commit (knowing) murder, premised on the fact that their agreement was accompanied by: (1) a *desire* to engage in conduct, which, if carried out, would have culminated in murder (i.e., blowing up the facility); and (2) their *awareness as to a practical certainty* that such conduct would result in V's death. *See* Robinson & Grall, *supra* note 5, at 757 ("When causing a particular result is an element of the object offense and such result does not occur, the actor, to be liable for conspiracy under Subsection (1), must have the purpose or belief that the conduct contemplated by the agreement will cause such result."); Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 926 (1959)) ("[A] person may be held to intend that which is the *anticipated consequence* of a particular action to which he agrees[.]"); *but see* Model Penal Code § 5.03 cmt. at 408 ("[I]t 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.").

[20] *See, e.g., Falcone*, 109 F.2d at 581 (Hand, J.) ("[T]he law should not be broadened to punish those whose primary motive is to conduct an otherwise lawful business in a profitable manner" because this would "seriously undermin[e] lawful commerce."); Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 353 (1985) (absent purpose requirement, the criminal law would "cast a pall on ordinary activity" by giving us reason to "fear criminal liability for what others might do simply because our actions made their acts more probable"); Model Penal Code § 5.03 cmt. at 406 (observing that "the complicity provisions of the Code" require "a purpose to advance the criminal end," and deeming "the case" for this resolution to be an "even stronger one" in the context of conspiracy, such that "[a] conspiracy does not exist [under the Code] if a provider of goods or services is aware of, but fails to share, another person's criminal purpose").

This purpose requirement 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.'" Model Penal Code § 5.03 cmt. at 406

[21] It has been observed that, "[o]ften, if not usually, aid rendered with guilty knowledge implies purpose since it has no other motivation." Model Penal Code § 2.06 cmt. at 316. And the same is also presumably true of *agreements* to aid. That said, "there are many and important cases where this is the central question in determining liability." *Id.*; *see, e.g., State v. Maldonado*, 114 P.3d 379, 382 (N.M. 2005) ("Defendant's conviction presents a recurring question in the law of conspiracy: does a defendant whose only involvement is supplying generally available goods or services become a co-conspirator merely because he knows that the goods or services he provides may or will be used by another for a criminal purpose?"); *United States v. Falcone*, 311 U.S. 205, 208-10 (1940) (same).

[22] To illustrate, consider the following modified version of the scenario presented *supra* note 19. P seeks to rob a bank on his own, but needs a fast car to implement his plan. P relays his conundrum to his friend, A, who happens to own a vehicle of this nature, over the phone. Having been informed of this, P offers to

The third issue is the relevance of impossibility to general conspiracy liability—i.e., the fact that the target offense cannot be consummated under the circumstances due to a mistake on behalf of the defendant(s).[23] Paragraph (a)(1) establishes, in relevant

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purchase A's car for market value. A accepts the offer to sell his car for market value because A was already planning to sell the vehicle, so accepting P's offer will save A the effort of having to list it on his own. However, A thinks the bank robbery is a stupid idea, and tells P this much. P ignores A's advice and subsequently begins his initial preparations for the robbery. Soon thereafter, however, the police—who had tapped A's phone, and thus overheard the agreement—arrest both A and P. On these facts, A (and therefore P) cannot be held liable for conspiring to commit robbery because, *inter alia*, A did not consciously desire to facilitate or promote P's criminal conduct. Instead, A's purpose was to save himself the hassle of having to list and sell the vehicle on his own. That A knew the sale of his car to P would facilitate the bank robbery, and was arguably indifferent as to P's criminal conduct, would not support liability under section 303.

[23] The defendant in this kind of situation may admit that he or she possessed the requisite intent to commit that target offense and engaged in significant conduct, but nevertheless argue that impossibility of completion should by itself preclude the imposition of conspiracy liability. *See, e.g.*, LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 1, at § 27.07. In resolving this claim, there are four general categories of impossibility that might be considered for evaluative purposes (i.e., these are not analytically perfect distinctions).

The first category is *pure factual impossibility*, which arises where the parties to an agreement to commit a crime are precluded from consummating that crime because of circumstances unknown to them or beyond their control. The following situation is illustrative: 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.

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 criminalizes their intended objective. The following situation is illustrative. 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.

The third category is *hybrid impossibility*, which arises where the object of an agreement between two or more parties constitutes a crime, 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. The following situation is illustrative. 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.

The fourth category of impossibility is *inherent impossibility*, which arises where the parties to an agreement to commit a crime plan to "employ[] means which a reasonable man would view as totally inappropriate to the objective sought." LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 11.5(a)(4). The following situation is illustrative. 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 impossibility because any reasonable person would have known that the manikin was not a child. *See* Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237, 244-45 (1995) (common denominator underlying

part, that agreements to directly engage in or provide accessorial support to conduct that, if carried out, would merely constitute an "*attempt* to commit an offense" can also provide the basis for general conspiracy liability.[24] This reference to attempts imports the broad abolition of impossibility claims employed in the RCC's general attempt provision into the conspiracy context.[25] Under this approach, it is generally immaterial that the agreed-upon criminal scheme could never have succeeded under the circumstances.[26] So long as the parties agreed to bring about conduct that would have culminated in an offense if "the situation was as [the parties] perceived it" then conspiracy liability may attach,[27] provided that the agreed-upon plan of action was at least "reasonably adapted" to commission of the target offense.[28]

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inherent impossibility is that the parties' "actions are so absurd or patently ineffective that the completion of the crime would always be impossible under the same set of circumstances").

[24] *See, e.g.*, Model Penal Code § 5.03(1) (conspiracy liability where one person 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."); Model Penal Code § 5.03 cmt. at 421 ("[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 [the MPC's general attempt provision] if the contemplated conduct had occurred.").

[25] Under RCC § 22E-301(a)(3)(A)(ii), a person commits an attempt if, *inter alia*, he or she "engages in conduct that . . . [w]ould have come dangerously close to completing that offense if the situation was as the person perceived it." Subparagraph (a)(3)(B) thereafter adds that the person's conduct must have been "reasonably adapted to completion of that offense."

[26] *See* RCC § 22E-301(a), Explanatory Notes ("Reliance on the defendant's perspective renders the vast majority of impossibility claims immaterial by authorizing an attempt conviction under circumstances in which the person's conduct *would have been* dangerously close to committing an offense *had* the person's view of the situation been accurate.").

[27] RCC § 22E-301(a)(3)(A)(ii). Specifically, the subjective approach incorporated into subparagraph (a)(1)(B) renders pure factual and hybrid impossibility claims immaterial. *See supra* note 23 (defining these categories). For example, under the RCC it would not be a defense to conspiracy to commit murder that: (1) the intended victim was already dead, provided that the parties to the conspiracy mistakenly believed the person to be alive at the moment one of them engaged in an overt act; or that (2) the intended murder weapon was inoperable, provided that the parties mistakenly believed it be operable. Nor would it preclude liability for conspiracy to commit theft under the RCC that: (1) the owner of the target property consented to its taking, provided that the parties to the conspiracy mistakenly believed it to be absent; or that (2) the safe targeted is empty, provided that the parties believed it be filled with valuable objects. *See, e.g.*, PAUL H. ROBINSON, 1 CRIM. L. DEF. § 85 (Westlaw 2019) ("The modern trend, evident in most jurisdictions, is to reject both [forms of] impossibility as defenses."); DRESSLER, *supra* note 1, at § 27.07 (same).

In contrast, pure legal impossibility remains a viable theory of defense under the RCC. *See supra* note 23 (defining this category). However, this does not hinge on RCC § 22E-301(a)(3)(A)(ii), or any other provision in section 301. Rather, the "underlying basis for acquittal is the principle of legality," which "provides that we should not punish people—no matter culpable or dangerous they are—for conduct that does not constitute the charged offense at the time of the action." DRESSLER, *supra* note 1, at § 27.07; *see* Model Penal Code § 5.01 cmt. at 318 ("[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.").

For example, "it is not a crime to throw even a [District of Columbia] steak into a garbage can." JEROME HALL, GENERAL PRINCIPLES OF THE CRIMINAL LAW 595 (2d ed. 1960). So if after losses against the Washington Nationals, the Oriole Bird, the Baltimore Orioles mascot, and the Phillie Phanatic, the Philadelphia Phillies mascot, together place a local District steak in the garbage, neither is guilty of committing any offense. Nor could the Oriole Bird and the Phillie Phanatic be convicted of conspiring to commit an imaginary offense of this nature although they honestly believed such conduct to be prohibited

Paragraph (a)(2) establishes that an overt act in furtherance of the conspiracy by either the defendant or a person with whom he or she has conspired is a necessary element of general conspiracy liability.[29] This overt act requirement is quite narrow.[30] For example, it does not require proof of progress sufficient to rise to the level of an

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by the D.C. Code. *E.g.*, DRESSLER, *supra* note 1, at § 27.07 ("Just as a person may not ordinarily escape punishment on the ground that she is ignorant of a law's existence, it is also true that we cannot punish people under laws that are purely the figments of their guilty imaginations."); *In re Sealed Cases*, 223 F.3d 775 (D.C. Cir. 2000) (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").

Inherent impossibility also remains a viable (if exceedingly limited) theory of defense under the reasonable adaptation standard codified in paragraph (a)(2) of section 301. *See infra* note 28.

[28] RCC § 22E-301(a)(3)(B). As the Explanatory Notes accompanying subparagraph (a)(3)(B) of section 301 explain:

> This reasonable adaptation requirement is intended to limit attempt liability to those situations where there exists a basic correspondence between the defendant's conduct and the criminal objective sought to be achieved. Requiring the government to establish this basic correspondence both limits the risk that innocent conduct will be misconstrued as criminal and precludes convictions for inherently impossible attempts.

Id. (collecting District case law and national legal authority in support of this approach).

Inherent impossibility is an issue in conspiracy prosecutions where the parties to a criminal agreement plan to "employ[] means which a reasonable man would view as totally inappropriate to the objective sought." LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 11.5(a)(4); *see, e.g.*, John F. Preis, *Witch Doctors and Battleship Stalkers: The Edges of Exculpation in Entrapment Cases*, 52 VAND. L. REV. 1869, 1904 (1999) (recognition of inherent impossibility defense to attempt most strongly supported by relevant case law, statutes, and commentary); *Ventimiglia v. United States*, 242 F.2d 620, 622 (4th Cir. 1957) (recognizing inherent impossibility defense to conspiracy); *compare* Model Penal Code § 5.05(2) (providing sentencing mitigation for a conspiracy that "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 under this Section"). Conduct of this nature would not be "reasonably adapted" to completion of the target offense under subparagraph (a)(3)(B) of section 301, and, therefore, could constitute a (failure of proof) defense to conspiracy liability under the RCC.

For example, the fact that the defendant in a conspiracy to murder prosecution agreed with another person to kill the victim by pulling the trigger on a broken firearm that the parties mistakenly believed to be operable would not call into question whether the defendant's conduct was reasonably adapted to the completion of murder. In contrast, the fact that the defendant in a conspiracy to murder prosecution agreed with another person to kill the victim by shooting a fully functional firearm at a voodoo doll with the victim's picture attached to it would be relevant to evaluating the reasonable adaptation standard—and ultimately preclude the attachment of conspiracy liability under paragraph (a)(2). *See, e.g., Ventimiglia v. United States*, 242 F.2d 620, 622 (4th Cir. 1957) ("[A]n attack on a wooden [dummy] 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.")

[29] *See, e.g.*, Model Penal Code § 5.03(5) ("No 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."); DRESSLER, *supra* note 1, at § 29.04 (overt act requirement has gained "wide acceptance" among the states, while "[m]ost penal code revisions" apply it to all conspiracies); *Whitfield v. United States*, 543 U.S. 209, 216 (2005) ("Congress has included an express overt-act requirement in at least [23] current conspiracy statutes.").

[30] *See, e.g.*, LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.2(b) ("If the agreement has been established but the object has not been attained, virtually any act will satisfy the overt act requirement.") (collecting cases); Model Penal Code § 5.03(5) cmt. at 387, 454 (same).

attempt to commit the target offense.[31] Nor must the act be illegal.[32] While not particularly demanding, however, the requisite overt act must be proven beyond a reasonable doubt in order to support a conspiracy conviction.[33]

Subsection (b) provides additional clarity concerning the culpable mental state requirement governing a criminal conspiracy as it relates to the result and circumstance elements of the target offense. Whereas the prefatory clause of subsection (a) generally clarifies that an conspiracy conviction entails proof that the defendant acted with a level of culpability that is no less demanding than that required by the target offense, subsection (b) specifically establishes that the "defendant and at least one other person" must both: (1) "[i]ntend to cause any result element required by that offense"[34]; and (2) "[i]ntend for any circumstance element required by that offense to exist."[35] In effect,

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[31] *See, e.g.*, LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.2(b) n.81 ("The overt act need not rise to the level of a 'substantial step' required for an attempt to commit the felony that is the conspiracy's object.") (quoting *Owens v. State*, 929 N.E.2d 754 (Ind. 2010)); DRESSLER, *supra* note 1, at § 29.04(d) (overt act "need not constitute an attempt to commit the target offense").

[32] *See, e.g.*, DRESSLER, *supra* note 1, at § 29.04(d) ("overt act need not be illegal"); *State v. Heitman*, 262 Neb. 185, 198, 629 N.W.2d 542, 553 (2001) (same). This means that otherwise innocent conduct, such as writing a letter, making a phone call, purchasing an instrumentality, or attending a meeting, can, when made pursuant to an unlawful agreement, satisfy the overt act requirement. DRESSLER, *supra* note 1, at § 29.04 (d) (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)); *see* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.2(b) (noting comparable examples).

[33] *E.g.*, Model Penal Code § 5.03, cmt. at 454 ("[W]hen an overt act is required, it is of course an element of the crime of conspiracy, since it must be alleged and proved to support a conviction."); *see, e.g., id.* at 453 (overt act "affords at least a minimal added assurance, beyond the bare agreement, that a socially dangerous combination exists"); *People v. Russo*, 25 P.3d 641, 645 (Cal. 2001) (overt act appropriately respects the admonition that "evil thoughts alone cannot constitute a criminal offense."); *United States v. Sassi*, 966 F.2d 283, 284 (7th Cir. 1992) (overt act helps "to separate truly dangerous agreements from banter and other exchanges that pose less risk.").

[34] *See, e.g*, LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.2(c) ("[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."); *State v. Donohue*, 150 N.H. 180, 184, 834 A.2d 253, 256 (2003) (deeming this position to be well-established, and collecting authorities in accordance).

Dressler illustrates operation of this principle in the context of a result element crime subject to recklessness accordingly:

> It follows from the specific-intent nature of conspiracy that the culpability required for conviction of conspiracy at times must be greater than is required for conviction of the object of the agreement. For example, suppose 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. Put another away, as a matter of logic, one "cannot agree to accomplish a required specific result unintentionally."

DRESSLER, *supra* note 1, at § 29.05(B) (quoting *State v. Beccia*, 505 A.2d 683, 684 (Conn. 1986) (holding that conspiracy to commit reckless arson is not a cognizable offense)).

[35] *See, e.g.*, Commentary on Haw. Rev. Stat. § 705-520 ("It seems clear [] 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."); *State v. Pond*, 315 Conn. 451, 484, 108 A.3d 1083, 1102 (2015) (deeming this position to be well-established, and collecting authorities in accordance);

subsection (b) incorporates dual principles of culpable mental state elevation[36] applicable whenever the target offense is comprised of a result or circumstance that may be satisfied by proof of a non-intentional mental state (i.e., recklessness or negligence), or none at all (i.e., strict liability).[37]

To satisfy the first principle, codified in paragraph (b)(1), the government must prove that the defendant's purposeful agreement was accompanied by a *practically certain belief* that the agreed-upon course of conduct would cause the result element(s) required by the target offense, or, alternatively, by a *conscious desire* for that course of conduct to cause the result(s). Similarly, to satisfy the second principle, codified in paragraph (b)(2), the government must prove that the defendant's purposeful agreement was accompanied by a *practically certain belief* that the circumstance element(s) incorporated into the target offense exist, or, alternatively, by a *conscious desire* for the requisite circumstance(s) to exist.[38]

Subsection (c) establishes the penalties for criminal conspiracies. Paragraph (c)(1) states the default rule governing the punishment of criminal conspiracies under the RCC: a fifty percent decrease in the maximum "punishment" applicable to the target offense.[39] "Punishment," for purposes of this paragraph, means: (1) imprisonment and

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see also, e.g., Rosemond v. United States, 134 S. Ct. 1240, 1242 (2014) ("[A]iding and abetting requires intent extending to the whole crime . . . . That requirement is satisfied when a person actively participates in a criminal venture with *full knowledge of the circumstances* constituting the charged offense."); *United States v. Encarnacion-Ruiz*, 787 F.3d 581, 589 (1st Cir. 2015) ("[U]nder *Rosemond*, an aider and abettor of [the crime of producing child pornography] must have *known* the victim was a minor" although the victim's age is a matter of strict liability for the target offense).

To illustrate how this principle operates in the context of a strict liability crime, consider the following scenario involving two twenty one year-old male college students, P and A. One evening, P asks A if he can borrow A's college dorm room to have consensual sex with V, a girl P just met at a fraternity party. Unbeknownst to both A and P, however, V is a fourteen year-old minor, who P mistakenly believes to be twenty-one and, crucially, who A has never met. A agrees to let P use his room, hands P his keys, and, thereafter, P and V have sex in A's room. If P is subsequently prosecuted for a strict liability sexual abuse offense applicable to fourteen year-old victims, P can be convicted notwithstanding his mistake of fact. However, the same mistake of fact would exonerate A under subsection (b) notwithstanding the strict liability nature of the target offense. Although A purposely agreed to aid P with his sexual rendezvous with V, A lacked the *intent* to facilitate sex with *a fourteen year old*, which would be required by the principle of culpable mental state elevation codified by subsection (b).

[36] Note that for those target offenses that already require proof of intent, knowledge, or purpose as to any result or circumstance, subsection (b) does not elevate the applicable culpable mental state for a conspiracy charge.

[37] Importantly, neither of these principles of culpable mental state elevation precludes the government from charging conspiracies to commit target offenses comprised of result or circumstance elements subject to recklessness, negligence, or strict liability. However, to secure a conspiracy conviction for such offenses, proof that the parties to the agreement acted with the intent to cause every result and circumstance element that constitutes the target offense is necessary.

[38] When formulating jury instructions for a conspiracy to commit a target offense subject to a culpable mental state of knowledge (whether as to a result or circumstance), the term "intent," as defined in RCC § 22E-206(b), should instead be substituted for the term knowledge. This substitution is appropriate given that the term "knowledge" can be misleading in the context of inchoate offenses—whereas the substantively identical term "intent" is not. *See* RCC § 22E-206(b), Explanatory Notes.

[39] *See, e.g.*, Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?*, 1994 J. CONTEMP. LEGAL ISSUES 299, 305 (1994) ("Adhering to an objective view of grading, a majority of jurisdictions reduce the grade of inchoate conduct below that of the corresponding substantive offense."); LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.4(d) (nearly half of American jurisdictions

fine if both are applicable to the target offense; (2) imprisonment only if a fine is not applicable to the target offense; and (3) fine only if imprisonment is not applicable to the target offense. Paragraph (c)(2) thereafter lists those offenses that are exempt from this default rule and specifies the punishment for each exception.[40]

Subsections (d), (e), and (f) recodify the jurisdictional provisions set forth in D.C. Code § 22-1805a,[41] and, in so doing, address two issues relevant to general conspiracy

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"provide that the conspiracy crime is one class lower than the object crime") (collecting statutes); Model Penal Code § 5.05 cmt. at 489 n.19 ("Many recent revisions generally grade conspiracy one level below the object offense."). This penalty reduction is to be contrasted with the Model Penal Code, which grades most criminal conspiracies as "crimes of the same grade and degree as the most serious offense which is attempted." Model Penal Code § 5.05(1); *but see id.* ("[A] conspiracy . . . to commit a [capital crime or a] felony of the first degree is a felony of the second degree.").

The drafters of the Model Penal Code adopted this policy of conspiracy penalty equalization, in a significant departure from the prevailing common law approach, on the basis of the same dangerousness-based rationale that motivated their endorsement of a unilateral approach to conspiracy and equalizing the penalty for other general inchoate crimes, such as attempt. *See, e.g.*, Model Penal Code § 5.05, cmt. at 490 ("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."). However, as discussed in the Explanatory Notes accompanying RCC § 22E-301(d), this rationale for punishment has been called into question by many on empirical grounds, including, perhaps most notably, by the drafters of the recent Model Penal Code Sentencing Project. *See, e.g.*, Model Penal Code: Sentencing § 6.06 PFD (2017) ("There are undenied elements of inefficacy and injustice in the Code's endorsement of incapacitation as a ground for incarceration, particularly when authorities misapprehend the dangerousness of individual offenders.").

The (original) Model Penal Code's equalization of conspiracy penalties also conflicts with a strong intuitive sense, captured by public opinion surveys, that resultant harm should matter for grading purposes. *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, 429-30 (1998) (failure to consummate an offense generates, at minimum, "a reduction in liability of about 1.7 grades" by lay jurors, while the earlier the defendant's plans are frustrated, the greater this "no harm" discount). This may explain why, "[i]n the United States, three-quarters of the jurisdictions reject the notion of grading inchoate offenses the same as the completed offense." Robinson, *supra* note 39, at 320 ("Nearly two-thirds of American jurisdictions have adopted codes that have been heavily influenced by the Model Penal Code, but less than 30% of these have adopted the Code's inchoate grading provision or something akin to.").

[40] Many jurisdictions that subject conspiracy liability to generally applicable grading principles statutorily recognize exceptions for particular conspiracy offenses or categories of conspiracy offenses. *See, e.g.*, Model Penal Code § 5.05(1) ("[An] attempt . . . to commit a [capital crime or a] felony of the first degree is a felony of the second degree."); ROBINSON, *supra* note 39, at 320 n.67 (nearly all jurisdictions that statutorily equalize punishment for general inchoate crimes recognize some exceptions); Utah Code Ann. § 76-4-202 ("Conspiracy to commit . . . a first degree felony is a second degree felony; except that conspiracy to commit child kidnaping, in violation of Section 76-5-301.1 or to commit any of those felonies described in Title 76, Chapter 5, Part 4, Sexual Offenses, which are first degree felonies, is a first degree felony punishable by imprisonment for an indeterminate term of not less than three years and which may be for life[.]").

[41] The relevant statutory provisions, subsections (c) and (d), read:

> (c) When the object of a conspiracy contrived within the District of Columbia is to engage in conduct in a jurisdiction outside the District of Columbia which would constitute a criminal offense under an act of Congress applicable exclusively to the District of Columbia if performed therein, the conspiracy is a violation of this section if:

liability under the RCC. The first is whether and to what extent section 303 applies to conspiracies to commit target offenses outside the District of Columbia. And the second is whether and to what extent section 303 applies to conspiracies formed outside the District of Columbia.

Subsection (d) addresses the first situation, where the requisite agreement is formed within the District of Columbia, but where the object of the agreement is to engage in conduct outside the District of Columbia. It establishes that general conspiracy liability applies if the conduct to be performed outside the District of Columbia would constitute a criminal offense under the statutory laws of the District of Columbia if performed inside the District of Columbia, provided that one of the two following conditions is met.[42] First, that conduct would constitute a criminal offense under the statutory laws of that other jurisdiction if performed in that jurisdiction.[43] Second, and alternatively, that conduct would constitute a criminal offense under the statutory laws of the District of Columbia even if it was performed outside the District of Columbia.[44]

Subsection (e) addresses the second situation, where the requisite agreement is formed outside the District of Columbia, but where the object of the agreement is to engage in conduct inside the District of Columbia. It establishes that general conspiracy liability applies if the conduct to be performed inside the District of Columbia would constitute a criminal offense under the statutory laws of the District of Columbia,[45] provided that an overt act in furtherance of the conspiracy is committed within the District of Columbia.[46] Under these circumstances, subsection (e) further clarifies that it is no defense that the conduct that is the object of the conspiracy would not constitute a criminal offense under the laws of that other jurisdiction.[47]

> (1) Such conduct would also constitute a crime under the laws of the other jurisdiction if performed therein; or
>
> (2) Such conduct would constitute a criminal offense under an act of Congress exclusively applicable to the District of Columbia even if performed outside the District of Columbia.
>
> (d) A conspiracy contrived in another jurisdiction to engage in conduct within the District of Columbia which would constitute a criminal offense under an act of Congress exclusively applicable to the District of Columbia if performed within the District of Columbia is a violation of this section when an overt act pursuant to the conspiracy is committed within the District of Columbia. Under such circumstances, 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 crime under the laws of the other jurisdiction.

D.C. Code § 22-1805a. Note that the prior references to "act[s] of Congress exclusively applicable to the District of Columbia" in the old District statute have been replaced with the phrase "statutory laws of the District of Columbia" in RCC § 22E-303(d), (e), and (f). This explicitly clarifies that these jurisdictional provisions apply to all criminal offenses in the D.C. Code, rather than just congressionally enacted offenses.

[42] RCC § 22E-303(d)(1).

[43] RCC § 22E-303(c)(2)(A).

[44] RCC § 22E-303(c)(2)(B).

[45] RCC § 22E-303(d)(1).

[46] RCC § 22E-303(d)(2).

[47] Nothing in subsection (e) 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).

Section 303 is intended to preserve existing District law relevant to conspiracy liability to the extent it is consistent with the RCC's statutory text and accompanying commentary.[48] Subsections (a)-(e) therefore incorporate existing District legal authorities whenever appropriate.[49]

Relation to Current District Law. RCC § 22E-303 clarifies, improves the proportionality of, and fill in gaps in the District law of criminal conspiracies.

The D.C. Code provides for conspiracy liability in a variety of ways. Most prominently, the D.C. Code contains a general conspiracy penalty provision that applies to a relatively broad group of offenses.[50] Additionally, the D.C. Code contains a variety of semi-general conspiracy penalty provisions, which create conspiracy liability for narrower groups of offenses with related social harms.[51] Finally, some specific offenses in the D.C. Code individually provide for conspiracy liability by incorporating the term "conspires" as an element of the offense.[52]

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[48] This includes both those topics explicitly addressed by subsections (a)-(e) as well as those that are not, such as, for example: (1) determining the scope, duration, and number of conspiracies, see *McCullough v. United States*, 827 A.2d 48, 60 (D.C. 2003); (2) unanimity, see D.C. Crim. Jur. Instr. § 7.102 (citing *U.S. v. Treadwell*, 760 F.2d 327, 336-37 (D.C. Cir. 1985)); (3) charging, see *Tann v. United States*, 127 A.3d 400, 430 (D.C. 2015); (4) joinder, see *McCray v. United States*, 133 A.3d 205 (D.C.), *cert. denied sub nom. Fortson v. United States*, 137 S. Ct. 581, 196 L. Ed. 2d 455 (2016), and (5) the fact-finder's role in determining whether the relevant jurisdictional bases have been met, see *Gilliam v. United States*, 80 A.3d 192 (D.C. 2013).

[49] For an example of an area of the District's law of conspiracy changed by the RCC, compare D.C. Code § 22-1805a(a)(1) ("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* . . . .") *with* RCC § 22E-303(a) ("A person is guilty of a conspiracy to commit *an offense* . . . ."); *see supra* note 2.

[50] That provision, D.C. Code § 22-1805a, establishes in relevant part:

> (a)(1) 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 not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both, except that if the object of the conspiracy is a criminal offense punishable by less than 5 years, the maximum penalty for the conspiracy shall not exceed the maximum penalty provided for that offense.
>
> (2) If 2 or more persons conspire to commit a crime of violence as defined in § 23-1331(4), each shall be fined not more than the amount set forth in § 22-3571.01 nor the maximum fine prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or imprisoned not more than 15 years nor the maximum imprisonment prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or both.

The first subparagraph was created by Congress in 1970. *See* 84 Stat. 599, Pub. L. 91-358, title II, § 202, at 599 (July 29, 1970). The latter subparagraph was added by the D.C. Council in 2009 as part of the Omnibus Public Safety and Justice Amendment Act of 2009. *See* D.C. Law 18-88, § 209, 56 DCR 7413, 2009 District of Columbia Laws 18-88 (Dec. 10, 2009). Both subparagraphs were subject to the Criminal Fine Proportionality Act of 2012, see D.C. Law 19-317, § 201(z), 60 DCR 2064 (June 11, 2013).

[51] *See* D.C. Code § 48-904.09 (setting forth penalties for conspiracy to commit various drug offenses); D.C. Code § 8-417 (setting forth penalties for conspiracy to commit various pesticide-related violations); D.C. Code § 50-1331.08 (setting forth penalties for conspiracy to commit various false title-related violations).

[52] *See* D.C. Code § 22-3153 (conspiracy to commit particular crimes of violence as acts of terrorism); D.C. Code § 22-3154 (conspiracy to manufacture or possess a weapon of mass destruction); D.C. Code § 22-

The District's scattered collection of conspiracy statutes present the same two basic problems reflected in the District's "patchwork of attempt statutes."[53] The first is that the District's conspiracy statutes fail to clearly communicate the elements of a criminal conspiracy. In no place, for example, does the D.C. Code define the term conspiracy. This statutory silence has effectively delegated to District courts the responsibility to establish the contours of conspiracy liability. Over the years, the DCCA has issued numerous opinions and proffered a variety of statements relevant to determining the contours of conspiracy liability under District law. The case law in this area reflects the piecemeal evolution of doctrine over more than a century: it is sometimes ambiguous, occasionally internally inconsistent, and has never been clearly synthesized into a single analytical framework. Nonetheless, a holistic reading of District authority reveals basic and fundamental principles governing the contours of conspiracy liability. Consistent with the interests of clarity and consistency, RCC § 22E-303 translates these principles into a detailed statutory framework.

The second main problem in the District's conspiracy statutes is that they lack a consistent grading principle. For example, some District conspiracies are subject to the same statutory maxima governing the completed offense. Many other District conspiracies, in contrast, are subject to a statutory maximum less severe than (typically one-half) the statutory maximum applicable to the completed offense. Viewed collectively, then, the D.C. Code manifests at least two fundamentally different patterns in how it grades conspiracies, without any discernible rationale for the variances. This produces a penalty scheme which authorizes the imposition of sentences that are, at least in relation to one another, quite disproportionate. Consistent with the interests of consistency and proportionality, RCC § 22E-303 changes District law by adopting a uniform approach to grading conspiracies at one half the severity of the completed offense.

A more detailed analysis of District conspiracy law and its relationship with RCC § 22E-303 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) the treatment of non-criminal objectives; (7) penalties; and (8) jurisdictional issues.

RCC § 22E-303(a) (Prefatory Clause): Relation to Current District Law on Plurality Requirement. The prefatory clause of RCC § 22E-303(a) both codifies and clarifies the bilateral approach to conspiracy currently applied in the District.

One fundamental policy issue at the heart of conspiracy liability is whether the offense is bilateral or unilateral in nature. This distinction can be summarized as follows:

> The bilateral approach asks whether there is an agreement between two or more persons to commit a criminal act. Its focus is on the content of the agreement and whether there is a shared understanding between the conspirators. The unilateral approach is not concerned with the content of

3155 (conspiracy to use, disseminate, or detonate a weapon of mass destruction); D.C. Code § 22-2001 (conspiracy to kidnap); D.C. Code § 21-591 (conspiracy to violate various fiduciary obligations); D.C. Code § 1-1001.14 (conspiracy to engage in corrupt election practices).

[53] 1978 D.C. Code Rev. § 22-201 cmt. at 113.

> the agreement or whether there is a meeting of minds. Its sole concern is whether the agreement, shared or not, objectively manifests the criminal intent of at least one of the conspirators.[54]

Under current District law, it is well established that conspiracy is a bilateral, rather than unilateral, offense. The genesis of this approach is the District's general conspiracy statute, which explicitly states that "2 or more persons [must] conspire" to commit an offense.[55] The DCCA, in turn, has observed that this language means what it says, namely, that at least two of the relevant parties must actually agree.[56]

District practice, as captured by the Redbook jury instructions, also reflects a bilateral approach to conspiracy. More specifically, the Redbook states that the government must prove that "an agreement existed between two or more people to commit the crime" that constitutes the object of the conspiracy.[57] This aspect of the jury instructions does not entail proof of "a formal agreement or plan, in which everyone involved sat down together and worked out the details."[58] At the very least, however, the government must prove beyond a reasonable doubt that "there was a common understanding among those who were involved to commit the crime," which constitutes the object of the conspiracy.[59]

Under current District law, therefore, "[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, is not a mere technicality but 'the fundamental characteristic of a conspiracy.'"[60]

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[54] *State v. Pacheco*, 125 Wash. 2d 150, 160 (1994).

[55] D.C. Code §§ 22-1805a(1)-(2). Note that a person who merely *solicits* another to commit a crime of violence is subject to criminal liability under the District's general solicitation statute. *See* D.C. Code § 22-2107(b) ("Whoever is guilty of soliciting a crime of violence as defined by § 23-1331(4), whether or not such crime occurs, shall be sentenced to a period of imprisonment not exceeding 10 years, a fine not more than the amount set forth in § 22-3571.01, or both.") Under District law, a "crime of violence" means:

> aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.

D.C. Code § 23-1331(4).

[56] *E.g.*, *McCullough v. United States*, 827 A.2d 48, 58 (D.C. 2003); *Gibson v. United States*, 700 A.2d 776, 779 (D.C. 1997); *see De Camp v. United States*, 10 F.2d 984, 985 (D.C. Cir. 1926) ("It is true that a conspiracy can only exist between two or more persons, and a single defendant could not be guilty of the crime.").

[57] D.C. Crim. Jur. Instr. § 7.102.

[58] *Id.*

[59] *Id.*

[60] *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)).

Consistent with the interests of clarity, as well as the preservation of current District law, the RCC codifies this bilateral approach to conspiracy. This is reflected in the prefatory clause of RCC § 22E-303(a), which establishes that a person is guilty of a conspiracy to commit an offense when, *inter alia*, that "person *and at least one other person*" satisfy the elements of a conspiracy. This italicized language, drawn from DCCA case law, replaces the "2 or more persons" language employed in the District's current general conspiracy statute.[61] It more clearly communicates the required joint commitment at the heart of the bilateral approach to conspiracy under District law.

RCC § 22E-303(a)(1): Relation to Current District Law on Agreement Requirement. RCC § 22E-303(a)(1) codifies District law relevant to the agreement requirement of a criminal conspiracy.

The agreement constitutes both the "gist of"[62] and "[t]he essential element"[63] of a conspiracy under District law. Absent a statutory clarification of the agreement requirement in D.C. Code § 22-1805a, however, it has fallen to the DCCA to determine the contours of this essential element. The body of case law that has resulted can be subdivided into two different dimensions: (1) substantive (i.e., the principles of liability governing the agreement requirement); and (2) evidentiary (i.e., the kind of proof that will satisfy those principles). This section focuses on the substantive dimension.

The scope of the agreement requirement is quite broad under DCCA case law, encompassing a wide range of conduct. For example, it is well established that a defendant can be deemed to have agreed with others to pursue criminal objectives without "knowing the identity of all the other people . . . participating in the agreement."[64] Nor, for that matter, does the defendant need to have "agreed to all the details" of a scheme to be deemed to have agreed to pursue its objectives.[65]

Perhaps most importantly, a defendant can be convicted of a conspiracy under District law "even if that person agrees to play only a minor part as long as that person understands the unlawful nature of the plan."[66] This seems to mean that an agreement to aid another in the planning or commission of an offense, just like an agreement to directly

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[61] D.C. Code § 22-1805a(a).

[62] *Wilson-Bey v. United States*, 903 A.2d 818, 841 (D.C. 2006) (*en banc*) (quotations and citations omitted).

[63] *Pearsall v. United States*, 812 A.2d 953, 961 (D.C. 2002) (citation omitted).

[64] *Thomas v. United States*, 748 A.2d 931, 939 (D.C. 2000); *Green v. United States*, 718 A.2d 1042, 1057 (D.C. 1998); *see Irving v. United States*, 673 A.2d 1284, 1288 (D.C. 1996) (rejecting appellant's argument that he did not knowingly participate in a conspiracy because he had never been sure with whom he conspired); *see also Rogers v. United States*, 340 U.S. 367, 375 (1951) ("[A]t least two persons are required to constitute a conspiracy but the identity of the other members of the conspiracy is not needed inasmuch as one person can be convicted of conspiracy with persons whose names are unknown.") (cited in D.C. Crim. Jur. Instr. § 7.102).

[65] *Thomas*, 748 A.2d at 939; *Green*, 718 A.2d at 1057. So, for example, as the DCCA observed in *Collins v. United States*:

> The formation of a conspiracy to rob does not necessarily require agreement either as to the means of committing the robbery, or as to the particular person to be robbed . . . . Indeed, conspirators may leave room for improvisation or refinement of details so long as they have agreed upon their fundamental goal . . . .

73 A.3d 974, 983 (D.C. 2013) (citations and quotations omitted).

[66] *Thomas*, 748 A.2d at 939; *Green*, 718 A.2d at 1057.

commit that offense, can provide the basis for conspiracy liability "provided there is assent to contribute to a common enterprise."[67] Consistent with this principle, proof that a person agreed to participate in "every phase of the criminal venture" is neither a necessary nor essential component of conspiracy liability under District law.[68]

RCC § 22E-303(a)(1) codifies the above District authorities applicable to understanding the scope of the agreement requirement. Specifically, RCC § 22E-303(a)(1) establishes that an "[a]gree[ment] to engage in or aid the planning or commission" of criminal conduct is sufficient to establish general conspiracy liability under the RCC. This two-part formulation clarifies that agreements to aid (i.e., assist[69]), no less than agreements to directly commit, an offense constitute a sufficient basis for general conspiracy liability. This is consistent with current District law pertaining to the scope of the agreement requirement, and, as such, should preserve current District law pertaining to proof of the agreement requirement.[70]

RCC §§ 22E-303(a) & (b): Relation to Current District Law on Culpable Mental State Requirement. RCC §§ 22E-303(a) and (b) codify and fills gaps in District law concerning the culpable mental state requirement governing a conspiracy.

The precise contours of the culpable mental state requirement applicable to conspiracy under District law are ambiguous. The DCCA has generally recognized that there exists "two separate intents" at issue in conspiracy, "the intent to agree and the

[67] *Long v. United States*, No. 16-CF-730, 2017 WL 4248198, at *7 (D.C. Sept. 14, 2017) (quoting *United States v. Gardiner*, 463 F.3d 445, 457 (6th Cir. 2006)); *see, e.g.*, *In re T.M.*, 155 A.3d at 404 (conspiracy conviction upheld where one party to agreement was "walking with and advising [the other party] on how to evade detection" after shooting); *McCoy v. United States*, 890 A.2d at 210 (conspiracy conviction upheld where one party to agreement shouted instructions at the other to drive the car in close range of the victim's car in furtherance of shooting); *Hairston v. United States*, 905 A.2d 765, 784 (D.C. 2006) (conspiracy conviction upheld where defendant "obtain[ed] guns and ammunition and join[ed] efforts to 'catch' members of [rival gang]"); *Green*, 718 A.2d at 1058 (upholding conspiracy conviction where defendant "joined the agreement with an understanding of its objective and with the intent to *assist* in its accomplishment").

[68] *Long*, 2017 WL 4248198, at *7 (quoting *Gardiner*, 463 F.3d at 457). The fact that agreements which envision accessorial support, no less than agreements to directly commit an offense, fall within the scope of conspiracy liability under District law seems to reflect the fact that concerted criminal activity is a social harm of the "gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime." *Wilson-Bey*, 903 A.2d at 841 (discussing when "two or more to confederate and combine together to commit or *cause to be committed* a breach of the criminal laws") (quoting *Pinkerton*, 328 U.S. at 644).

[69] *See generally Tann v. United States*, 127 A.3d 400 (D.C. 2015), *cert. denied sub nom. Arnette v. United States*, No. 16-8523, 2017 WL 1200942 (U.S. May 1, 2017); *Johnson v. United States*, 883 A.2d 135 (D.C. 2005); *Prophet v. United States*, 602 A.2d 1087 (D.C. 1992).

[70] As an evidentiary matter, DCCA case law clarifies that the agreement requirement need not be "proven by direct evidence." *Mitchell v. United States*, 985 A.2d 1125, 1135 (D.C. 2009) (quotations and citations omitted). Instead, they may be—and frequently must be—"inferred from a development and a collocation of circumstances." *Id.* (noting that evidentiary concerns are particularly significant in conspiracy cases given the difficulty of directly establishing the existence of an agreement.) The relevant circumstances considered by District courts as a matter of course "include the conduct of defendants in mutually carrying out a common illegal purpose, the nature of the act done, the relationship of the parties and the interests of the alleged conspirators." *Castillo–Campos v. United States*, 987 A.2d 476, 483 (D.C. 2010) (internal quotation marks and alterations omitted).

intent to achieve the criminal objective."[71] And, consistent with this understanding, the court has repeatedly held that the government is required to prove that the defendant both: (1) "intentionally joined [an] agreement"; and (2) did so "with the intent to advance or further the unlawful object of the conspiracy."[72] Upon closer consideration, however, the actual import of this particular formulation is less than clear.[73]

Consider that the first requirement, an intent to join an agreement, is a relatively insignificant part of any conspiracy offense. It is well established, for example, that "[t]he term 'agree' is commonly understood to include an 'intent to agree,'"[74] and that such an intent is "without moral content."[75] As a result, the larger, and more significant, issue is "what objective the parties intended to achieve by their agreement."[76] This is the issue that the second requirement of the previously quoted District formulation purports to address; it requires the government to prove an "intent to advance or further the unlawful object of the conspiracy."[77] Yet this formulation begs at least two different questions, neither of which is clearly resolved by the case law. First, what does "intent" mean in the context of an "intent to advance or further the unlawful object of the conspiracy"? And second, how does this intent requirement interact with the elements of the target offense, which may, or may not, be considered part of the "unlawful object of the conspiracy"?

Confounding the first question is the fact that the term "intent" is defined in two different ways by common law authorities. Historically, intent has been "viewed as a bifurcated concept embracing either the specific requirement of purpose," which entails proof of a conscious desire, "or the more general one of knowledge," which entails proof of a belief as to a practical certainty.[78] But there are exceptions to this bifurcated understanding. In specific contexts, for example, intent is employed as a synonym for purpose, thereby excluding knowledge as a viable basis for liability.[79] The law of

[71] *Green v. United States*, 718 A.2d 1042, 1057–58 (D.C. 1998).
[72] *Id.*; *see, e.g., Thomas v. United States*, 748 A.2d 931, 939 (D.C. 2000); D.C. Crim. Jur. Instr. § 7.102(2).
[73] Note that other DCCA cases use the phrase "knowing and voluntary participation in the agreement" instead of "intentionally joining an agreement." *E.g.*, *Campos-Alvarez v. United States*, 16 A.3d 954, 965 (D.C. 2011); *In re T.M.*, 155 A.3d 400, 404 (D.C. 2017); *McCullough v. United States*, 827 A.2d 48, 58 (D.C. 2003); *Gibson v. United States*, 700 A.2d 776, 779 (D.C. 1997). These appear to be substantively identical formulations, though one *could* read the term "participation" in the latter formulation to impose an additional conduct requirement, above and beyond agreement. One problem with such a reading, however, is that it would seem to render the overt act requirement superfluous in the sense that the element of participation would by itself always satisfy the overt act requirement. *See generally* Commentary to RCC § 22E-303(a)(2). In any event, as a matter of *mens rea*, this formulation does not alter the analysis of District law presented in this section. *See United States v. Childress*, 58 F.3d 693, 709 (D.C. Cir. 1995) (explaining why the "knowing and voluntary participation" language does not alter the fact that conspiracy is a "specific intent" crime).
[74] Robinson & Grall, *supra* note 5, at 752–53.
[75] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.2 (Westlaw 2017).
[76] *Id.*
[77] *McCrae v. United States*, 980 A.2d 1082, 1089 (D.C. 2009).
[78] *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 445 (1978); *see Tison v. Arizona*, 481 U.S. 137, 150 (1987).
[79] *See United States v. Bailey*, 444 U.S. 394, 405 (1980); Model Penal Code § 2.02, cmt. at 125; LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.2.

conspiracy has typically been considered to be one such context by common law authorities.[80]

A careful reading of District authorities suggests that existing District law *likely* accords with the common law view. For example, as the DCCA—quoting from U.S. Supreme Court case law—observed in *Brawner v. United States*:

> In certain narrow classes of crimes . . . heightened culpability has been thought to merit special attention . . . . [One] such example is the law of inchoate offenses such as . . . conspiracy, where a heightened mental state separates criminality itself from otherwise innocuous behavior.[81]

Consistent with this understanding of conspiracy as an offense that entails proof of a "heightened mental state," the DCCA has seemingly equated the "intent" at issue in conspiracy with an "unlawful purpose"[82] or "illegal purpose."[83] This kind of purpose-based interpretation also accords with persuasive precedent—cited by the Redbook—from the U.S. Court of Appeals for the D.C. Circuit, which explicitly clarifies that "a purposeful state of mind [is] required" for conspiracy.[84]

Also relevant to this issue is the DCCA's observation in *McCoy v. United States* that "[m]ere [] awareness" is "insufficient to make out a conviction for either aiding and abetting or conspiracy."[85] The requirement of a "purposive attitude" is, as recognized by the DCCA's *en banc* decision in *Wilson-Bey*, an essential component of complicity liability under District law.[86] It therefore stands to reason—and is likewise indicated by the *McCoy* decision—that the same kind of "purposive attitude" is a necessary component of conspiracy liability.[87]

Even assuming intent means purpose in the context of the phrase "intent to advance or further the unlawful object of the conspiracy," however, the culpable mental state requirement applicable to conspiracy under District law still remains ambiguous. The reason? It fails to respect the admonition that, as the DCCA observed in *Ortberg v. United States*, "clear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime."[88] To say, for example, that the parties to an agreement must desire to "advance or further the unlawful object of the conspiracy" does not specify

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[80] *See* sources cited *supra* note 49.
[81] 979 A.2d 1191, 1194 (D.C. 2009) (quoting *Bailey*, 444 U.S. at 405); *see Childress*, 58 F.3d at 707–08.
[82] *Green v. United States*, 718 A.2d 1042, 1058 (D.C. 1998).
[83] *Castillo-Campos*, 987 A.2d at 483; *see also Thomas*, 748 A.2d at 934 (for conspiracy requiring proof that the accused "*knowingly and intentionally* agrees.").
[84] *Childress*, 58 F.3d at 709; *see United States v. Clarke*, 24 F.3d 257, 264–65 (D.C. Cir. 1994) (to convict defendants of conspiracy to possess drugs with intent to distribute, "the government had to establish . . . that the defendants *purposefully* agreed to act in partnership"); *see also* Commentary to D.C. Crim. Jur. Instr. § 7.102 (citing *Childress* for the proposition that an erroneous instruction that conspiracy was a "general intent" crime was harmless since the instruction clearly informed the jury that a purposeful state of mind was required).
[85] *McCoy v. United States*, 890 A.2d 204, 211 (D.C. 2006), *as amended* (Feb. 23, 2006) (citing *Bolden v. United States*, 835 A.2d 532, 535 (D.C. 2003); *Speight v. United States*, 599 A.2d 794, 796-97 (D.C. 1991).
[86] *Wilson-Bey v. United States*, 903 A.2d 818, 831 (D.C. 2006) (*en banc*).
[87] *See* sources cited *supra* notes 55-56.
[88] *Ortberg v. United States*, 81 A.3d 303, 307 (D.C. 2013) (citations, quotations, and alterations omitted).

whether the requisite purpose requirement applies to the (1) the *conduct* planned to culminate in that offense; (2) the *circumstances* surrounding that conduct; or (3) the *results*, if any, that conduct would cause if carried out.

It seems relatively clear that, at minimum, the parties to the agreement must desire to bring about the conduct planned to culminate in an offense.[89] Less clear, however, is whether and to what extent this purpose requirement—or any other principle of culpable mental state elevation—applies to the results and circumstances of the target offense.

For example, to secure a conviction for conspiracy to commit robbery *against a senior citizen*, must the government (merely) prove that the parties consciously desired to bring about conduct planned to culminate in the offense (e.g., knocking down and taking the wallet of victim X, who is over the age of 65)? Or, alternatively, must the government also prove that the parties consciously desired the relevant circumstance to exist (e.g., that victim X actually be over the age of 65)?

Likewise, where a target offense involving a result element is involved (e.g., homicide), must the government prove a conscious desire to bring about that result as well? Or, alternatively will a lesser mental state suffice (e.g., could two persons be convicted of conspiracy to commit second-degree murder where they agreed to blow up a housing project they were practically certain to be inhabited if their *purpose* was the destruction of building, and not to kill any of its inhabitants)?

Existing DCCA case law on conspiracy sheds little light on these issues.[90] The best one can do, then, is look to other legal contexts, where awareness—but likely nothing less than awareness—seems to suffice for liability.

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[89] *See* sources cited *supra* notes 51-55; *see also Brown v. United States*, 89 A.3d 98, 103–04 (D.C. 2014) (noting that conspiracy is "a specific intent" crime); *In re T.M.*, 155 A.3d at 404 (upholding conspiracy conviction on the basis that one party "intended to help [the other party] carry out the overt act without detection").

[90] This is perhaps unsurprising given that, under the *Pinkerton* doctrine, the government can, in many cases, use proof of a conspiracy to commit *any* offense plus negligence as to the results or circumstances of a greater or distinct offense to secure full liability for the latter offense. *See Pinkerton v. United States*, 328 U.S. 640 (1946). Here's how the DCCA summarized the *Pinkerton* doctrine in *Wilson-Bey*:

> [T]he *Pinkerton* doctrine provides that "a co-conspirator who does not directly commit a substantive offense may [nevertheless] be held liable for that offense if it was committed by another co-conspirator in furtherance of the conspiracy and was a reasonably foreseeable consequence of the conspiratorial agreement." *Gordon v. United States*, 783 A.2d 575, 582 (D.C. 2001). Thus, in order to secure a conviction in conformity with *Pinkerton*, the prosecution must prove that an agreement existed, that a substantive crime was committed by a co-conspirator in furtherance of that agreement, and that the substantive crime was a reasonably foreseeable consequence of the agreement between the conspirators. *Pinkerton*, 328 U.S. at 646-47, 66 S.Ct. 1180; *Gordon*, 783 A.2d at 582. The government is not, however, required to establish that the co-conspirator actually aided the perpetrator in the commission of the substantive crime, but only that the crime was committed in furtherance of the conspiracy.

903 A.2d at 840. Note that the *Pinkerton* doctrine, while requiring proof of the elements of a conspiracy, is actually a theory of complicity. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.08 (6th ed. 2012). Therefore, it is not addressed in this Report, but will instead be considered alongside accomplice liability in the CCRC's forthcoming work on complicity. The provisions that comprise RCC § 22E-303 neither preclude nor necessitate continued recognition of the *Pinkerton* doctrine.

For example, DCCA case law on attempt—described in the Commentary to RCC § 22E-301(a)—appears to indicate that a principle of intent elevation governs the results of the target offense.[91] If true, this would mean that, where an attempt to commit a result element crime is charged, the government must prove that the defendant acted with either a belief that it was practically certain that the person's conduct would cause that result, or, alternatively, that the person consciously desired to cause any results of the target offense—regardless of whether that result is subject to a less demanding culpable mental state.[92] (It would also mean, however, that purpose as to a result, while sufficient, is not necessary for an attempt conviction.[93])

Given that conspiracy, which merely requires proof of an agreement and a mere overt act in furtherance of it,[94] is even more inchoate than attempt, which requires proof of conduct dangerously close to completion,[95] it stands to reason that the culpable mental state requirement applicable to the results of a conspiracy would, at minimum, entail a principle of culpable mental state elevation at least as demanding as that applicable to attempt.[96]

For circumstances, on the other hand, DCCA case law on accomplice liability provides a relevant point of departure. In this context, the DCCA in *Robinson v. United States* recently observed that—quoting from U.S. Supreme Court case law—"[a]n aiding and abetting conviction requires not just an act facilitating one or another element, but also a state of mind extending to the entire crime . . . . [T]he intent must go to the specific and entire crime charged."[97] It therefore follows, as the *Robinson* court concluded, that "[a] person cannot intend to aid an armed offense if she is unaware a weapon will be involved."[98]

The *Robinson* decision indicates that, whatever the culpable mental state governing the circumstances of the target offense, a person cannot be deemed an accomplice of that offense without knowledge (or perhaps a belief) that they existed—regardless of whether a less demanding culpable mental state, such as recklessness or negligence, will suffice to establish to target offense.[99] (It also indicates, however, that a purpose requirement does not govern the circumstances of the target offense when charged under a complicity theory.[100])

Given that accomplice liability requires proof that the target offense was completed—whereas conspiracy liability does not—it stands to reason that the culpable mental state requirement applicable to the circumstances of a conspiracy would, at minimum, entail principles of culpable mental state elevation that are at least as demanding as those applicable to those of accomplice liability.[101]

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[91] *See* RCC § 22E-301(a): Relation to Current District Law on Culpable Mental State Requirement.
[92] *See id.*
[93] *See id.*
[94] *See* LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 61, at § 27.07.
[95] *Robinson v. United States*, 608 A.2d 115, 116 (D.C. 1992) (citing *Iannelli v. United States*, 420 U.S. 770, 786 n.17 (1975).
[96] *See, e.g.*, Model Penal Code § 5.01 cmt. at 408-09.
[97] *Robinson*, 100 A.3d at 105–06 (quoting *Rosemond v. United States*, 134 S. Ct. 1240, 1249 (2014)).
[98] *Id.*
[99] *See id.*
[100] *See Rosemond*, 134 S. Ct. at 1249.
[101] *See, e.g.*, Model Penal Code § 5.01 cmt. at 408-09.

One question left open by this analysis is whether an even *more demanding* principle of purpose elevation might apply to the results and circumstances of the target offense when a conspiracy is charged.[102] While purpose elevation is possible,[103] it's hard to see why anything more demanding than intent as to the results and circumstances of the target offense should be necessary to ground a conspiracy conviction as a policy matter.[104]

In accordance with this section's analysis of District law, subsections (a) and (b) codify the culpable mental state requirement of conspiracy as follows. The prefatory clause of subsection (a) establishes that the culpability requirement applicable to a criminal conspiracy necessarily incorporates "the culpability required by [the target] offense." Subsection (a)(1) thereafter establishes a requirement of purpose applicable to both the agreement itself as well as to the conduct envisioned by the agreement, i.e., the parties must "[p]urposely agree to engage in or aid the planning or commission" of criminal conduct. These requirements are consistent with current District law on conspiracy.

Finally, subsection (b) establishes that the "defendant and at least one other person" must both: (1) "[i]ntend to cause any result element required by that offense"; and (2) "[i]ntend for any circumstance element required by that offense to exist." This language incorporates dual principles of culpable mental state elevation[105] applicable whenever the target offense is comprised of a result or circumstance that may be satisfied by proof of a non-intentional mental state (i.e., recklessness or negligence), or none at all (i.e., strict liability).[106] In this case, proof of intent on behalf of two or more parties is required. These two policies fill a gap in the District law of conspiracy in a manner that is broadly consistent with District law applicable in other relevant contexts.

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[102] *But see Rosemond*, 134 S. Ct. at 1249.

[103] *But see Childress*, 58 F.3d at 707–08; *compare with Clarke*, 24 F.3d at 264–65 and *United States v. Haldeman*, 559 F.2d 31, 112 (D.C. Cir. 1976).

[104] The following example is illustrative. Environmental activists X and Y agree to blow up a coal-processing facility during the evening/afterhours when only a single person, the on-duty night guard, V, will be present. Both X and Y are practically certain that V will die from the blast, though they'd very much prefer that V not be injured. The police intercede right before X and Y are able to set off the explosives, thereby saving V's life. On these facts, both X and Y should be able to be convicted of conspiracy to commit (knowing) murder, premised on the fact that their agreement was accompanied by: (1) a *desire* to engage in conduct, which, if carried out, would have culminated in murder (i.e., blowing up the facility); and (2) their *awareness as to a practical certainty* that such conduct would result in V's death. *See* Robinson & Grall, *supra* note 5, at 757 ("When causing a particular result is an element of the object offense and such result does not occur, the actor, to be liable for conspiracy under Subsection (1), must have the purpose or belief that the conduct contemplated by the agreement will cause such result."); Note, *supra* note 5 ("[A] person may be held to intend that which is the *anticipated consequence* of a particular action to which he agrees[.]"); *but see* Model Penal Code § 5.03 cmt. at 408 ("[I]t 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.").

[105] Note that for those target offenses that already require proof of intent, knowledge, or purpose as to any result or circumstance, subsection (b) does not elevate the applicable culpable mental state for a conspiracy charge.

[106] Importantly, neither of these principles of culpable mental state elevation precludes the government from charging conspiracies to commit target offenses comprised of result or circumstance elements subject to recklessness, negligence, or strict liability. However, to secure a conspiracy conviction for such offenses, proof that the parties to the agreement acted with the intent to cause every result and circumstance element that constitutes the target offense is necessary.

RCC § 22E-303(a)(1): Relation to Current District Law on Impossibility. RCC § 22E-303(a)(1) fills gaps in District law pertaining to the relevance of impossibility to conspiracy prosecutions in a manner that is consistent with the District approach to impossibility in the context of attempt prosecutions.

The issue of impossibility arises in the conspiracy context wherein two or more parties agree to engage in or facilitate conduct that would culminate in a consummate criminal offense if—but only if—the conditions were as they perceived them. In this kind of situation, one or more parties charged with conspiracy might argue that liability should not attach due to the fact that, by virtue of a mistake concerning the surrounding conditions, completion of the target offense was impossible.[107] If presented with such a claim, the court would then have to determine whether and to what extent the particular kind of mistake rendering the criminal objective at the heart of a conspiracy prosecution impossible constitutes a defense.

There does not appear to be any District legal authority governing this particular kind of situation. No District statute speaks directly to the relationship between conspiracy and impossibility, and the DCCA does not appear to have published any opinions addressing it either.[108] The closest issue that District law addresses is the relationship between attempt and impossibility.

The commentary to RCC § 22E-301(a) provides a detailed discussion of the relevant legal trends in the District concerning this issue.[109] Generally speaking, impossibility is not a defense to an attempt charge under District law. In practical effect, this means that the fact that a criminal undertaking fails because of a defendant's mistaken beliefs concerning the situation in which he or she acts is typically deemed to be irrelevant for purposes of assessing attempt liability.

This broad rejection of impossibility claims extends to two different situations: (1) those involving pure factual impossibility, i.e., where "the intended substantive crime is impossible of accomplishment [] because of some physical impossibility unknown to the defendant"[110]; and (2) those involving hybrid impossibility, i.e., 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.[111] The reason for this broad rejection of impossibility is

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[107] *See* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 1, at § 27.07.

[108] *See also* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.4 (noting that "the issue of impossibility has been dealt with in the law of attempts . . . with much greater frequency").

[109] *See* RCC § 22E-301(a): Relation to Current District Law on Impossibility.

[110] *In re Doe*, 855 A.2d 1100, 1106 (D.C. 2004) (citing *German v. United States*, 525 A.2d 596, 606 n.20 (D.C. 1987) and LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 11.5). 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). *See* DRESSLER, *supra* note 1, at § 27.07. 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. *See id.*

[111] DRESSLER, *supra* note 1, at § 27.07; *see In re Doe*, 855 A.2d at 1106. 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

that in either of these situations, the defendant's "conduct, intent, culpability, and dangerousness are all exactly the same."[112]

At the same time, the District law of attempts also appears to recognize a narrow exception to this general rejection of impossibility. More specifically, it appears that impossibility may constitute a defense where the defendant's conduct is not "reasonably adapted" to completion of the target offense.[113] So, for example, if a person attempts to kill another by "invok[ing] witchcraft, charms, incantations, maledictions, hexing or voodoo," such conduct could not "constitute an attempt to murder since the means employed are not in any way adapted to accomplish the intended result."[114] By requiring a basic correspondence between the defendant's conduct and the criminal objective sought to be achieved, this reasonable adaptation requirement would seem to both preclude convictions for inherently impossible attempts[115] and limits the risk that innocent conduct will be misconstrued as criminal.[116]

These impossibility principles recognized by the DCCA in the attempt context are relevant to understanding contours of conspiracy liability under District law for two reasons. First, it's at least possible that these principles have actually been statutorily incorporated into the District's law of conspiracy. More specifically, the District's general conspiracy statute criminalizes conspiracies to commit any "crime of violence."[117] The latter category, in turn, is defined by D.C. Code § 23-1331 to include

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actually an undercover police officer, for attempted distribution of obscene material to a minor. *See People v. Thousand*, 631 N.W.2d 694 (Mich. 2001).

[112] *In re Doe*, 855 A.2d at 1106.

[113] *See, e.g.*, *Seeney v. United States*, 563 A.2d 1081, 1083 (D.C. 1989); *Thompson v. United States*, 678 A.2d 24, 27 (D.C. 1996); *Williams v. United States*, 966 A.2d 844, 848 (D.C. 2009); *Doreus v. United States*, 964 A.2d 154, 158 (D.C. 2009); *Corbin v. United States*, 120 A.3d 588, 602 n.20 (D.C. 2015).

[114] Edwin R. Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 469 (1954). As explained in the commentary to § 22E-301(a), there's no DCCA case law specifically addressing these kinds of issues. However, this is not surprising since attempt prosecutions premised upon "inherently impossible" attempts of this nature "seldom confront the courts." LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 11.5. Nevertheless, the DCCA has affirmatively upheld attempt convictions in impossibility cases based upon the premise that the defendant's conduct *was* reasonably adapted to commission of an offense. *See, e.g.*, *Seeney*, 563 A.2d at 1083; *Thompson*, 678 A.2d at 27. The implication, then, is that where a defendant's conduct is *not* reasonably adapted to commission of an offense—as would be the case with attempted murder by means of witchcraft—attempt liability could not attach.

[115] An inherently impossible attempt is one "where any reasonable person would have known from the outset that the means being employed could not accomplish the ends sought." LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 11.5. An illustrative example is an attempt to kill implemented by means of witchcraft, incantation, or any other superstitious practice.

[116] This conclusion is also consistent with the DCCA's policy rationale for generally rejecting impossibility defenses. For example, in *In re Doe*, the DCCA rejected an impossibility defense on the rationale that "[w]hether the targeted victim is a child or an undercover agent, the defendant's conduct, intent, culpability, and dangerousness are all exactly the same." 855 A.2d at 1106. Where, however, a person attempts to commit a crime by means not otherwise reasonably adapted to commission of the target offense—for example, where the defendant's sole means of enticing a child is by performing a witchcraft ceremony in his own home—this rationale does not hold since the person's conduct and dangerousness seem qualitatively different.

[117] D.C. Code § 22-1805a(a) establishes in relevant part:

> (2) If 2 or more persons conspire to commit a crime of violence as defined in § 23-1331(4), each shall be fined not more than the amount set forth in § 22-3571.01 nor the maximum fine prescribed for the offense, the commission of which was the object of the

"attempt[s]" to commit a long list of designated offenses.[118] When viewed collectively, then, the possibility of liability for a conspiracy to attempt a crime of violence could be understood to cover impossible conspiracies.[119]

Second, and perhaps more important, is that the policy considerations relevant to the resolution of impossibility claims are the same whether in the context of attempt liability or conspiracy liability. Indeed, if anything, the policy considerations that weigh against recognizing impossibility claims in the attempt context weigh even more heavily in favor against recognizing impossibility claims in the conspiracy context.[120]

With these considerations in mind, and given the interests of clarity, consistency, and proportionality, the RCC applies the same approach to impossibility in the context of attempts—itself a codification of current District law—to impossibility in the context of conspiracy. This outcome is achieved by means of incorporation. Paragraph (a)(1) of section 303 establishes, in relevant part, that agreements to directly engage in or provide accessorial support to conduct that, if carried out, would merely constitute an "*attempt* to

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> conspiracy, whichever is less, or imprisoned not more than 15 years nor the maximum imprisonment prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or both.

[118] More specifically, D.C. Code § 23-1331 "defines" a crime of violence by reference to a list of offenses so designated, which includes criminal attempts:

> (4) The term "crime of violence" means aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an *attempt*, solicitation, or conspiracy to commit any of the foregoing offenses.

D.C. Code § 23-1331(4) (emphasis added).

[119] For a discussion of federal case law on conspiracy to attempt, see Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 60 (1989).

[120] As one court has framed the point:

> The case has been argued as though, for purposes of the defense of impossibility, a conspiracy charge is the same as a charge of attempting to commit a crime. It seems that such an equation could not be sustained, however, because . . . a conspiracy charge focuses primarily on the intent of the defendants, while in an attempt case the primary inquiry centers on the defendants' conduct tending toward the commission of the substantive crime. The crime of conspiracy is complete once the conspirators, having formed the intent to commit a crime, take any step in preparation; mere preparation, however, is an inadequate basis for an attempt conviction regardless of the intent . . . Thus, the impossibility that the defendants' conduct will result in the consummation of the contemplated crime is not as pertinent in a conspiracy case as it might be in an attempt prosecution.

State v. Moretti, 52 N.J. 182, 187 (1968).

commit an offense" can also provide the basis for general conspiracy liability. This reference to attempts imports the broad abolition of impossibility claims employed in the RCC's general attempt provision into the conspiracy context.[121] Under this approach, it is generally immaterial that the agreed-upon criminal scheme could never have succeeded under the circumstances.[122] So long as the parties agreed to bring about conduct that would have culminated in an offense if "the situation was as [the parties] perceived it" then conspiracy liability may attach,[123] provided that the agreed-upon plan of action was at least "reasonably adapted" to commission of the target offense.[124]

RCC § 22E-303(a)(2): Relation to Current District Law on Overt Act Requirement. RCC § 22E-301(a)(2) both codifies and clarifies current District law on the overt act requirement.

It is well established under District law that proof of a bilateral agreement to commit a crime and the requisite intent is not, by itself, sufficient to secure a conviction for conspiracy. Rather, "[u]nder D.C. law, a conspiracy requires proof of both agreement and action."[125] The latter component of action is reflected in the overt act requirement, which is expressly codified by the District's general conspiracy statute.

More specifically, D.C. Code § 22-1805a(b) states that: "No person may be convicted of conspiracy unless an overt act is alleged and proved to have been committed by 1 of the conspirators pursuant to the conspiracy and to effect its purpose."[126]

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[121] Under RCC § 22E-301(a)(3)(A)(ii), a person commits an attempt if, *inter alia*, he or she "engages in conduct that . . . [w]ould have come dangerously close to completing that offense if the situation was as the person perceived it." Subparagraph (a)(3)(B) thereafter adds that the person's conduct must have been "reasonably adapted to completion of that offense."

[122] *See* RCC § 22E-301(a), Explanatory Notes ("Reliance on the defendant's perspective renders the vast majority of impossibility claims immaterial by authorizing an attempt conviction under circumstances in which the person's conduct *would have been* dangerously close to committing an offense *had* the person's view of the situation been accurate.").

[123] RCC § 22E-301(a)(3)(A)(ii); *see supra* note 27 (observing that: (1) "the subjective approach incorporated into subparagraph (a)(1)(B) [of section 303] renders pure factual and hybrid impossibility claims immaterial"; and (2) "[i]n contrast, pure legal impossibility remains a viable theory of defense under the RCC").

[124] RCC § 22E-301(a)(3)(B). As the Explanatory Notes accompanying subparagraph (a)(3)(B) of section 301 explain:

> This reasonable adaptation requirement is intended to limit attempt liability to those situations where there exists a basic correspondence between the defendant's conduct and the criminal objective sought to be achieved. Requiring the government to establish this basic correspondence both limits the risk that innocent conduct will be misconstrued as criminal and precludes convictions for inherently impossible attempts.

Id. (collecting District case law and national legal authority in support of this approach); *see supra* note 29 ("Inherent impossibility is an issue in conspiracy prosecutions where the parties to a criminal agreement plan to employ means which a reasonable man would view as totally inappropriate to the objective sought' . . . . Conduct of this nature would not be "reasonably adapted" to completion of the target offense under subparagraph (a)(3)(B) of section 301, and, therefore, could constitute a (failure of proof) defense to conspiracy liability under the RCC.").

[125] *Gilliam v. United States*, 80 A.3d 192, 208 (D.C. 2013) (quoting *Gibson v. United States*, 700 A.2d 776, 779 (D.C. 1997).

[126] D.C. Code § 22-1805a(b).

Construing this language, the DCCA has held that the overt act requirement entails proof that "during the life of the conspiracy, and in furtherance of its objective, the commission by at least one conspirator of at least one of the overt acts specified in the indictment."[127]

This overt act requirement often is not difficult to satisfy as a matter of practice.[128] In contrast to the conduct requirement of an attempt, for example, the DCCA has observed that conspiracy's overt act requirement "is far less exacting; a preparatory act, innocent in itself, may be sufficient."[129] All the same, it seems clear from both case law and statute that the overt act requirement is nevertheless an element of the offense of conspiracy.[130]

Consistent with these legal authorities, the RCC codifies the overt act requirement reflected in current District law. The relevant language employed in RCC § 22E-303(a)(2) requires proof that "[o]ne of the parties to the agreement engages in an overt act in furtherance of the agreement." This language is intended to be substantively identical to that employed in D.C. Code § 1805a(b); however, two clarifying revisions bear notice.

First, the phrase "alleged and proved," employed in D.C. Code § 1805a(b), is omitted as superfluous. This is a product of the fact that the RCC incorporates the overt act requirement into the definition of a conspiracy, rather than treating it through a separate subsection as is presently the case under D.C. Code § 1805a(b). Due to this reorganization, it is clear that the overt act requirement is an element of a conspiracy under the RCC. There is, then, no need to affirmatively state that the overt act requirement is entitled to the same procedural protections afforded to any other element of an offense.

Second, the phrase "pursuant to the conspiracy and to effect its purpose," employed in D.C. Code § 1805a(b), is replaced with the phrase "in furtherance of the conspiracy" under RCC § 22E-303(a)(2). This substitution more accessibly communicates the contours of the overt act requirement in District law.[131]

RCC §§ 22E-303(a) and (b) (Generally): Relation to Current District Law on Agreements to Achieve Non-Criminal Objectives. RCC §§ 22E-303(a) and (b) clarify, but may also change, District law by excluding non-criminal objectives from the scope of general conspiracy liability.

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[127] *Hairston v. United States*, 905 A.2d 765, 784 (D.C. 2006); *see, e.g., Mitchell v. United States*, 985 A.2d 1125, 1135 (D.C. 2009). Likewise, the District's criminal jury instructions further clarify that this overt act must have been committed "for the purpose of carrying out the conspiracy." D.C. Crim. Jur. Instr. § 7.102.

[128] *See, e.g., Hairston*, 905 A.2d at 784; *Mitchell*, 985 A.2d at 1135.

[129] *Robinson v. United States*, 608 A.2d 115, 116 (D.C. 1992) (citing *Iannelli v. United States*, 420 U.S. 770, 786 n.17 (1975)).

[130] *See, e.g., Mitchell*, 985 A.2d at 1135. Note, however, that while D.C. Code § 1805a(b) requires for an overt act to be "alleged and proved," the DCCA has observed that "the overt act requirement is not a part of the 'corpus delicti' of conspiracy," which is to say the "body, substance or foundation of the crime." *Irving v. United States*, 673 A.2d 1284, 1288 (D.C. 1996). Rather, as the court in *Irving v. United States* phrased it: "The substance of the crime of conspiracy is knowing participation in an agreement to accomplish an unlawful act; the requirement of an overt act is merely an evidentiary prophylactic." *Id.* at 1288. This is relevant for evidentiary reasons. *See Bellanger v. United States*, 548 A.2d 501, 502–03 (D.C. 1988) (holding that proof of overt act is not required to support admission of evidence of statement of coconspirator during course of conspiracy).

[131] *See, e.g., Hairston*, 905 A.2d at 784; *Mitchell*, 985 A.2d at 1135.

Under current District law, agreements to engage in non-criminal objectives also provide the basis for conspiracy liability under limited circumstances. This is a product of the fact that the District's general conspiracy statute criminalizes conspiring "*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*."[132] As the DCCA recently explained in *Long v. United States*: "The use of the word "either" in the conspiracy statute envisions two types of conspiracies: (1) a conspiracy to defraud the District of Columbia or any court or agency; and (2) a conspiracy to commit a specific offense."[133]

The contours of conspiracy to defraud liability under District law are ill defined. The relevant statutory language seems to expand criminal liability beyond that provided for by a charge of conspiracy to commit fraud (e.g., it seems to cover forms of fraud that would not be criminal if committed by a single individual). Just how far this expansion is intended to go, however, is unclear: the relevant statutory language is quite vague,[134] while reported conspiracy cases premised on "defraud[ing] the District of Columbia or any court or agency" appear to be exceedingly rare. At minimum, though, relevant case law clarifies that such language is capacious enough to encompass at least some public corruption schemes.

For example, in *United States v. Lewis*, the U.S. Court of Appeals for the D.C. Circuit (CADC) upheld a conviction for conspiracy to defraud under the District's general conspiracy statute where the defendant, the owner of a restaurant-bar, agreed with two government officials to a scheme in which the officials would pressure a shopping center to provide the defendant with a lease to a liquor store in exchange for a portion of that store's profits.[135] In so doing, the CADC held that the District's general conspiracy statute covers "conspiring to defraud the District of Columbia of its lawful governmental functions including its right to have the disinterested official services of [the defendants], and its right to have its business conducted honestly."[136]

The DCCA's recent decision in *Long v. United States* is similarly in accordance.[137] In that case, the Court of Appeals upheld a conviction for conspiracy to defraud based upon the defendant's participation in a public corruption scheme, wherein he agreed to: (1) serve as the driver for a mayoral candidate paid off the books in order to avoid campaign finances laws; and (2) arrange a meeting for one mayoral candidate to endorse another in exchange for some form of compensation.[138]

Aside from these two decisions, the contours of the conspiracy to defraud prong of D.C. Code § 22-1805a are undefined by existing case law. At the same time, there is general support in the case law for the proposition that the conspiracy to defraud prong of

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[132] D.C. Code § 22-1805a(1).
[133] *Long v. United States*, No. 16-CF-730, 2017 WL 4248198, at *5 (D.C. Sept. 14, 2017) (citing *Eaglin v. District of Columbia*, 123 A.3d 953, 956 (D.C. 2015)).
[134] *See generally* Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 414 (1959) (noting that similar language in the federal conspiracy to defraud statute is extremely vague).
[135] *United States v. Lewis*, 716 F.2d 16, 22-23 (D.C. Cir. 1983). Having been convicted by the federal trial court of conspiracy to defraud under the District's general conspiracy statute, the defendant argued on appeal that his conviction ought to be overturned because the conspiracy to defraud prong of that statute "should be limited to fraud on the government involving money or property and not be read to reach fraud which impairs governmental functions." *Id.* at 23.
[136] *Id*.
[137] *Long*, 2017 WL 4248198, at *5.
[138] *See id.*

D.C. Code § 22-1805a should be construed in accordance with the comparable prong in the federal conspiracy statute, 18 U.S.C. § 371, which criminalizes conspiracies "to defraud the United States, or any agency thereof in any manner or for any purpose." For example, the CADC in *Lewis* observed that:

> Though the legislative history does not expressly indicate Congress's desire to model the D.C. provision after the federal provision, the similarity of language and the routine construction of D.C.'s local statutes in accord with their federal counterparts lend strong support to the view that the D.C. provision should be interpreted along the lines of the federal provision.[139]

Likewise, the DCCA's *Long* decision seems to be consistent with this reading. In that case, the court observed that the federal conspiracy statute "contains essentially the same language as the District's statute," and, therefore, indicated that it should be construed in accordance with the federal statute.[140]

Assuming the breadth of these two provisions are identical, however, raises a host of problems. As further discussed below,[141] the federal conspiracy to defraud provision is oft-criticized for the use of language that is "shadowy" at best.[142] The relevant ambiguities, in turn, have produced criminal liability of "such broad and imprecise proportions as to trench . . . the standards of fair trial and on constitutional prohibitions against vagueness and double jeopardy."[143] In light of these problems, today "most states provide that the object of a criminal conspiracy must be some crime, or some felony."[144]

Given these policy and practice considerations, and consistent with the interests of clarity and consistency, the RCC's general conspiracy provision excludes any reference to conspiracies "to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose." RCC §§ 22E-303(a) and (b) are instead limited to agreements to commit criminal "offenses," including the revised and expanded fraud offense.[145] This exclusion will ensure that the RCC clearly communicates the elements of general conspiracy liability. This change may—but need not necessarily—circumscribe the limits of conspiracy liability under District law.[146]

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[139] *Lewis*, 716 F.2d at 23 (citing *Dennis v. United States*, 384 U.S. 855, 859-864 (1966); *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)).

[140] *Long*, 2017 WL 4248198, at *5.

[141] *See* RCC §§ 22E-303(a) & (b) (Generally): Relation to National Legal Trends on Non-Criminal Objectives.

[142] Goldstein, *supra* note 134, at 408; *see In re McBride*, 602 A.2d 626, 633 (D.C. 1992) (citing *id.*).

[143] Goldstein, *supra* note 134, at 408.

[144] LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.3.

[145] By implication, conspiracy liability does not attach to agreements to engage in conduct that would not otherwise be criminal if committed by an individual.

[146] Whether this constitutes a change in law depends, first, upon whether there is a meaningful policy difference between conspiring to "defraud the District of Columbia or any court or agency thereof in any manner or for any purpose" under current law, and conspiring to commit the revised fraud statute. Assuming the answer to this question is yes, then the existence of a change in law depends upon, second, whether the RCC codifies a specific public corruption conspiracy offense, which might otherwise fill the foregoing gap in liability.

RCC §§ 22E-303(c): Relation to Current District Law on Conspiracy Penalties. Subsection (c) establishes a uniform and proportionate grading scheme for criminal conspiracies, which clarifies, simplifies, and changes District law.

The D.C. Code's general conspiracy statute, D.C. Code § 22-1805a, establishes a default penalty framework for conspiracy offenses comprised of two basic rules. First, conspiracies to commit offenses other than "crimes of violence" are punishable by a maximum of 5 years incarceration, "except that if the object of the conspiracy is a criminal offense punishable by less than 5 years, the maximum penalty for the conspiracy shall not exceed the maximum penalty provided for that offense."[147] And second, conspiracies to commit "crimes of violence"[148] are punishable by a maximum of either "15 years []or the maximum imprisonment prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or both."[149]

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[147] *See* D.C. Code § 22-1805a(a)(1) ("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 not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both, except that if the object of the conspiracy is a criminal offense punishable by less than 5 years, the maximum penalty for the conspiracy shall not exceed the maximum penalty provided for that offense.").

Note that this provision also subjects conspiracies "to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose" to a maximum 5-year penalty. Interpreting this language, the DCCA has observed that:

> The use of the word "either" in the conspiracy statute envisions two types of conspiracies: (1) a conspiracy to defraud the District of Columbia or any court or agency; and (2) a conspiracy to commit a specific offense. *See* Eaglin v. District of Columbia, 123 A.3d 953, 956 (D.C. 2015) ("If the plain meaning of statutory language is clear and unambiguous and will not produce an absurd result, we will look no further." (citation, internal quotation marks, and brackets omitted)). The statute also contemplates a default five-year maximum prison term for conspiracy, except if the charge is a conspiracy to commit a specific offense and the specific offense alleged has a lower maximum prison term than five years. *See* D.C. Code § 22–1805a(a)(1).

Long v. United States, 169 A.3d 369, 375–77 (D.C. 2017) (upholding conspiracy to defraud charge, and concomitant five year statutory maximum, notwithstanding the "fact that the government could have charged appellant with a misdemeanor conspiracy to commit the specific offense of funding and concealing contributions to Mayoral Campaign A in excess of those permitted under the Campaign Finance Reform Act") (citing *District of Columbia v. Economides*, 968 A.2d 1032, 1036 (D.C. 2009) ("[T]he decision of whether or not to prosecute, and what charges to file . . . generally rests entirely in the prosecutor's discretion.").

[148] D.C. Code § 23-1331(4) ("The term 'crime of violence' means aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.").

[149] *See* D.C. Code § 22-1805a(a)(2) ("If 2 or more persons conspire to commit a crime of violence as defined in § 23-1331(4), each shall be fined not more than the amount set forth in § 22-3571.01 nor the maximum fine prescribed for the offense, the commission of which was the object of the conspiracy,

Notwithstanding these two generally applicable rules, numerous District statutes communicate important penalty exceptions. Some of these exceptions are communicated through the penalty provisions governing conspiracies to commit individual or certain groupings of offenses. Illustrative provisions include the D.C. Code provisions setting forth penalties for conspiracies to commit: (1) various drug-related offenses[150]; (2) the manufacture or possession of a weapon of mass destruction[151]; and (3) the use, dissemination, or detonation of a weapon of mass destruction.[152]

Other exceptions to the District's general conspiracy penalty rules are communicated through incorporation of the term "conspires" into the definition of a given offense, effectively providing that a conspiracy to commit that offense is subject to the same punishment as the completed offense. Illustrative provisions in the D.C. Code include the statutory definitions of (1) kidnapping,[153] (2) criminal violations of fiduciary obligations,[154] and (3) corrupt election practices.[155]

Collectively, the District's scattered approach to penalizing conspiracies presents two main problems: (1) it lacks a consistent grading principle; and (2) it is confusingly

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whichever is less, or imprisoned not more than 15 years nor the maximum imprisonment prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or both.").

[150] *See* D.C. Code § 48-904.09 ("Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

[151] *See* D.C. Code § 22-3154(b) ("A person who attempts or conspires to manufacture or possess a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries to multiple persons, or massive destruction of property may, upon conviction, be punished by imprisonment for not more than 30 years.")

[152] *See* D.C. Code § 22-3155(b) ("A person who attempts or conspires to use, disseminate, or detonate a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries to multiple persons, or massive destruction of property may, upon conviction, be punished by imprisonment for not more than 30 years.").

[153] *See* D.C. Code Ann. § 22-2001 ("If 2 or more individuals enter into any agreement or conspiracy to do any act or acts which would constitute a violation of the provisions of this section, and 1 or more of such individuals do any act to effect the object of such agreement or conspiracy, each such individual shall be deemed to have violated the provisions of this section.").

[154] *See* D.C. Code Ann. § 21-591 ("Whoever: (1) without probable cause for believing a person to be mentally ill: (A) causes or conspires with or assists another person to cause the hospitalization, under this chapter, of the person first referred to; or (B) executes a petition, application, or certificate pursuant to this chapter, by which he secures or attempts to secure the apprehension, hospitalization, detention, or restraint of the person first referred to; or (2) causes or conspires with or assists another person to cause the denial to a person of a right accorded to him by this chapter; or (3) being a physician, psychiatrist or qualified psychologist, knowingly makes a false certificate or application pursuant to this chapter as to the mental condition of a person -- shall be fined not more than the amount set forth in [§ 22-3571.01] or imprisoned not more than three years, or both.").

[155] *See* D.C. Code Ann. § 1-1001.14 (a-1)(1) ("A person shall not knowingly or willfully: (A) Pay, offer to pay, or accept payment of any consideration, compensation, gratuity, reward, or thing of value for registration to vote or for voting; (B) Give false information as to his or her name, address, or period of residence for the purpose of establishing his eligibility to register or vote, that is known by the person to be false; (C) Procure or submit voter registration applications that are known by the person to be materially false, fictitious, or fraudulent; (D) Procure, cast, or tabulate ballots that are known by the person to be materially false, fictitious, or fraudulent; or (E) Conspire with another individual to do any of the above."); *id.* at § (a)(2) ("A person who violates paragraph (1) of this subsection shall, upon conviction, be fined not more than $10,000, be imprisoned not more than 5 years, or both.").

communicated. With respect to the first problem, at least two fundamentally different grading patterns appear in the penalties governing conspiracies to commit both crimes of violence and non-violent crimes under the D.C. Code.

The first grading pattern, which might be referred to as a "significant punishment discount," is reflected in the numerous District conspiracy offenses subject to statutory maxima that are significantly less severe than (typically half) the statutory maxima governing the completed offense.

A penalty discount of this nature is perhaps most clearly reflected in the grading of conspiracies to commit various non-violent crimes. For example, whereas the statutory maxima for felony property offenses such as first degree theft,[156] first degree fraud,[157] and first degree financial exploitation of a vulnerable adult or elderly person[158] are set at 10 years, a conspiracy to commit any of those offenses is subject to the 5 year default rule governing conspiracies to commit non-crimes of violence under the general conspiracy statute.[159] In addition, the 7-year statutory maximum applicable to first degree receiving stolen property[160] is reduced to 5 years under this default rule.[161] And the 10-year statutory maxima applicable to second degree cruelty to children,[162] as well as the 20-year statutory maximum applicable to felony threats,[163] are also reduced to five years under the first default rule.[164] (Neither of these offenses is a crime of violence.[165])

A pattern of significant punishment discounting can also be seen in the penalties governing numerous conspiracies to commit crimes of violence. For example, whereas first-degree murder[166] and second-degree murder[167] are both potentially subject to a

[156] D.C. Code § 22-3212(a) ("Any person convicted of theft in the first degree shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 10 years, or both, if the value of the property obtained or used is $1,000 or more.").
[157] D.C. Code § 22-3221(a)(1) ("Any person convicted of fraud in the first degree shall be fined not more than the amount set forth in § 22-3571.01 or twice the value of the property obtained or lost, whichever is greater, or imprisoned for not more than 10 years, or both, if the value of the property obtained or lost is $1,000 or more . . . .").
[158] D.C. Code § 22-936.01(a) ("Any person who commits the offense of financial exploitation of a vulnerable adult or elderly person in violation of § 22-933.01 shall be subject to the following criminal penalties . . . When the value of the property or legal obligation is $1,000 or more, a fine of not more than the amount set forth in § 22-3571.01, or imprisonment for not more than 10 years, or both.").
[159] D.C. Code § 22-1805a(a)(1).
[160] D.C. Code § 22-3232(c)(1) ("Any person convicted of receiving stolen property shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 7 years, or both, if the value of the stolen property is $1,000 or more.").
[161] *See* D.C. Code § 22-1805a(a)(1).
[162] D.C. Code § 22-1101(b)(2) ("Any person convicted of cruelty to children in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 10 years, or both.").
[163] D.C. Code § 22-1810 ("Whoever threatens within the District of Columbia to kidnap any person or to injure the person of another or physically damage the property of any person or of another person, in whole or in part, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 20 years, or both.").
[164] *See* D.C. Code § 22-1805a(a)(1).
[165] *See* D.C. Code § 23-1331(4).
[166] D.C. Code § 22-2104(a)("The punishment for murder in the first degree shall be not less than 30 years nor more than life imprisonment without release . . . .").
[167] D.C. Code § 22-2104(c) ("Whoever is guilty of murder in the second degree shall be sentenced to a period of incarceration of not more than life . . . .").

sentence of life in prison under the D.C. Code, a conspiracy to commit either of those offenses is subject to the 15 year default rule governing conspiracies to commit crimes of violence under the general conspiracy statute.[168] Likewise, the 30 year statutory maxima applicable to first degree burglary[169] is also reduced to 15 years under the default rule governing conspiracies to commit crimes of violence.[170]

These significantly discounted conspiracy penalties are to be contrasted with those that reflect a grading pattern that might be referred as "equal punishment," namely, they subject conspiracies to the same statutory maximum governing the completed offense. The D.C. Code is comprised of numerous conspiracy offenses that effectively equalize the sanction for conspiracies, though the D.C. Council has authorized this outcome in a variety of ways.

Most explicit is the District's semi-general penalty provision for drug crimes, D.C. Code § 48-904.09, which broadly states that conspiracies to commit drug crimes may be punished as seriously as completed drug crimes.[171] In practical effect, this means that, *inter alia*, conspiracies to manufacture, distribute, or possess, with intent to manufacture or distribute, a Schedule I or II controlled substance are subject to the same 30 statutory maximum governing the completed offense.[172]

A pattern of equal punishment is also apparent in those District offenses that statutorily incorporate the term "conspires" into their statutory definition. Illustrative provisions in the D.C. Code include the statutory definitions of (1) kidnapping,[173] (2) criminal violations of fiduciary obligations,[174] and (3) corrupt election practices.[175]

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[168] *See* D.C. Code § 22-1805a(a)(2).

[169] D.C. Code § 22-801(a) ("Burglary in the first degree shall be punished by imprisonment for not less than 5 years nor more than 30 years.").

[170] *See* D.C. Code § 22-1805a(a)(2).

[171] D.C. Code § 48-904.09 ("Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy[.]").

[172] *See* D.C. Code § 48-904.01(2)(A) ("Any person who violates this subsection with respect to . . . A controlled substance classified in Schedule I or II that is a narcotic or abusive drug shall be imprisoned for not more than 30 years or fined not more than the amount set forth in § 22-3571.01, or both.").

[173] *See* D.C. Code § 22-2001 ("If 2 or more individuals enter into any agreement or conspiracy to do any act or acts which would constitute a violation of the provisions of this section, and 1 or more of such individuals do any act to effect the object of such agreement or conspiracy, each such individual shall be deemed to have violated the provisions of this section.").

[174] *See* D.C. Code § 21-591 ("Whoever: (1) without probable cause for believing a person to be mentally ill: (A) causes or conspires with or assists another person to cause the hospitalization, under this chapter, of the person first referred to; or (B) executes a petition, application, or certificate pursuant to this chapter, by which he secures or attempts to secure the apprehension, hospitalization, detention, or restraint of the person first referred to; or (2) causes or conspires with or assists another person to cause the denial to a person of a right accorded to him by this chapter; or (3) being a physician, psychiatrist or qualified psychologist, knowingly makes a false certificate or application pursuant to this chapter as to the mental condition of a person -- shall be fined not more than the amount set forth in [§ 22-3571.01] or imprisoned not more than three years, or both.").

[175] *See* D.C. Code § 1-1001.14 (a-1)(1) ("A person shall not knowingly or willfully: (A) Pay, offer to pay, or accept payment of any consideration, compensation, gratuity, reward, or thing of value for registration to vote or for voting; (B) Give false information as to his or her name, address, or period of residence for the purpose of establishing his eligibility to register or vote, that is known by the person to be false; (C) Procure or submit voter registration applications that are known by the person to be materially false, fictitious, or fraudulent; (D) Procure, cast, or tabulate ballots that are known by the person to be materially

Numerous other District conspiracy offenses exhibit a pattern of equal punishment through more convoluted means. For example, the District's while armed enhancement applies the same flat 30-year statutory maximum add-on to numerous crimes, without regard to whether the underlying crime is completed or merely attempted, through the D.C. Code's definition of "crimes of violence" and "dangerous crimes."[176]

In addition, conspiracies to commit second degree fraud,[177] unauthorized use of a motor vehicle,[178] and blackmail[179] (not involving a threat of violence[180]) are all subject to the same 5-year penalty as the completed offense by virtue of the default rule applicable to non-violent crimes in the general conspiracy statute.[181] And, along similar lines, conspiracies to commit the least severe forms of theft,[182] fraud,[183] receiving stolen property,[184] financial exploitation of a vulnerable adult or elderly person,[185] and assault[186]

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false, fictitious, or fraudulent; or (E) Conspire with another individual to do any of the above."); *id.* at § (a)(2) ("A person who violates paragraph (1) of this subsection shall, upon conviction, be fined not more than $10,000, be imprisoned not more than 5 years, or both.").

[176] More specifically, D.C. Code § 22–4502(a)(1) establishes that anyone who commits a violent or dangerous crime:

> May, if such person is convicted for the first time of having so committed a crime of violence, or a dangerous crime in the District of Columbia, be sentenced, in addition to the penalty provided for such crime, to a period of imprisonment which may be up to, and including, 30 years for all offenses . . . and shall, if convicted of such offenses while armed with any pistol or firearm, be imprisoned for a mandatory-minimum term of not less than 5 years . . . .

See D.C. Code § 23-1331(4) ("The term 'crime of violence' means . . . [a] conspiracy to commit any of the foregoing [enumerated] offenses.").

[177] D.C. Code § 22-3221(b)(1) ("Any person convicted of fraud in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or twice the value of the property which was the object of the scheme or systematic course of conduct, whichever is greater, or imprisoned for not more than 3 years, or both, if the value of the property which was the object of the scheme or systematic course of conduct is $1,000 or more . . . .").

[178] D.C. Code § 22-3215(d)(1) ("[A] person convicted of unauthorized use of a motor vehicle under subsection (b) of this section shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 5 years, or both.").

[179] D.C. Code § 22-3252 (b) ("Any person convicted of blackmail shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 5 years, or both.").

[180] *See* D.C. Code § 23-1331(4).

[181] *See* D.C. Code § 22-1805a(a)(1).

[182] D.C. Code § 22-3212(b) ("Any person convicted of theft in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both, if the property obtained or used has some value.").

[183] D.C. Code § 22-3222(b)(2) ("Any person convicted of fraud in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both, if the property that was the object of the scheme or systematic course of conduct has some value.").

[184] D.C. Code § 22-3232(c)(2) ("Any person convicted of receiving stolen property shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both, if the stolen property has some value.").

[185] D.C. Code § 22-936.01(a)("Any person who commits the offense of financial exploitation of a vulnerable adult or elderly person in violation of § 22-933.01 shall be subject to the following criminal penalties . . . . When the property or legal obligation has some value, a fine of not more than the amount set forth in § 22-3571.01, or imprisonment for not more than 180 days, or both.").

are all subject to the same 180-day penalty as the completed offense (again) by virtue of the default rule applicable to non-violent crimes in the general conspiracy statute.[187]

Finally, conspiracies to commit first degree cruelty to children,[188] second degree burglary,[189] and robbery[190] are all subject to the same 15-year statutory maximum applicable to the completed offense by virtue of the default rule applicable to *violent crimes* under the District's general conspiracy statute.[191]

Viewed as a whole, then, the District's approach to grading criminal conspiracies does not reflect any consistent principle of punishment. Indeed, the D.C. Code manifests at least two fundamentally different patterns in how it grades conspiracies, without any discernible rationale for the variances. In practical effect, this produces a penalty scheme which authorizes the imposition of sentences that are, at least in relation to one another, quite disproportionate.

At the same time, these potential disproportionalities are not immediately apparent given the second fundamental flaw reflected in the District law of conspiracies, namely, its disorganized approach to codification. For example, notwithstanding the fact that the District's general conspiracy statute purports to articulate the District's overarching penalization scheme, the D.C. Code contains numerous exceptions to these rules. Further, the manner in which these exceptions are communicated is quite inconsistent: some are communicated through individual penalty provisions incorporated into a single offense; others are communicated through semi-general conspiracy penalty provisions that apply to groups of offenses; and still other exceptions are communicated by including the word "conspires" in the definition of the offense.

RCC § 22E-303(c) endeavors to remedy these issues by establishing a clear and consistent approach to grading conspiracies, which renders offense penalties more proportionate. First, paragraph (c)(1) adopts a single generally applicable grading principle: a proportionate penalty discount under which the statutory maximum and fine for a conspiracy is set at one-half of the statutory maximum and fine of the completed offense.[192] This general principle, which is similarly applicable to criminal attempts and criminal solicitations under the RCC, is supplemented by paragraph (c)(2), which

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

[187] *See* D.C. Code § 22-1805a(a)(1).

[188] D.C. Code § 22-1101(c)(1) ("Any person convicted of cruelty to children in the first degree shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 15 years, or both.").

[189] D.C. Code § 22-801(b) ("Burglary in the second degree shall be punished by imprisonment for not less than 2 years nor more than 15 years.").

[190] D.C. Code § 22-2801 ("Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than 2 years nor more than 15 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[191] *See* D.C. Code § 22-1805a(a)(2).

[192] The Explanatory Notes, *supra*, further clarify that, for purposes of paragraph (d)(1): "'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."

expressly recognizes the possibility of offense-specific exceptions to be clearly articulated in a single general provision incorporated into the General Part.[193]

RCC §§ 22E-303(d), (e), and (f): Relation to Current District Law on Jurisdiction. Subsections (d), (e), and (f) are in accord with, but may also fill a potential gap in, current District law governing jurisdiction in conspiracy prosecutions.

The District's general conspiracy statute currently contains two provisions, D.C. Code §§ 22-1805a(c) and (d), which address separate jurisdictional issues. The relevant statutory provisions read:

> (c) When the object of a conspiracy contrived within the District of Columbia is to engage in conduct in a jurisdiction outside the District of Columbia which would constitute a criminal offense under an act of Congress applicable exclusively to the District of Columbia if performed therein, the conspiracy is a violation of this section if:
>
> (1) Such conduct would also constitute a crime under the laws of the other jurisdiction if performed therein; or
>
> (2) Such conduct would constitute a criminal offense under an act of Congress exclusively applicable to the District of Columbia even if performed outside the District of Columbia.
>
> (d) A conspiracy contrived in another jurisdiction to engage in conduct within the District of Columbia which would constitute a criminal offense under an act of Congress exclusively applicable to the District of Columbia if performed within the District of Columbia is a violation of this section when an overt act pursuant to the conspiracy is committed within the District of Columbia. Under such circumstances, 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 crime under the laws of the other jurisdiction.[194]

The general import of these provisions, enacted as part of the District of Columbia Court Reform and Criminal Procedure Act of 1970, is relatively clear: they proscribe basic jurisdictional principles for dealing with conspiracies formed inside the District to commit crimes outside the District, D.C. Code § 22-1805a(c), as well as for conspiracies formed outside the District to commit crimes inside the District, D.C. Code § 22-1805a(d). However, there is scant District authority illuminating the precise meaning of these provisions. Relevant legislative history in the House Committee Report only indicates a general recognition that this language was "modeled" on the law of

[193] The effect of this penalty scheme on current District law varies depending on the scope, gradations, and classifications applied to individual revised offenses. For a detailed analysis of this nature in the context of attempt penalties, which is broadly applicable here, see RCC § 22E-301(d), Relation to Current District Law on Attempt Penalties.

[194] D.C. Code §§ 22-1805a(c)-(d).

conspiracy in New York, "rather than Federal law, because of the need for greater specificity in a statute applicable to a geographically limited area within the United States."[195]

One issue that both the statutory text and legislative history leave unclear is whether and to what extent D.C. Code §§ 22-1805a(c) and (d) were intended to apply to criminal offenses *passed by the D.C. Council*. The lack of clarity on this issue is a product of the fact that D.C. Code §§ 22-1805a(c) and (d) make continuous reference to "an act of Congress applicable exclusively to the District of Columbia." This phrasing reflects the pre-Home Rule reality that, when the relevant jurisdictional provisions were enacted in 1970, local criminal laws were written by Congress. Since Home Rule, however, the D.C Council has been responsible for passing nearly all of the District's criminal laws.[196] Which raises the following question: are conspiracies to commit such offenses, enacted by the D.C. Council, covered by the jurisdictional provisions set forth in D.C. Code §§ 22-1805a(c) and (d)?[197]

There does not appear to be any case law addressing this particular issue, and the reported decisions even mentioning these jurisdictional provisions is scant.[198] However, the one DCCA case directly addressing them, *Gilliam v. United States*, seems to provide indirect support for the proposition that conspiracies to commit offenses enacted by the D.C. Council might be covered by the relevant jurisdictional provisions.[199] After quoting to the text of D.C. Code § 22-1805a(d), for example, the *Gilliam* decision states that:

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[195] DISTRICT OF COLUMBIA COURT REFORM AND CRIMINAL PROCEDURE ACT OF 1970: REPORT OF THE COMMITTEE ON THE DISTRICT OF COLUMBIA ON H.R. 16196, at 66 (March 13, 1970). The relevant provision in the New York Penal Code reads:

> 1. A person may be prosecuted for conspiracy in the county in which he entered into such conspiracy or in any county in which an overt act in furtherance thereof was committed.
>
> 2. An agreement made within this state to engage in or cause the performance of conduct in another jurisdiction is punishable herein as a conspiracy only when such conduct would constitute a crime both under the laws of this state if performed herein and under the laws of the other jurisdiction if performed therein.
>
> 3. An agreement made in another jurisdiction to engage in or cause the performance of conduct within this state, which would constitute a crime herein, is punishable herein only when an overt act in furtherance of such conspiracy is committed within this state. Under such circumstances, it is no defense to a prosecution for conspiracy that the conduct which is the objective of the conspiracy would not constitute a crime under the laws of the other jurisdiction if performed therein.

N.Y. Penal Law § 105.25.

[196] *See, e.g.*, D.C. Code § 22-3002 (sexual abuse); D.C. Code § 22-3053 (revenge porn).

[197] Note that D.C. Code §§ 22-1805a(c)-(d) do not purport to address jurisdiction over all conspiracy prosecutions, only those where: (1) "the object of a conspiracy contrived within the District of Columbia is to engage in conduct in a jurisdiction outside the District of Columbia"; or (2) "[a] conspiracy [is] contrived in another jurisdiction to engage in conduct within the District of Columbia"); *see Gilliam v. United States*, 80 A.3d 192, 209-10 (D.C. 2013) (noting that these provisions address two particular situations).

[198] *See United States v. Lewis*, 716 F.2d 16, 23 (D.C. Cir. 1983) (noting that the "venue and jurisdiction" provisions of D.C. Code § 22-1805a reflect the "necessity of greater specificity in a statute applicable to a geographically limited area within the United States").

[199] At issue in *Gilliam* were indictments charging "that appellants entered into an agreement within the District of Columbia to murder [the victim]" in Maryland. 80 A.3d at 192. More specifically, the

> We understand this provision to mean that when a prosecution for conspiracy is predicated on an agreement made in another jurisdiction, the government must prove that an overt act pursuant to the conspiracy was committed within the District of Columbia in order to prove the offense.[200]

Notably absent from this statement is any reference to conspiracies to commit offenses specifically passed by Congress; instead, the court merely references "a prosecution for conspiracy."[201] (That said, such a reference would not have been necessary because the charge at issue in the *Gillam* case was conspiracy to commit murder.)

Lastly, in 2009 the D.C. Council amended the District's general conspiracy statute to more severely punish conspiracies "to commit a crime of violence as defined in § 23-1331(4)."[202] The latter category of offenses specifically includes a variety of crimes enacted by the D.C. Council since Home Rule.[203] With that in mind, it seems unlikely that the D.C. Council would have declined to revise the relevant jurisdictional provisions

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indictments alleged that the appellants "committed nine overt acts during and in furtherance of that conspiracy—four acts in Maryland [] and five acts in the District[]." *Id.* At trial, the court instructed the jury that "proof of any one of [these overt acts] would support a conviction for conspiracy." *Id.* The appellants were thereafter convicted by the jury. On appeal, the appellants argued that "the trial court improperly allowed the jury to convict them for conspiracy based solely on acts occurring outside the District of Columbia over which . . . the Superior Court lacked jurisdiction." *Id.* at 209. The DCCA ultimately agreed, deeming it "plausible that the jury relied solely on overt acts in Maryland in convicting appellants of conspiracy." *Id.*

[200] *Id.* at 209–10. The DCCA ultimately concluded that the foregoing "statutory requirement was overlooked" by the trial court given that:

> the jury could have convicted appellants of conspiracy based solely on a finding that they entered into an agreement in Maryland and that they committed an overt act in Maryland—i.e., without finding any conspiratorial agreement made or joined, or overt act committed, within the District of Columbia.

Id.

[201] *Id.*

[202] This new penalty provision was part of the Omnibus Public Safety and Justice Amendment Act of 2009. *See* D.C. Law 18-88, § 209, 56 DCR 7413, 2009 District of Columbia Laws 18-88 (Dec. 10, 2009).

[203] Under District law, a "crime of violence" means:

> aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.

D.C. Code § 23-1331(4). Many of these offenses—for example, aggravated assault, carjacking, sexual abuse, and child sex abuse, among others—were enacted by the D.C. Council.

had they been understood to exclude many of the very offenses that were receiving enhanced penalties under the Omnibus Public Safety and Justice Amendment Act.

Subsections (d), (e), and (f) accord with the previously discussed District authorities. These three subsections recodify D.C. Code §§ 22-1805a(c) and (d), making one potential change to District law and three kinds of non-substantive revisions to the current statutory text.

The potential change is that the revised jurisdictional provisions replace the phrase "an act of Congress applicable exclusively to the District of Columbia" with a reference to "the statutory laws of the District of Columbia." This definitively resolves the issue discussed above: conspiracies to commit offenses enacted by the D.C. Council are explicitly covered by the jurisdictional provisions set forth in D.C. Code §§ 22-1805a(c) and (d). It is unlikely this constitutes a departure from current District law, but, to the extent it does, it fills an unjustifiable (and likely unintended) gap created by the advent of home rule in the District.

The three kinds of non-substantive revisions, which improve the clarity and consistency of current District law governing jurisdiction in conspiracy prosecutions, are as follows. First, the revised jurisdictional provisions rephrase the current jurisdictional provisions in a more accessible manner. For example, the legalistic term "contrived," employed in both D.C. Code §§ 22-1805a(c) and (d), is replaced with the simpler term "formed" in both RCC §§ 22E-303(d) and (e).

Second, the revised jurisdictional provisions reorganize the current jurisdictional provisions in a more intuitive way. For example, the substantive requirement that the relevant conduct "constitute a criminal offense under an act of Congress applicable exclusively to the District of Columbia if performed therein," employed in both D.C. Code §§ 22-1805a(c) and (d), is broken out into its own separate subsection in both RCC §§ 22E-303(d) and (e). In addition, the clarification stated in D.C. Code § 22-1805a(d)—that "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 crime under the statutory laws of the other jurisdiction" where the substantive requirements stated in subsection (e) are met—is placed in its own subsection, RCC § 22E-303(f).

Third, the revised jurisdictional provisions rephrase the current jurisdictional provisions in a more descriptively accurate manner. For example, the vague use of "therein" employed throughout D.C. Code §§ 22-1805a(c) and (d) is replaced with a more specific reference to the relevant location in both RCC §§ 22E-303(d) and (e).

When viewed collectively, RCC §§ 22E-303(d), (e), and (f) both improve upon and preserve current District law governing jurisdiction in conspiracy prosecutions.

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

Explanatory Notes. Section 304 establishes two exceptions to the general inchoate offenses of solicitation and conspiracy.[1]

Paragraph (a)(1) excludes the victim of an offense from being held liable for soliciting or conspiring in its commission.[2] For example, a minor who asks an adult to engage in sex may technically satisfy the requirements of general solicitation liability in the sense of having purposefully requested that adult to perpetrate statutory rape against the minor.[3] And if that adult accepts the solicitation, then the minor may technically satisfy the requirements of general conspiracy liability in the sense of having purposefully agreed to the commission of a statutory rape against the minor.[4] Nevertheless, paragraph (a)(1) precludes holding the minor criminally liable for soliciting

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[1] 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." PAUL H. ROBINSON, 1 CRIM. L. DEF. § 83 (Westlaw 2019). 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. *Id.*

Sometimes, the exceptions to general inchoate liability available to these classes of individuals are stated or discussed directly. *See, e.g.,* Ark. Code Ann. § 5-3-103(a) ("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."); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.09(D)(1) (6th ed. 2012) ("A person may not be convicted of conspiracy to violate an offense if her conviction would frustrate a legislative purpose to exempt her from prosecution for the underlying substantive crime.").

More common (though less clear), however, is for these exceptions to be articulated by reference to the comparable exceptions governing legal accountability from which they've been derived. *See, e.g.,* Model Penal Code § 5.04(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[.]"); Model Penal Code § 2.06(6)(a) ("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 . . . he is a victim of that offense; or [] the offense is so defined that his conduct is inevitably incident to its commission[.]"); 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.").

Both the statutory text of section 304 and this commentary employ the first (and clearer) approach of directly addressing the relevant exceptions to general inchoate liability, without express reliance on the parallel exceptions to legal accountability that otherwise exist under the RCC. *See* RCC § 22E-211(a) ("A person is not legally accountable for the conduct of another under RCC § 22E-210 or RCC § 22E-211 when: (1) The person is a victim of the offense; or (2) The person's conduct is inevitably incident to commission of the offense as defined by statute.").

[2] This rule effectively *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. *See, e.g.,* ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 83; DRESSLER, *supra* note 1, 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).

[3] *See* RCC § 22E-302(a) (solicitation defined).

[4] *See* RCC § 22E-303(a) (conspiracy defined).

or conspiring in the commission of the minor's own victimization under sections 302 and 303 of the RCC.[5]

Paragraph (a)(2) excludes an actor whose criminal objective is inevitably incident to commission of an offense—as defined by statute[6]—from being held liable for soliciting or conspiring to commit that offense.[7] For example, a prospective purchaser

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[5] *See, e.g.*, DRESSLER, *supra* note 1, at § 29.09(D)(2) ("[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." [] And, because underage females [] cannot be convicted as accomplices[], they are also immune from prosecution for conspiracy to commit [statutory rape] upon themselves."); *In re Meagan R.*, 42 Cal. App. 4th 17, 21–22 (1996) (minor "cannot be liable as [a] coconspirator to the crime of her own statutory rape"). This same exception would also apply to many other kinds of "people who are victims of the underlying offense—such as, for example, a person who agrees to pay money to an extortionist, thereby technically entering into a 'conspiracy' with the extortionist." Commentary on Proposed Del. Crim. Code § 705 (2017). Although those "who pay extortion, blackmail, or ransom monies" can be understood to have agreed to "significantly assist[] in the commission of the crime," the fact they are the "victim of a crime" means that they "may not be indicted" on conspiracy or solicitation charges. *United States v. Southard*, 700 F.2d 1, 19 (1st Cir. 1983) (analyzing comparable exceptions in the context of complicity).

[6] That the person's criminal objective must be inevitably incident to commission of an offense *as defined by statute* clarifies that paragraph (a)(2) only applies when the target offense could not have been committed without the defendant's planned participation under any set of facts. This is to be distinguished from the situation of a defendant whose planned participation was merely useful or conducive to the commission of target offense *as charged in a particular case*. *See, e.g.*, LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3 (In applying the 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.") (quoting *State v. Duffy*, 8 S.W.3d 197, 201-202 (Mo. App. 1999)).

So, for example, the role of a doorman in protecting a particular drug house from being robbed or ripped off may inextricably be part of the main business of that home, the sale and purchase of controlled substances. However, because it is entirely possible to distribute controlled substances without the assistance of a doorman, the doorman's criminal objective—as contrasted with that of the purchaser—is not inevitably incident to the commission of the crime of drug distribution. Therefore, paragraph (a)(2) would not preclude holding a prospective doorman who offers a drug dealer his services in return for a portion of the proceeds liable for soliciting or conspiring to commit the distribution of controlled substances. *Wagers v. State*, 810 P.2d 172, 175-76 (Alaska Ct. App. 1991) ("[B]ecause [defendant's] role as a doorman/guard was not 'inevitably incidental' to the commission of the crime of possession with intent to deliver, [he] is not exempt[.]").

For another example, consider a prospective bribery scheme involving bribe offeror, B, go-between G, and public official, P. B gives G $20,000 in cash with instructions to approach P and propose a transaction whereby P will receive the money in return for providing B with a government license to which B is not otherwise entitled. If G agrees with B to participate in this scheme and approaches P, paragraph (a)(2) would *not* preclude holding G liable for conspiring with B to commit the crime of bribe offering. Although G's criminal objective—to act as a middleman, and facilitate the offering of a bribe—might be useful and conducive to the crime of bribe offering *as perpetrated on these facts*, it is not strictly necessary to commit the crime of bribe offering, which can be completed without a go-between. *See, e.g.*, LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 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.").

[7] This rule effectively *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. *See, e.g.*, Commentary on Ky. Rev. Stat. Ann. § 502.040; Commentary on Ala. Code § 13A-4-3.

who approaches a dealer in the hopes of securing a supply for personal use may technically satisfy the requirements of general solicitation liability in the sense of having purposefully requested the seller to perpetrate the distribution of a controlled substance.[8] And if that dealer accepts the solicitation, then the purchaser may technically satisfy the requirements of general conspiracy liability in the sense of having purposefully agreed with the seller to perpetrate the distribution of a controlled substance.[9] Nevertheless, because the purchaser's criminal objective—the *acquisition* of controlled substances—is inevitably incident to the *distribution* of controlled substances, paragraph (a)(2) precludes holding the purchaser criminally liable for soliciting or conspiring in the commission of drug distribution.[10]

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[8] *See* RCC § 22E-302(a) (solicitation defined).

[9] *See* RCC § 22E-303(a) (conspiracy defined).

[10] *See, e.g.*, *Tyler*, 587 So. 2d at 1241 ("[W]here A solicits B only to sell drugs to A, and A does not receive any controlled substance, A . . . is not guilty of solicitation to commit the offense of distribution of a controlled substance."); *People v. Allen*, 92 N.Y.2d 378, 681 N.Y.S.2d 216, 703 N.E.2d 1229 (1998) (same); *Com. v. Fisher*, 426 Pa. Super. 391, 394, 627 A.2d 732, 733 (1993) (same); *United States v. Parker*, 554 F.3d 230 (2d Cir. 2009) ("[T]he objective to transfer the drugs from the seller to the buyer cannot serve as the basis for a charge of conspiracy to transfer drugs"). Along similar lines, paragraph (a)(2) would also preclude holding the dealer criminally liable for soliciting or conspiring in the commission of drug *possession*.

In contrast, paragraph (a)(2) would not preclude holding the dealer liable for conspiring to *distribute* controlled substances based on an agreement with the purchaser. *See Ex parte Parker*, 136 So. 3d 1092, 1095 (Ala. 2013) (assuming that drug transaction is sufficient to support conspiracy to distribute conviction against *seller*). This is because the dealer's criminal objective—the *distribution* of controlled substances—is not inevitably incident to commission of the target offense, but rather, actually *constitutes* the target offense (i.e., provides the actual basis for a drug distribution charge). *See also Tyler*, 587 So. 2d at 1242 ("In a prosecution against the seller, where the statutorily proscribed conduct is the sale of the controlled substance, [it is] the buyer's conduct [that] would be "inevitably or necessarily incidental" to the sale."). And, according to the same logic, subsection (a)(2) would neither preclude holding the purchaser liable for conspiring to *possess* controlled substances based on an agreement with the dealer. *See also Tyler*, 587 So. 2d at 1243 ("Similarly, in a prosecution against the buyer, where the proscribed conduct is the possession of the controlled substance, [it is] the seller's conduct [that] would be 'inevitably or necessarily incidental' to that possession.").

This treatment is consistent with the RCC approach to dealing with conduct inevitably incident in the context of complicity. *See* RCC § 22E-212(a)(2) ("A person is not legally accountable for the conduct of another under RCC § 22E-210 or RCC § 22E-211 when . . . [t]he person's conduct is inevitably incident to commission of the offense as defined by statute."). For example, RCC § 22E-212(a)(2) generally precludes holding: (1) a drug purchaser liable for *distribution* as an accomplice to the drug dealer; and (2) a drug dealer liable for *possession* as an accomplice to the *drug purchaser*. *See id.*, Explanatory Notes. Conversely, RCC § 22E-212(a)(2) does not preclude holding: (1) a drug dealer directly liable for distribution; or (2) a drug purchaser directly liable for possession. And because such actors can be held directly liable for committing an offense, RCC § 22E-304(a)(2) would not preclude holding them liable for conspiring to commit that offense.

This parallel treatment of the conduct inevitably incident exception to conspiracy liability is, however, inconsistent with the broadest interpretation of Wharton's Rule, under which "[n]o 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[.]" Ky. Rev. Stat. Ann. § 506.050; *see* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.4(c)(4) ("[This includes] the buying and selling of contraband goods, and the giving and receiving of bribes.") (citing 2 F. WHARTON, CRIMINAL LAW § 1604 (12th ed. 1932)). However, this expansive interpretation of Wharton's Rule is also the least defensible and has been subject to significant criticism. *See, e.g.*, Model Penal Code § 5.04(2) cmt. at 481 ("[Such an approach] 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."); LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.4(c)(4).

Subsection (b) establishes an important limitation on the exceptions to solicitation and conspiracy liability set forth in subsection (a), namely, that they do not apply when "criminal liability [is] expressly provided for by an individual offense." This clarifies that section 304 is only a *default* bar on criminal liability for victims and those whose criminal objective is inevitably incident to commission of an offense.[11] It merely establishes that such actors are excluded from the general principles of solicitation and conspiracy liability set forth in sections 302 and 303.[12] As such, the legislature is free to

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On the narrower and more defensible reading, in contrast, Wharton's Rule merely "supports a presumption" that, "absent legislative intent to the contrary," charges for conspiracy and a substantive offense that requires "concerted criminal activity" should "merge when the substantive offense is proved." *Iannelli v. United States*, 420 U.S. 770, 785–86 (1975); *see, e.g., Pearsall v. United States*, 812 A.2d 953, 962 & n.11 (D.C. 2002) ("Wharton's Rule [merely] bar[s] convictions for both the substantive offense and conspiracy to commit that same offense," so, "[e]ven if the rule applies, initial dismissal of the conspiracy count is not required because the purpose of the rule is avoidance of dual punishment."); LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.4(c)(4) ("To the extent [Wharton's Rule simply] avoids cumulative punishment for conspiracy and the completed offense, [the doctrine] makes sense."); Model Penal Code § 5.04(2) cmt. at 481 ("[Wharton's] 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."). Section 304 does not preclude this outcome, while the RCC's general merger provision effectively requires it. *See* RCC § 22E-214(a)(4) (establishing presumption of merger whenever "[o]ne offense reasonably accounts for the other offense given the harm or wrong, culpability, and penalty proscribed by each"); *id.*, Explanatory Notes ("For example, where D, a drug dealer, is convicted of both conspiracy to commit drug distribution and drug distribution, and those convictions arise from the same course of conduct (e.g., a single drug deal with purchaser X), the conspiracy charge would merge with the drug distribution charge, since the latter, by effectively requiring an agreement to distribute as a precursor, 'reasonably accounts' for the former.").

[11] *See, e.g.*, Model Penal Code § 5.04(2) cmt. at 481 ("The position [] 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.").

[12] This reflects the fact that both the victim and conduct inevitably incident exceptions to solicitation and conspiracy are justified on the basis of legislative intent. *See, e.g.*, DRESSLER, *supra* note 52, at § 29.09 n.195 ("It would frustrate legislative intent[] if the underage party [in a statutory rape prosecution] were subject to prosecution for conspiracy in her own victimization."); *Gebardi v. United States*, 287 U.S. 112, 123, 53 S.Ct. 35, 77 L.Ed. 206 (1932) ("[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."); *Commonwealth v. Jennings*, 490 S.W.3d 339, 344 n.4 (Ky. 2016) ("[T]he 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.") (quotations and citations omitted); LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 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."); Alan C. Michaels, *Fastow and Arthur Andersen: Some Reflections on Corporate Criminality, Victim Status, and Retribution*, 1 OHIO ST. J. CRIM. L. 551, 571 (2004) ("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.").

Underlying this legislative intent rationale are considerations of proportionate punishment. For example, it has been observed that subjecting drug purchasers to liability for conspiracy or solicitation to distribute would conflict with:

impose criminal liability upon these general categories of protected actors on an offense-specific basis.[13] In that case, however, the legislature must draft individual criminal statutes to clearly reflect this determination.[14]

> [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.

United States v. Parker, 554 F.3d 230, 235 (2d Cir. 2009); *see, e.g.*, *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."); *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.").

[13] *See, e.g.*, ROBINSON, *supra* note 1, 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."); *see also, 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.").

[14] The following situation is illustrative: X, the bribe offeror in a two-person corruption scheme involving public official Y, proposes to give Y $20,000 in cash in return for a government license to which X is not otherwise entitled. On these facts, X *cannot* be held liable for soliciting the commission of the crime of *bribe receiving* under section 304 since X's criminal objective—the *giving* of a bribe—is inevitably incident to Y's perpetration of that crime. X can, however, be held criminally liable for his conduct under a statute that, through its express terms, prohibits the *offering of a bribe*.

The same analysis is applicable to general conspiracy liability. For example, if Y agrees to the transaction, X *cannot* be held liable for conspiring in the commission of the crime of *bribe receiving* under section 304 since X's criminal objective—the *giving* of a bribe—is inevitably incident to Y's perpetration of that crime. X can, however, be held criminally liable for his own conduct under a statute that, through its express terms, prohibits *bribery agreements.*

Section 304 should also be construed to exclude victims and conduct inevitably incident from the scope of general attempt liability based on a solicitation (or conspiracy). For example, where a prospective drug purchaser asks a dealer to sell him his daily supply, knowing that the dealer will agree and has the drugs on his person, the purchaser's solicitation could potentially satisfy the requirements for attempted distribution of controlled substances. (And, where the seller accepts the invitation, all the more could the resultant conspiracy potentially satisfy the requirements for attempted distribution of controlled substances.) *See generally* RCC § 22E-301(a) (attempt generally requires intent to commit offense and dangerous proximity to completion). Under these circumstances, subsection (a)(2) should be understood to preclude holding the purchaser criminally liable for an attempt to perpetrate the distribution of controlled substances just as it would preclude comparable theories of solicitation or conspiracy liability.

Relation to Current District Law. RCC § 22E-304 clarifies, improves the proportionality of, and fill in gaps in the District law of general inchoate liability.

RCC § 22E-304(a)(1) and (b): Relation to Current District Law on General Inchoate Liability for Victims. There is no current D.C. Code provision or case law directly addressing whether, as a general principle of criminal law, a victim can be held criminally liable for soliciting or conspiring in the commission of a crime perpetrated against him or herself. That said, this exception is consistent with the legislative intent underlying some current statutory offenses enacted by the D.C. Council. And it also has been explicitly recognized by two century-old judicial decisions from the District interpreting congressionally enacted statutes that have since been repealed in the context of accomplice liability.

No current District criminal statute explicitly exempts victims from the scope of general solicitation or conspiracy liability. However, an analysis of the child sex abuse statutes contained in the D.C. Code illustrates why this exception is consistent with legislative intent. For example, the District's current first-degree child sex abuse offense subjects to potential life imprisonment a person who, "being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act."[15] And the District's current second-degree child sex abuse offense subjects to ten years of imprisonment a person who, "being at least 4 years older than a child, engages in sexual contact with that child or causes that child to engage in sexual contact."[16] These current offenses exist specifically for the *protection* of minor-victims.[17]

At the same time, the normal principles of general inchoate liability derived from the District's general solicitation statute, D.C. Code § 22-2107,[18] and general conspiracy statute, D.C. Code § 22-1805a,[19] would appear to authorize treating a minor-victim

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[15] D.C. Code § 22-3008.

[16] D.C. Code § 22-3009.

[17] *See* D.C. Code § 22-3011(a) ("Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403."); *Ballard v. United States*, 430 A.2d 483, 486 (D.C. 1981) ("[T]he statutory proscription against carnal knowledge is intended to protect females below the age of sixteen, regardless of the use of force or consent, from any sexual relationship.").

[18] The relevant statutory text reads:

> (a) Whoever is guilty of soliciting a murder, whether or not such murder occurs, shall be sentenced to a period of imprisonment not exceeding 20 years, a fine not more than the amount set forth in § 22-3571.01, or both.
>
> (b) Whoever is guilty of soliciting a crime of violence as defined by § 23-1331(4), whether or not such crime occurs, shall be sentenced to a period of imprisonment not exceeding 10 years, a fine not more than the amount set forth in § 22-3571.01, or both.

D.C. Code § 22-2107.

[19] The relevant statutory text reads:

> (a)(1) 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 not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both, except that if the object of the conspiracy is a criminal offense

criminally liable for soliciting or conspiring in the perpetration of child sex abuse against him or herself.[20] Consider, for example, the situation of a minor who both initiates and agrees to a sexual act or contact with an adult. Under these circumstances, it might be said that the minor purposefully solicited and conspired with the adult to commit statutory rape in a manner sufficient to satisfy the requirements of general inchoate liability. In practical effect, then, applying general principles of solicitation and conspiracy liability to the District's child sex abuse statutes would mean that a minor may be subject to significant levels of criminal liability.

Treating the minor-victim of a statutory rape in this way seems disproportionate, counterintuitive, and in conflict with the policy goals animating the District's statutory rape offenses. Given these problems, it's unsurprising that reported District case law involving prosecutions for first or second-degree child sex abuse does not appear to ever include charges of this nature. This example may also indicate that—from a broader legislative and executive perspective—a victim exception to general inchoate liability is implicitly understood to exist in District law and practice.

This kind of exception has also been explicitly recognized in the complicity context through two century-old District judicial decisions in the course of interpreting congressionally-enacted statutes that have since been repealed. Although in both cases the victim exceptions to accomplice liability were recognized for testimonial/evidentiary purposes, and not because the would-be accomplices were themselves being prosecuted

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> punishable by less than 5 years, the maximum penalty for the conspiracy shall not exceed the maximum penalty provided for that offense.
>
> (2) If 2 or more persons conspire to commit a crime of violence as defined in § 23-1331(4), each shall be fined not more than the amount set forth in § 22-3571.01 nor the maximum fine prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or imprisoned not more than 15 years nor the maximum imprisonment prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or both.
>
> (b) No person may be convicted of conspiracy unless an overt act is alleged and proved to have been committed by 1 of the conspirators pursuant to the conspiracy and to effect its purpose . . . .

D.C. Code § 22-1805a.

[20] The District's jury instruction on solicitation liability summarizes current District law as follows: "[The defendant solicited another person] voluntarily, on purpose, and not by mistake or accident. 'Solicit' means to request, command, or attempt to persuade." CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, INSTRUCTION NO. 4.500—SOLICITATION (5th ed. 2017).

And the District's jury instruction on conspiracy liability summarizes current District law as follows:

> [A] conspiracy is a kind of partnership in crime. For any defendant to be convicted of the crime of conspiracy, the government must prove two [three] things beyond a reasonable doubt: first, that [during (the charged time period)] there was an agreement to [^] [describe object of conspiracy]; [and] second, that [^] [name of defendant] intentionally joined in that agreement; [and third, that one of the people involved in the conspiracy did one of the overt acts charged].

Id. at § 7.102.

for aiding or abetting the target offenses, the holding in each case remains relevant. In the first case, *Yeager v. United States* (1900), the U.S. Court of Appeals for the D.C. Circuit (CADC) determined that the victim of an offense criminalizing sexual intercourse with a female under sixteen years of age could not be deemed an accomplice to that offense precisely *because* she was victim of the party committing the act.[21] In the second case, *Thompson v. United States* (1908), the U.S. Court of Appeals for the District of Columbia applied similar reasoning in holding that a woman who consented to an illegal abortion could not be deemed an accomplice in the commission of an offense criminalizing the procurement of a miscarriage.[22]

Another relevant aspect of District law is the *de facto* victims exception incorporated into the District's prostitution offense. The relevant criminal statute, D.C. Code § 22-2701, codifies a general policy of excluding "children"—defined as anyone under the age of 18[23]—from criminal liability for prostitution.[24] Beyond creating a general immunity from prosecution for victimized children (including, presumably, those who might otherwise satisfy the requirements of accomplice liability), this statute further requires the police to "refer any child suspected of engaging in or offering to engage in a sexual act or sexual contact in return for receiving anything of value to an organization that provides treatment, housing, or services appropriate for victims of sex trafficking of children under § 22-1834."[25] These provisions appear to reflect the D.C. Council's view,

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[21] *Yeager v. United States*, 16 App. D.C. 356, 357, 360 (D.C. Cir. 1900) ("The crime is committed against her, and not with her. She is, by force of the law, victim and not *particeps criminis* or accomplice.").

The relevant statute, as quoted in *Yeager*, reads:

> Every person who shall carnally and unlawfully know any female under the age of sixteen years, or who shall be accessory to such carnal and unlawful knowledge before the fact in the District of Columbia or other place, except the territories, over which the United States has exclusive jurisdiction, . . . shall be guilty of a felony, and when convicted thereof shall be punished by imprisonment at hard labor, for the first offense for not more than fifteen years and for each subsequent offense not more than thirty years.

Id.

[22] *Thompson v. United States*, 30 App. D.C. 352, 362–63 (D.C. Cir. 1908) (the woman whose "miscarriage has been produced, though with her consent, [] is regarded as his victim, rather than an accomplice.").

The relevant statute, as quoted in *Thompson*, reads:

> Whoever, with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug, or substance whatever, or with like intent uses any instrument or means, unless when necessary to preserve her life or health, and under the direction of a competent licensed practitioner of medicine, shall be imprisoned for not more than five years; or, if the woman or her child dies in consequence of such act, by imprisonment for not less than three nor more than twenty years.

Id.

[23] D.C. Code § 22-2701(d)(3).

[24] *See generally* D.C. Code § 22-2701. More specifically, subsection (a) of the relevant statute makes it "unlawful for any person to engage in prostitution or to solicit for prostitution," subject to the "[e]xcept[ion] provided in subsection (d)." *Id.* Thereafter, subsection (d) creates an exception from criminal liability for any "child who engages in or offers to engage in a sexual act or sexual contact in return for receiving anything of value." *Id.* at § (d)(1).

[25] *Id.* at § (d)(2).

articulated in supporting legislative history, that "[v]ictims of sexual abuse should not be arrested, prosecuted, or convicted."[26]

RCC § 22E-304(a)(1) and (b) accords with the above authorities, as well as the policy considerations that support them, by excluding the victim of an offense from the scope of general solicitation and conspiracy liability unless expressly provided by statute.[27] (This is consistent with the similar exclusion for victims applicable to legal accountability under RCC § 22E-212.[28])

RCC § 22E-304(a)(2) and (b): Relation to Current District Law on General Inchoate Liability for Conduct Inevitably Incident. A conduct inevitably incident exception to general inchoate liability is generally consistent with District case law recognizing Wharton's Rule. This exception is also consistent with the legislative intent underlying current statutory offenses enacted by the D.C. Council. And it is consistent with conduct inevitably incident exception to accomplice liability, which the D.C. Court of Appeals (DCCA) has implicitly recognized through *dicta* on at least one occasion.

No current District criminal statute explicitly recognizes an exemption to general solicitation or conspiracy liability for an actor whose criminal objective is inevitably incident to the commission of an offense. That said, DCCA case law recognizes the doctrine known as Wharton's Rule, which has been described as a "specialized application" of the conduct inevitably incident exception to conspiracy liability.[29]

Specifically, Wharton's Rule "is an 'exception to the general principle that a conspiracy and the substantive offense that is its immediate end' are discrete crimes for which separate sanctions may be imposed."[30] As the court in *Pearsall v. United States* observed:

> Under Wharton's Rule, an agreement by two people to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to require necessarily the participation of two people for its commission. [] For example, Wharton's Rule applies to offenses such as adultery, incest, bigamy, and duelling that require concerted criminal

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[26] COUNCIL OF THE DISTRICT OF COLUMBIA, COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY, COMMITTEE REPORT ON BILL 20-714, *Sex Trafficking of Children Prevention Amendment Act of 2014*, at 5 (Nov. 7, 2014). The Committee Report goes on to observe that:

> Without this immunity, law enforcement can use threats of prosecution to coerce victims into testifying as witnesses and into participating in treatment programs. However, this coercion inevitably creates a relationship of antagonism between the government and these victims, causing victims to fear and distrust the police, prosecutors and services provided by the government, and being less willing to cooperate as trial witnesses or program participants.

Id.

[27] Note that under RCC § 22E-304(b) the legislature remains free to subject victims to general inchoate liability on an offense-specific basis. In that case, however, the legislature should draft individual criminal statutes to clearly reflect this determination.

[28] *See generally* Commentary on RCC § 22E-212(a)(1).

[29] PAUL H. ROBINSON, 1 CRIM. L. DEF. § 83 (2d. Westlaw 2018).

[30] *Pearsall v. United States*, 812 A.2d 953, 961-62 (D.C. 2002) (quoting *Iannelli v. United States*, 420 U.S. 770, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975)).

> activity, a plurality of criminal agents and is essentially an aid to the determination of legislative intent. [] Only where it is impossible under any circumstances to commit the substantive offense without cooperative action, does Wharton's Rule bar convictions for both the substantive offense and conspiracy to commit that same offense . . . . .
>
> In determining whether more than one person is necessary to commit the offense, it is recognized that a participant is necessary to the commission of a crime, for purposes of merging substantive and conspiracy counts, if the substantive statute requires the [participant's] existence as an abstract legal element of the crime . . . .
>
> The crimes that traditionally fall under Wharton's Rule share three characteristics:
>
> [1] [t]he parties to the agreement are the only persons who participate in commission of the substantive offense . . . . [2] the immediate consequences of the crime rest on the parties themselves rather than on society at large . . . . and [3] the agreement that attends the substantive offense does not appear likely to pose the distinct kinds of threats to society that the law of conspiracy seeks to avert.[31]

In light of these principles, the *Pearsall* court rejected the defendant's claim that his dual convictions for (1) conspiracy to commit armed robbery and (2) armed robbery premised on his role as an accomplice violated Wharton's Rule.[32]

At the heart of the DCCA's reasoning is a recognition that it is "entirely possible for appellant to commit the offense of armed robbery . . . without the participation of anyone else."[33] True, consummation of "armed robbery may be *easier* with the assistance of others."[34] Nevertheless, "such assistance is not *necessary* to commit the offense," i.e., "[a]rmed robbery does not require proof that there was more than the one actor."[35] And "[s]ince the focus of a Wharton's Rule inquiry is on the statutory elements, rather than the facts proved at trial, that the evidence showed several persons participated in the armed robbery does not make the rule applicable."[36] Accordingly, the *Pearsall* court concluded, "Wharton's Rule does not preclude conviction in a single trial of conspiracy to commit armed robbery and the substantive offense of armed robbery or its lesser-included offense of attempted armed robbery."[37]

Both the general recognition of Wharton's Rule in *Pearsall* as well as DCCA's decision to uphold the defendant's conspiracy conviction in light of it provides judicial

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[31] *Pearsall*, 812 A.2d at 962 (internal citations, quotations, and footnotes removed); *see also id.* n.11 ("Even if the rule applies, initial dismissal of the conspiracy count is not required because the purpose of the rule is avoidance of dual punishment.").

[32] *Id.* at 962.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* (internal citations and quotations omitted).

[37] *Id.* at 963.

support for a conduct inevitably incident exception to conspiracy liability.[38] The conduct inevitably incident exception, like Wharton's Rule, has the practical effect of curtailing general conspiracy liability where the target offense necessarily requires the participation of two parties as a matter of law.[39] And the conduct inevitably incident exception, like Wharton's Rule, has no application where—as was the case in *Pearsall*—the participation of one party was merely helpful to completion of the target offense based on the facts of the case.[40]

Case law aside, an analysis of the drug statutes in the current D.C. Code illustrates why a conduct inevitably incident exception to general inchoate liability is consistent with legislative intent. Compare the District's different approaches to punishing those who distribute and those who merely possess controlled substances.

The District's current distribution statute makes it a thirty year felony for "any person knowingly or intentionally to manufacture, distribute, or possess, with intent to manufacture or distribute, a controlled substance," which is, in fact, "a narcotic or abusive drug" subject to classification "in Schedule I or II."[41] In contrast, the District's current possession statute makes it a 180 day misdemeanor to "knowingly or

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[38] As the commentary to the D.C. jury instruction on conspiracy observes:

> Under Wharton's Rule, an agreement by two people to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two people for its commission. Typically, this Rule applies to offenses such as adultery, incest, bigamy, and dueling that require concerted activity. Only where it is impossible under any circumstances to commit the substantive offense without cooperative action, does Wharton's Rule, under a double jeopardy analysis, bar convictions for both the substantive offense and the conspiracy to commit that same offense. *See Pearsall v. U.S.*, 812 A.2d 953 (D.C. 2002); *U.S. v. Payan*, 992 F.2d 1387, 1390 (5th Cir. 1993). The focus of Wharton's Rule is on the statutory elements of an offense, rather than the facts proved at trial. Thus, an armed robbery, for example, does not require proof that there was more than one actor and Wharton's Rule does not apply in such circumstances. *Pearsall*, 812 A.2d at 962.

CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, INSTRUCTION NO. 7.102—CONSPIRACY (5th ed. 2017).

[39] *See, e.g., State v. Roldan*, 314 N.J. Super. 173, 182–83, 714 A.2d 351, 356 (App. Div. 1998) (Wharton's Rule holds that "where an agreement between two parties is inevitably incident to the commission of a crime, such as a sale of contraband, '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.'") (quoting *Iannelli v. United States*, 420 U.S. 770, 773, 95 S.Ct. 1284, 1288, 43 *L. Ed.*2d 616, 620 (1975)). For discussion of the differences between Wharton's Rule and the conduct inevitably incident exception to conspiracy, see ROBINSON, *supra* note 23, at 1 CRIM. L. DEF. § 83.

[40] *Roldan*, 314 N.J. Super. at 182–83, 714 A.2d at 356 (noting that no exception where "the evidence shows that two or more parties have entered into an agreement to engage in concerted criminal activity which goes beyond the kind of simple agreement inevitably incident to the sale of contraband") (citing *Iannelli*, 420 U.S. at 778, 95 S.Ct. at 1290, 43 L.Ed.2d at 623) (quoting *Callanan v. United States*, 364 U.S. 587, 593-94, 81 S.Ct. 321, 325, 5 L.Ed.2d 312, 317 (1961)).

[41] D.C. Code § 48-904.01(a)(1)-(2); *see id.* at (a)(2)(A) ("Any person who violates this subsection with respect to . . . A controlled substance classified in Schedule I or II that is a narcotic or abusive drug shall be imprisoned for not more than 30 years or fined not more than the amount set forth in § 22-3571.01, or both[.]").

intentionally to possess a controlled substance" of a similar nature.[42]

These different approaches are likewise reflected in the District's current drug offense-specific attempt and conspiracy penalty provision, D.C. Code § 48-904.09, which penalizes an attempt or conspiracy to commit any particular drug offense at precisely the same level as the completed version of that drug offense.[43] This stark contrast in grading appears to reflect a legislative judgment that mere possessors are far less culpable and/or dangerous than distributors, and, therefore, should be subject to significantly less liability.[44]

At the same time, application of the District's normal principles of conspiracy liability would appear to authorize holding a purchaser-possessor criminally liable for conspiring in the distribution of drugs by the seller to the purchaser-possessor.[45] Consider, for example, the situation of a drug user who both initiates and pursues the purchase of a controlled substance from a seller. Under these circumstances, it might be said that the drug user purposefully agreed to commit distribution in a manner sufficient

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[42] D.C. Code § 48-904.01(d)(1) ("It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter or Chapter 16B of Title 7, and provided in § 48-1201. Except as provided in paragraph (2) of this subsection, any person who violates this subsection is guilty of a misdemeanor and upon conviction may be imprisoned for not more than 180 days, fined not more than $1,000, or both."); *compare* D.C. Code § 48-904.01(d)(2) ("Any person who violates this subsection by knowingly or intentionally possessing the abusive drug phencyclidine in liquid form is guilty of a felony and, upon conviction, may be imprisoned for not more than 3 years, fined not more than the amount set forth in § 22-3571.01, or both.").

[43] D.C. Code § 48-904.09 ("Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

[44] Indeed, "[t]he District of Columbia Uniform Controlled Substances Act was enacted, in part, in order to punish offenders according to the seriousness of their conduct." *Long v. United States*, 623 A.2d 1144, 1151 n.13 (D.C. 1993) (citing Council of the District of Columbia, *Committee on the Judiciary, Report on Bill 4–123*, The Uniform Controlled Substances Act of 1981, 2–3 (April 8, 1981)) (hereinafter "Committee Report"). For example, the legislative history underlying the District's Uniform Controlled Substances Act observes that:

> While there is dispute over what penalties should be imposed, the proposition that the criminal consequences of prohibited conduct should be tied to the nature of the offense committed is unassailable. Title IV of the CSA would abolish the unilateral approach of the UNA and would introduce a system in which the penalty for prohibited conduct is graded according to the nature of the offense and the schedule of the substance involved.

Committee Report, at 5. *See also, e.g., Long*, 623 A.2d at 1150 (observing that "the fundamental message [in a federal case]—that the legislature did not intend to treat with equal severity on the one hand, entrepreneurs who profit from distribution of heroin or crack, and on the other hand, addicts who pool their resources to purchase drugs for their own joint use—finds meaningful support in the legislative history of the District's Uniform Controlled Substances Act."); *Lowman v. United States*, 632 A.2d 88, 98 (D.C. 1993) (Schwelb, J. dissenting) ("[A] central purpose of the enactment of the [District's] local [drug] statute was to abolish the 'unilateral approach' of the former Uniform Narcotics Act, which was viewed as not discriminating sufficiently between serious and less serious offenders, and to introduce a system in which the penalty for prohibited conduct is graded according to the nature of the offense and the schedule of the substance involved.").

[45] *See generally supra* note 14.

to satisfy the requirements of conspiracy liability under D.C. Code § 22-1805(a).[46] In practical effect, then, applying general principles of conspiracy liability to the District's drug distribution statute would mean that the drug user could be held liable to the same extent as the seller under D.C. Code § 48-904.09.

A similar analysis is likewise applicable to solicitation. Although the District's current general solicitation statute, D.C. Code § 22-2107, only applies to crimes of violence[47] (and therefore not to drug distribution), a solicitation might also provide the basis for attempt liability.[48] For example, where a prospective drug purchaser asks a dealer to sell him his daily supply, knowing that the dealer will agree and has the drugs on his person, the purchaser's solicitation might potentially satisfy the conduct requirement for attempt liability, given both the proximity to and likelihood that the solicitation would result in the distribution of controlled substances.[49] If true, however, then it would follow that the drug user, by attempting to perpetrate the distribution of controlled substances, could be held liable to the same extent as the seller under D.C. Code § 48-904.09.

Treating the purchaser-possessor in a drug deal in either of the ways described above seems disproportionate, counterintuitive, and in conflict with the policy goals animating the District's current controlled substances offenses.[50] Given these problems, it's unsurprising that reported District case law does not appear to include a single drug distribution prosecution involving general inchoate crimes brought against a drug user purchasing for individual use. This example may also indicate that—from a broader legislative and executive perspective—a conduct inevitably incident exception to general inchoate liability is implicitly understood to exist in District law and practice.

This conclusion is further bolstered by the conduct inevitably incident exception to accomplice liability, which the DCCA has implicitly recognized through *dicta*. In the

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[46] *See generally supra* note 14.

[47] The phrase "crime of violence" is defined in D.C. Code § 23-1331(4) to encompass the following offenses:

> 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.

[48] *See generally* Commentary on RCC § 301(a): Relation to Current District Law.

[49] *Id.*; *see also State v. Fristoe*, 135 Ariz. 25, 658 P.2d 825 (Ariz. App. 1982) (mere solicitation can amount to an attempt); *Ward v. State*, 528 N.E.2d 52 (Ind. 1988) (same); *but see Tyler v. State*, 587 So. 2d 1238 (Ala. Crim. App. 1991) (mere solicitation cannot amount to attempt).

[50] *See* sources cited *supra* note 38; *Lowman*, 632 A.2d at 96 (Schwelb, J. dissenting) (observing that if every purchaser were to be "deemed an aider and abettor to [distribution]," this would effectively "write out of the Act the offense of simple possession, since under such a theory every drug abuser would be liable for aiding and abetting the distribution which led to his own possession.'") (quoting *United States v. Swiderski*, 548 F.2d 445, 451 (2d Cir. 1977)).

relevant case, *Lowman v. United States*, two of the three judges on the panel held—relying on a line of prior District precedent—that an intermediary who arranges a drug transaction between "a willing buyer [and] a willing seller" can be held criminally liable for distribution as an accomplice.[51] One judge dissented, arguing that, among other problems, the majority's holding *could* logically support holding the *buyer* him or herself liable for distribution as an accomplice.[52] In response, the two-judge majority explained that they were "unpersuaded at this point that the court's interpretation of aiding and abetting might result in a buyer of illegal drugs being guilty of the crime of distribution," while citing to federal case law explicitly recognizing that "one who receives drugs does not aid and abet distribution 'since this would totally undermine the statutory scheme [by effectively writing] out of the Act the offense of simple possession."[53]

RCC § 22E-304(a)(2) and (b) accords with the above authorities, as well as the policy considerations that support them, by excluding an actor whose criminal objective is inevitably incident to the commission of an offense as a matter of law from the scope of general solicitation and conspiracy liability unless expressly provided by statute. [54] (This is consistent with the similar exclusion for conduct inevitably incident applicable to legal accountability under RCC § 22E-212.[55])

[51] *Lowman v. United States*, 632 A.2d 88, 91 (D.C. 1993) (upholding distribution conviction where defendant brought "a willing buyer to a willing seller" and "specifically asked [distributor] if he had any twenty-dollar rocks, the precise drugs that the undercover officer had said he wanted to buy"); *see, e.g.*, *Griggs v. United States*, 611 A.2d 526, 527, 529 (D.C. 1992) (upholding distribution conviction where an officer approached the defendant and asked if anyone was "working," the defendant escorted the officer to a seller, and the defendant told the seller that the officer "wanted one twenty"); *Minor v. United States*, 623 A.2d 1182, 1187 (D.C. 1993) ("[B]eing an agent of the buyer is not a defense to a charge of distribution.").

[52] *Lowman*, 632 A.2d at 96 (Schwelb, J. dissenting) (observing that "if the government's position were adopted, and if everyone who assisted a buyer of drugs were thereby rendered a distributor, then, *a fortiori*, every purchaser would also logically have to be deemed an aider and abettor to a felony, and would therefore be subject to a mandatory minimum sentence.").

[53] *Lowman*, 632 A.2d at 92 (quoting *United States v. Swiderski*, 548 F.2d 445, 451 (2d Cir. 1977)).

[54] Note that under RCC § 22E-304(b) the legislature remains free to impose general inchoate liability on those whose criminal objectives are inevitably incident to an offense on an offense-specific basis. In that case, however, the legislature should draft individual criminal statutes to clearly reflect this determination.

[55] *See generally* Commentary on RCC § 22E-212(a)(2).

RCC § 22E-305. Renunciation Defense to General Inchoate Liability.

Explanatory Notes. Section 305 establishes a renunciation defense to liability for attempting, soliciting, or conspiring to commit an offense.[1]

The affirmative defense set forth in section 305 is comprised of three basic requirements. First, the defendant must have engaged in conduct aimed at preventing the target of the charged attempt, solicitation, or conspiracy. Second, the defendant's conduct must have been motivated by a genuine desire to avoid the social harm implicated by the target offense (in contrast to more pragmatic goals, such as a desire to avoid arrest or postpone completion of the offense). Third, the target offense underlying the charged inchoate crime must not have been consummated, whether due to the defendant's preventative efforts or otherwise.[2]

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[1] Typically, "an offense is complete and criminal liability attaches and is irrevocable as soon as the actor satisfies all the elements of an offense." PAUL H. ROBINSON, 1 CRIM. L. DEF. § 81 (Westlaw 2019). However, where a defendant has been charged with a general inchoate offense (e.g., attempt, solicitation, and conspiracy) or an offense premised on legal accountability (e.g., complicity), the criminal justice system affords an "offender the opportunity to escape liability, even after he has satisfied the elements of these offenses, by renouncing, abandoning, or withdrawing from the criminal enterprise." *Id*; *see, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 28.03 (6th ed. 2012); WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5(b) (3d ed. Westlaw 2019). As it arises in the context of general inchoate liability, this widely recognized (though seldom raised) defense is typically referred to as "renunciation." Daniel G. Moriarty, *Extending the Defense of Renunciation*, 62 TEMP. L. REV. 1 (1989); *see, e.g.*, ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 81 (observing that "[a] majority of American jurisdictions recognize some form of renunciation defense to an attempt to commit an offense," while "[n]early every jurisdiction permits some form of renunciation defense to a charge of criminal solicitation" and "to a charge of conspiracy."); Model Penal Code § 5.01 cmt. at 361 ("Instances of renunciation of criminal purpose are not frequent.").

[2] Widespread recognition of "renunciation as an affirmative defense to inchoate crimes" is often said to be driven by "two basic reasons":

> First, renunciation indicates a lack of firmness of that purpose which evidences criminal dangerousness. The same rationale underlies the reluctance to make merely "preparatory" activity a basis for liability in criminal attempt: the criminal law does not seek to condemn where there is an insufficient showing that the defendant has a firm purpose to bring about the conduct or result which the penal law seeks to prevent. Where the defendant has performed acts which indicate, *prima facie*, sufficient firmness of purpose, the defendant should be allowed to rebut the inference to be drawn from such acts by showing that the defendant has plainly demonstrated the defendant's lack of firm purpose by completely renouncing the defendant's purpose to bring about the conduct or result which the law seeks to prevent.
>
> Second, it is thought that the law should provide a means for encouraging persons to abandon courses of criminal activity which they have already undertaken. In the very cases where the first reason becomes weakest, this second reason shows its greatest strength. That is, in the penultimate stage, where purpose is most likely to be firmly set, any inducement to desist achieves its greatest value.

Commentary on Haw. Rev. Stat. Ann. § 705-530 (citing Model Penal Code § 5.01 cmt. at 361); *see, e.g.*, Moriarty, *supra* note 1, at 5-6 (observing that 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."); Moriarty, *supra* note 1, at 5 ("Just as the degree structure of criminal [provides] greater deterrence for the higher degrees of crime [through more

Paragraph (a)(1) codifies a "reasonable efforts" standard for evaluating the sufficiency of the defendant's attempt at preventing the target offense.[3] This standard requires a context-sensitive analysis, which calls upon the fact-finder to determine whether the defendant's efforts, when evaluated in light of the totality of the circumstances, were reasonably calculated to disrupt the criminal scheme in which he or she participated.[4] The type of conduct sufficient to satisfy this standard will, by

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severe punishments], 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.").

Perhaps a better explanation of the renunciation defense's recognition, though, is "[r]etributively oriented," namely, that voluntary and complete renunciation "makes us reassess our vision of the defendant's blameworthiness." Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 612 (1981). As numerous legal authorities have recognized:

> All 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, when we reach a certain point, desist, and return to our roles as law-abiding citizens.

Hernandez-Cruz v. Holder, 651 F.3d 1094, 1103 (9th Cir. 2011) (quoting LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 11.4, which in turn quotes Robert H. Skilton, *The Requisite Act in a Criminal Attempt*, 3 U. PITT. L. REV. 308, 310 (1937); *see, e.g.*, PAUL H. ROBINSON & JOHN DARLEY, INTUITIONS OF JUSTICE & THE UTILITY OF DESERT 247-57 (2014) (finding strong support in public opinion for renunciation defense).

[3] RCC § 22E-305(a)(1) ("The defendant engaged in reasonable efforts to prevent commission of the target offense[.]"); *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 n.88 (2012) (collecting and analyzing state renunciation statutes that require a "reasonable," "substantial," or "proper" effort to prevent the crime); *compare* Model Penal Code §§ 5.01(4), 5.02(3), 5.03(6) (defendant's renunciation must have "prevented [offense's] commission").

Notably, the same "reasonable efforts" standard is employed in the RCC's withdrawal defense to legal accountability. RCC § 22E-213(a) (withdrawal defense to legal accountability where defendant, *inter alia*, "[o]therwise makes reasonable efforts to prevent the commission of the offense").

[4] While RCC § 22E-305 requires that the underlying target offense not be committed, the RCC approach does not require proof that it was the defendant's reasonable efforts that actually prevented the target offense. *See infra* notes 14-16 and accompanying text (further discussing this aspect of section 305). Among other implications, this allows for the possibility of a renunciation defense in impossibility situations, such as, for example, where the defendant's general inchoate liability arises in the context of a sting operation. *See, e.g., People v. Sisselman*, 147 A.D.2d 261 (N.Y. Sup. Ct. 1989) (recognizing renunciation defense in impossibility situations as a matter of basic fairness); Moriarty, *supra* note 1, at 37 ("[It would be an] absurd result to deny [a renunciation] defense to those who have unwittingly attempted the impossible and offer it to all others. There seems to be no reason to distinguish between the two classes on the basis of either social danger or susceptibility to having their choices influenced by our offers."); *see also* RCC § 22E-301(a), Explanatory Notes (providing overview of impossibility situations).

The following fact pattern is illustrative. D solicits Y, an undercover informant, to assault V. Soon thereafter, however, D reconsiders his proposal, regrets having made the request, and then wholeheartedly tries to persuade Y not to carry out the assault (unaware that Y is, in fact, a police officer). *See Sisselman*, 147 A.D.2d at 261 (case with similar facts). In this situation, D cannot *actually* persuade Y to desist or otherwise prevent the assault from occurring since Y never intended to go through with it in the first place. *See id.* at 264 ("The real problem here is that defendant was in no position to prevent the object crime since [the informant] never intended to carry out the solicited assault."). Nevertheless, D would still be eligible for a renunciation defense under section 305 since such conduct meets the reasonable efforts standard. *See infra* note 7 and accompanying text (noting that attempting to deprive one's contribution to a criminal scheme of its effectiveness constitute reasonable preventative efforts).

necessity, be contingent upon the nature of the inchoate crime at issue. For example, in most attempt prosecutions, the defendant's abandonment of his or her criminal scheme will satisfy the reasonable efforts standard.[5] Where, however, a solicitation or conspiracy charge is at issue, and the defendant facilitates or promotes a criminal scheme that involves the participation of others, then mere desistance is unlikely to suffice.[6] In these contexts, a more proactive approach aimed at disrupting the collective criminal enterprise will be necessary. This includes, among other possibilities: (1) engaging in conduct sufficient to deprive one's prior contribution to a criminal scheme of its effectiveness[7]; (2) providing reasonable notice to law enforcement[8]; or (3) providing reasonable notice to the victim.[9]

Paragraph (a)(2) codifies a "voluntary and complete"[10] standard as the basis for

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[5] *See, e.g.*, Model Penal Code § 5.01(4) (it is an "affirmative defense" to attempt that the defendant, *inter alia*, "*abandoned* his effort to commit the crime or otherwise prevented its commission") (italics added). The exception is where a defendant has set in motion forces that will culminate in a crime independent of his or her subsequent abandonment, such as, for example, where D, intending to destroy a building, starts the timer on an explosive device placed in the basement and then later—but prior to the explosion—thinks better of the criminal scheme. *See* Model Penal Code § 5.03 cmt. at 458 ("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."). In this situation, D's abandonment would not, by itself, constitute reasonable efforts at preventing commission of the target offense. Instead, a more proactive effort, e.g., providing timely notification to the police, would be necessary. *See infra* notes 7-9 and accompanying text (discussing more proactive forms of reasonable preventative efforts).

[6] *See, e.g.*, Model Penal Code § 5.02(3) (it is an "affirmative defense" to solicitation that the defendant, *inter alia*, "*persuaded him not to do* so or otherwise prevented the commission of the crime") (italics added); Model Penal Code § 5.03(6) (it is an "affirmative defense" to conspiracy that the defendant, *inter alia*, "*thwarted the success of the conspiracy*") (italics added).

[7] Whether conduct is sufficient to deprive one's prior contribution to a criminal scheme of its effectiveness is contingent upon the nature of the contribution. For example, where the defendant's involvement goes no further than an initial request or tentative agreement to assist the commission of a crime, then a clear (and timely) statement of disapproval communicated to his or her co-participants would likely satisfy the reasonable efforts standard. However, a statement of this nature would not suffice if the defendant's participation was more significant, such as, for example, loaning a weapon central to the scheme's success. In that case, the actual retrieval of the weapon would be necessary to deprive one's prior contribution to a criminal scheme of its effectiveness.

[8] That is, notice to law enforcement, which is: (1) timely; (2) communicated to the appropriate agency (i.e., one with jurisdiction over the requisite criminal scheme); and (3) provides that agency with a reasonably feasible means of preventing the criminal scheme. Where, in contrast, notice is provided too late, relayed to the wrong agency, or does not provide a reasonably feasible means of preventing the criminal scheme, then the defendant's conduct would not meet the "reasonable efforts" standard.

[9] That is, notice to the victim, which is: (1) timely; and (2) provides the victim with a reasonably feasible means of avoiding the target harm. Where, in contrast, the notice is provided too late, or does not enable the victim to easily and safely escape harm, then the defendant's conduct would not meet the "reasonable efforts" standard.

[10] The voluntariness component of this renunciation *defense* is to be distinguished from the voluntariness requirement applicable to all criminal *offenses* under section 203. *See* RCC § 22E-203(a) (establishing, as a basic ingredient of criminal liability, that "a person voluntarily commit[] the conduct element necessary to establish liability for the offense"). With respect to the latter voluntariness requirement, the question presented is relatively narrow: was the act (or omission) "the product of conscious effort or determination, or [] otherwise subject to the person's control." RCC § 22E-203(b). Where, in contrast, the voluntariness of a defendant's renunciation is concerned, the focus is on the individual's reasons for action in a broader moral sense (i.e., whether the defendant's desistance was motivated by a concern for the legally protected

evaluating the sufficiency of the defendant's motivations in undertaking his or her preventative efforts.[11] This standard, as further clarified in subsection (b), denies a renunciation defense to two different kinds of actors. The first, addressed in paragraph (b)(1), are those whose preventative efforts are motivated (to any extent) by a belief in the existence of circumstances which either: (1) increase the probability of detection or apprehension of the defendant or another participant in the criminal enterprise; or (2) render accomplishment of the criminal plans more difficult.[12] The second, addressed in paragraph (b)(2), are those whose preventative efforts are motivated (again, to any extent) by a decision to: (1) postpone the criminal conduct until another time; or (2) transfer the criminal effort to another victim or a different but similar objective.[13]

Paragraph (a)(3) establishes that a renunciation defense is only available when "the target offense was not committed." This non-consummation requirement categorically bars a renunciation defense in any situation where the target of an attempt, solicitation, or conspiracy is successful, without regard to why it was successful.[14]

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interests of others). *Compare* Model Penal Code § 5.01(4), cmt. at 359 ("A 'voluntary' abandonment occurs when there is a change in the actor's purpose that is not influenced by outside circumstances[.] 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."), *with id.* ("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[.]").

[11] RCC § 22E-305(a)(2) ("Under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent"); *see, e.g.*, Model Penal Code § 5.01(4) (abandonment of attempt must occur "under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."); Model Penal Code § 5.02(3) (repudiation of solicitation must occur "under circumstances manifesting a complete and voluntary renunciation of his criminal purpose"); Model Penal Code § 5.03(6) (repudiation of conspiracy must occur "under circumstances manifesting a complete and voluntary renunciation of his criminal purpose").

Generally speaking, the requirement of a voluntary and complete renunciation envisions that the defendant's preventative conduct have been motivated by a genuine repudiation of his or her criminal plans, rather than by external influences. That said, a defendant's renunciation can be motivated by external influences in a way that is nevertheless consistent with this kind of genuine repudiation, such as, for example, where D, a participant in a nascent drug conspiracy, is persuaded by his parents to renounce because carrying out a criminal scheme would be the "wrong thing to do."

[12] *See, e.g.*, Model Penal Code § 5.01(4) ("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."). For example, if D arrives at a bank, intending to rob the bank, but ultimately decides against it based upon a determination that it is too risky to go ahead or because she lacks something essential to the completion of the crime, D's abandonment is not voluntary.

[13] *See* Model Penal Code § 5.01(4) ("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."). For example, if D arrives at a bank, intending to rob the bank, but ultimately decides against it based upon a determination that waiting another day or robbing a different bank would be preferable, D's subsequent abandonment is not complete.

[14] For this reason, the renunciation defense to general inchoate crimes under section 305 is narrower than the withdrawal defense to legal accountability under section 213, which is available even where the target offense is successfully completed. *See generally* RCC § 22E-213(a), Explanatory Notes (observing that it is not necessary for the target offense to have been prevented or frustrated to raise withdrawal defense).

Another way in which the renunciation defense to general inchoate crimes is narrower than the withdrawal defense to legal accountability relates to the defendant's motive. Whereas a renunciation

Where, in contrast, the target of the attempt, solicitation, or conspiracy is *unsuccessful*, there is no requirement under paragraph (a)(3) that the defendant have actually contributed to its prevention, let alone been the factual (i.e., but for) cause of the prevention.[15] It is sufficient for purposes of section 305 that the offense attempted, solicited, or conspired failed for reasons entirely unrelated to the defendant's preventative efforts—provided that those efforts were reasonable and undertaken with the appropriate motivations.[16]

Subsection (c) establishes that the burden of proof for a renunciation defense lies with the defendant, and is subject to a preponderance of the evidence standard.[17] This

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defense is *unavailable* where the defendant was motivated by a desire to avoid getting caught or postpone commission of the offense, the withdrawal defense does not incorporate a comparable requirement of non-culpable intent. *See generally* RCC § 22E-213(a), Explanatory Notes (observing that any motive will suffice for withdrawal defense).

Because of these two differences, it is possible for a defendant to avoid legal accountability for another person's conduct yet still incur general inchoate liability for his or her own conduct under the RCC. 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).

[15] So, for example, a defendant in a multi-party scheme would not need to prove that his timely warning to the police was essential—or even helpful—to the subsequent disruption by law enforcement.

[16] So, for example, a renunciation defense would remain available where the defendant's timely warning to law enforcement is rendered superfluous by identical information earlier transmitted by another source. *See also supra* note 4 (discussing availability of renunciation defense in the context of sting operation).

[17] *See, e.g.*, ROBINSON, *supra* note 1, 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."); *id.* ("[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); *id.* ("[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); *compare* Model Penal Code § 5.01: Explanatory Note (renunciation is an "affirmative defense," which, pursuant to the Model Penal Code's general provision concerning legal and evidentiary burdens, "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."), *with* Model Penal Code § 5.03 cmt. at 459 n.260 (conceding that it would be reasonable to put the burden on the

means that the defendant possesses the burden of raising this affirmative defense at trial. Once appropriately raised, the defendant then bears the burden of persuading the fact finder that the elements of a renunciation defense have been met beyond a preponderance of the evidence.[18]

Relation to Current District Law. Section 305 clarifies and fills gaps in District law concerning the availability and burden of proof governing a renunciation defense.

The current state of District law concerning the renunciation defense is unclear. The D.C. Code does not codify any general defenses to criminal conduct, including renunciation. There also does not appear to be any District case law directly addressing the issue in the context of attempt, solicitation, or conspiracy. At the same time, some District authority relevant to the renunciation defense exists, providing modest support for its recognition.

In the attempt context, District courts apply a conduct requirement that, in drawing the line between preparation and perpetration, seems to imply the absence of renunciation. This so-called probable desistance test requires proof of conduct which, "*except for the interference of some cause preventing the carrying out of the intent*, would have resulted in the commission of the crime."[19] As various commentators have observed, this formulation of attempt liability appears to be part and parcel with a renunciation defense in the sense that a "voluntary abandonment demonstr[ates] that the agent would not have 'committ[ed] the crime except for' extraneous intervention."[20] Which is to say, the fact that a defendant genuinely repudiates his or her criminal plans

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defendant in states that have less stringent renunciation requirements, such as taking "reasonable efforts" to prevent the crime) (citing Haw. Rev. Stat. § 705-530(5).

In support of placing the burden of persuasion on the defendant, it has been argued that: (1) "as an accurate reflection of reality, the defense will be relatively rare"; (2) "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"; and (3) because a renunciation defense is "tantamount to an admission that [the] defendant did participate in a criminal" scheme, "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." Peter Buscemi, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122 (1975); *see generally Smith v. United States*, 568 U.S. 106 (2013) (recognizing comparable policy rationales in the context of the burden of proof governing a withdrawal defense to conspiracy.

[18] The renunciation defense set forth in this provision is to be distinguished from, and is not intended to alter, the withdrawal defense to a conspiracy as recognized under District law. *See, e.g., Harris v. United States*, 377 A.2d 34, 38 (D.C. 1977). The renunciation defense addresses when a criminal defendant may avoid *liability* for a general inchoate crime. The withdrawal defense, in contrast, is broader in scope, but narrower in application; it addresses (among other issues) when a criminal defendant may avoid the *collateral consequences* of a conspiracy. *See, e.g.,* Model Penal Code § 5.03 cmt. at 456 (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.").

[19] *E.g., Wormsley v. United States*, 526 A.2d 1373, 1375 (D.C. 1987) (quoting *Sellers v. United States*, 131 A.2d 300, 301-02 (D.C. 1957)) (emphasis added); *see also In re Doe*, 855 A.2d 1100, 1107 and n.11 (D.C. 2004) (quoting *Wormsley* but noting this formulation is "imperfect" in the sense that "failure is not an essential element of criminal attempt").

[20] R.A. DUFF, CRIMINAL ATTEMPTS 395-96 (1996); *see, e.g.,* Model Penal Code § 5.01 cmt. at 357-58; LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 11.5.

establishes that, with or without external interference, the outcome would have been the same: failure to consummate the target offense.

In the conspiracy context, the DCCA has addressed an issue closely related to renunciation: withdrawal.[21] Withdrawal, unlike renunciation, does not speak to when an actor is relieved from conspiracy *liability*. Instead, it addresses when an actor may be relieved from the *collateral consequences* of a conspiracy.[22] For example, "a defendant may attempt to establish his withdrawal as a defense in a prosecution for substantive crimes subsequently committed by the other conspirators."[23] Or the defendant "may want to prove his withdrawal so as to show that as to him the statute of limitations has run."[24] On these kinds of collateral issues, DCCA case law recognizes a withdrawal defense, under which the defendant "must take affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation."[25] And, "[i]n the event that a defendant claims that he or she withdrew from the conspiracy and the evidence warrants such an instruction," the criminal jury instructions indicate that the burden is on the "government to prove that the defendant was a member of the conspiracy and did not withdraw it."[26]

In the solicitation context, there does not appear to be *any* DCCA case law on the contours of this form of general inchoate liability—let alone any case law on renunciation.[27]

In the absence of District authority directly addressing the viability of a renunciation defense to the general inchoate crimes of attempt, conspiracy, and solicitation, the most relevant aspect of District law is the intersection between withdrawal and accomplice liability. The DCCA appears to recognize that the same withdrawal defense applicable in the conspiracy context is also available to those being prosecuted as aiders and abettors.[28] In this context, however, withdrawal provides the basis for a *complete defense*. Which is to say, an accomplice that "take[s] affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which

[21] There does not appear to be *any* DCCA case law on the general inchoate crime of solicitation. *See generally* COMMENTARY ON D.C. CRIM. JUR. INSTR. § 4.500 (observing that does not appear to contain a single reported decision "involving [the District's general solicitation] statute.")

[22] PAUL H. ROBINSON, 1 CRIM. L. DEF. § 81 (Westlaw 2018) (collecting authorities).

[23] LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.4; *see* DRESSLER, *supra* note 1, at § 29.09 ("If a person withdraws from a conspiracy, she may avoid liability for subsequent crimes committed in furtherance of the conspiracy by her former co-conspirators.").

[24] LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.4; *see* DRESSLER, *supra* note 1, at § 27.07 ("[O]nce a person withdraws, the statute of limitations for the conspiracy begins to run in her favor.").

[25] *Bost v. United States*, No. 12-CF-1589, 2018 WL 893993, at *28 (D.C. Feb. 15, 2018) (quoting *Harris v. United States*, 377 A.2d 34, 38 (D.C. 1977) (citing *Hyde v. United States*, 225 U.S. 347, 369 (1911); *United States v. Chester*, 407 F.2d 53, 55 (3rd Cir. 1969)); *see, e.g., Kelly v. United States*, 639 A.2d 86, 91 (D.C. 1994); *Baker v. United States*, 867 A.2d 988, 1007 (D.C. 2005).

[26] COMMENTARY ON D.C. CRIM. JUR. INSTR. § 7.102.

[27] *See generally* COMMENTARY ON D.C. CRIM. JUR. INSTR. § 4.500.

[28] *See Plater v. United States*, 745 A.2d 953, 958 (D.C. 2000) ("Legal withdrawal [as a defense to accomplice liability] has been defined as '(1) repudiation of the defendant's prior aid or (2) doing all that is possible to countermand his prior aid or counsel, and (3) doing so before the chain of events has become unstoppable.") (quoting LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3).

indicate a full and complete disassociation" cannot be convicted of the crime for which he or she has been charged with aiding and abetting.[29]

Recognition of a withdrawal defense to accomplice liability is congruent with recognition of a renunciation defense to general inchoate crimes. This is clearest in the context of conspiracy and solicitation liability given that the elements of accomplice liability are nearly identical—indeed, soliciting or conspiring with another person to commit a crime are two ways of aiding and abetting its commission.[30] But it is also true in the context of attempts, given the broader sense in which holding someone criminally responsible as an aider and abettor effectively "constitute[s] a form of inchoate liability."[31] And, perhaps most importantly, the elements of a withdrawal defense are not only similar to, but are necessarily included within, the more stringent elements of a renunciation defense, which typically requires *non-consummation* of the target offense under circumstances manifesting a *voluntary* and *complete* repudiation of criminal intent.[32] Arguably, then, the failure to recognize a renunciation defense to general inchoate crimes would be "inconsistent with the doctrine allowing an analogous defense in the complicity area."[33]

This is not to say, however, that the *burden of proof* governing a renunciation defense should be the same as that applicable to a withdrawal defense.[34] Even assuming

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[29] *In re D.N.*, 65 A.3d 88, 95 (D.C. 2013) ("Withdrawal is no defense to accomplice liability unless the defendant takes affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation.") (quoting *Harris v. United States*, 377 A.2d 34, 38 (D.C. 1977)); *see In re D.N.*, 65 A.3d at 95 ("Even if D.N. regretted the unfolding consequences of the brutal robbery in which he participated, that does not relieve him of criminal liability.").

[30] *See, e.g.*, *Tann v. United States*, 127 A.3d 400, 499 n.11 ("Generally, it may be said that accomplice liability exists when the accomplice intentionally encourages or assists, in the sense that his purpose is to encourage or assist another in the commission of a crime as to which the accomplice has the requisite mental state.") (quoting LAFAVE, supra note 1, at 2 SUBST. CRIM. L. § 13.2); *United States v. Simmons*, 431 F. Supp. 2d 38, 48 (D.D.C. 2006), *aff'd sub nom. United States v. McGill*, 815 F.3d 846 (D.C. Cir. 2016) ("Convictions for first degree murder while armed . . . may be based on evidence that he solicited and facilitated the murder.") (citing *Collazo v. United States*, 196 F.2d 573, 580 (D.C. Cir. 1952)); *see also* Adam Harris Kurland, *To "Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense": A Critique of Federal Aiding and Abetting Principles*, 57 S.C. L. REV. 85 (2005); Model Penal Code § 2.06(3).

[31] Michael T. Cahill, *Defining Inchoate Crime: An Incomplete Attempt*, 9 OHIO ST. J. CRIM. L. 751, 756 n.14 (2012).

[32] As one commentator phrases the distinction:

> "Withdrawal," commonly used in reference to the collateral consequences of conspiracy, tends to require only notification of an actor's abandonment to his confederates. "Renunciation" generally requires not only desistance, but more active rejection, and usually contains specific subjective requirements, such as a complete and voluntary renunciation.

ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81.

[33] Model Penal Code § 5.03 cmt. at 457.

[34] As the D.C. Court of Appeals explained in *Green v. Dist. of Columbia Dep't of Employment Servs.*:

> The term 'burden of proof' [] encompass[es] two separate burdens: the burden of production and the burden of persuasion . . . The former refers to the burden of coming forward with satisfactory evidence of a particular fact in issue . . . The latter constitutes the burden of persuading the trier of fact that the alleged fact is true.

that the burden of persuasion for a withdrawal defense ultimately rests with the government under current District law,[35] there are nevertheless sound policy and practical reasons to place the burden of persuasion for a renunciation defense on the defendant, subject to a preponderance of the evidence standard.[36] And there is also general District precedent supporting such an approach; many statutory defenses in the D.C. Code are subject to a preponderance of the evidence standard that must be proven by the defendant.[37]

Consistent with the above analysis, the RCC recognizes 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.

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499 A.2d 870, 873 (D.C. 1985) (internal citations omitted).

[35] *Compare* COMMENTARY ON D.C. CRIM. JUR. INSTR. § 7.102 ("In the event that a defendant claims that he or she withdrew from the conspiracy and the evidence warrants such an instruction, [then the] burden [is] on government to prove that the defendant was a member of the conspiracy and did not withdraw it.") *with Smith v. United States*, 568 U.S. 106 (2013) (placing burden on defendant to prove withdrawal from conspiracy under federal law).

[36] *See supra* note 13 (noting policy considerations).

[37] Most notably, this includes the District's statutory insanity defense, D.C. Code § 24-501 ("No person accused of an offense shall be acquitted on the ground that he was insane at the time of its commission unless his insanity, regardless of who raises the issue, is affirmatively established by a preponderance of the evidence."); *see Bell v. United States*, 950 A.2d 56, 66 (D.C. 2008) ("To establish a prima facie case, the defendant must present sufficient evidence to show that at the time of the criminal conduct, as a result of a mental illness or defect, he lacked substantial capacity to recognize the wrongfulness of his act or to conform his conduct to the requirements of the law . . . If a defendant fails to establish a prima facie case, the trial court is justified in not presenting the issue to the jury."); *see also Bethea v. United States*, 365 A.2d 64, 90 (D.C. 1976) ("Properly viewed, the concepts of both diminished capacity and insanity involve a moral choice by the community to withhold a finding of responsibility and its consequence of punishment."). For other examples, see D.C. Code § 22-3611 (b) (providing, with respect to penalty enhancement for crimes committed against minors, that it "is an affirmative defense that the accused reasonably believed that the victim was not a minor at the time of the offense," which "defense shall be established by a preponderance of the evidence."); D.C. Code § 22-3601(c) (same for penalty enhancement for crimes committed against minors); D.C. Code § 22-3011(b) (providing, with respect to child sex abuse, that [m]arriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence . . . .").

RCC § 22E-701. Generally Applicable Definitions.

This section establishes definitions that apply to all provisions of Title 22E, unless otherwise specified. Each definition is discussed separately, below.

"Act" has the meaning specified in RCC § 22E-202.

Explanatory Note. The definition of "act" is addressed in the Commentary accompanying RCC § 22E-202.

"Actor" means person accused of a criminal offense.

Explanatory Note. The term "actor" is used in many RCC offenses to avoid both the confusion that may arise from multiple references to a "person" and the potential bias that may arise from other references to the alleged perpetrator in a criminal case. Use of the term "actor" is a drafting convention that is not intended to substantively affect any provision in the RCC.

The RCC definition of "actor" replaces the current definition of "actor" in D.C. Code § 22-3001(1),[1] applicable to provisions in Chapter 30, Sexual Abuse (although the term is not used consistently).[2] The RCC definition of "actor" is used in the RCC definition of "protected person,"[3] as well as all sex offenses in RCC Chapter 13,[4] and the revised offenses of criminal abuse of a vulnerable adult or elderly person[5] and criminal neglect of a vulnerable adult or elderly person.[6]

Relation to Current District Law. The RCC definition of "actor" is substantively identical to the statutory definition under current law.[7]

"Attorney General" means the Attorney General for the District of Columbia.

Explanatory Note. The RCC definition of "Attorney General" replaces the current definition of "Attorney General" in D.C. Code § 22-932(1),[8] applicable to provisions in Chapter 9A, Criminal Abuse and Neglect of Vulnerable Adults. The RCC definition of "Attorney General" is used in the revised financial exploitation of a vulnerable adult civil provisions,[9] as well as the revised offenses of blocking a public way[10] and unlawful demonstration.[11]

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[1] D.C. Code § 22-3001(1) ("'Actor' means a person accused of any offense proscribed under this chapter.").

[2] Only three of the current sex offense statutes use the term "actor." First degree and second degree sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016) and the aggravating circumstances statute (D.C. Code § 22-3020). Instead of "actor," the other current sex offense statutes use terms like "a person," "the defendant," or by the specific position that the defendant has, e.g., "teacher."

[3] RCC § 22E-701.

[4] Sexual assault (RCC § 22E-1301); Sexual abuse of a minor (RCC § 22E-1302); Sexual exploitation of an adult (RCC § 22E-1303); Sexually suggestive conduct with a minor (RCC § 22E-1304); Enticing a minor (RCC § 22E-1305); Arranging for sexual conduct with a minor (RCC § 22E-1306); and Nonconsensual sexual conduct (RCC § 22E-1307).

[5] RCC § 22E-1503.

[6] RCC § 22E-1504.

[7] D.C. Code § 22-3001(1).

[8] D.C. Code § 22-932(1) ("'Attorney General' means the Attorney General for the District of Columbia.").

[9] RCC § 22E-2209.

[10] RCC § 22E-4203.

Relation to Current District Law. The RCC definition of "Attorney General" is identical to the statutory definition under current law.[12]

"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.

Explanatory Note. The RCC definition of "audiovisual works" is new, the term is not currently defined in Title 22 of the D.C. Code (although similar language is used to define "audiovisual works" in D.C. Code § 22-3214.01, the deceptive labeling statute).[13] The RCC definition of "audiovisual recording" replaces the current definition of "audiovisual works" in D.C. Code § 22-3214.01, applicable to the deceptive labeling statute. The RCC definition of "audiovisual recording" is used in the revised offenses of unlawful creation or possession of a recording[14] and unlawful labeling of a recording.[15]

Relation to Current District Law. The RCC definition of "audiovisual recording" is substantively identical to the statutory definition of "audiovisual works" in current law.[16]

"Block," and other parts of speech, including "blocks" and "blocking," mean render impassable without unreasonable hazard to any person.

Explanatory Note. The RCC definition of "blocks" is new; the term is not currently defined in Title 22 of the D.C. Code (although similar language is used in the current crowding, obstructing, or incommoding statute[17]). The RCC definition of "block" is used in the revised offense of blocking a public way.[18]

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

As applied in the revised offense of blocking a public way, RCC § 22E-4203, the term "block" does not substantively change District law. The current crowding, obstructing, or incommoding statute[19] uses the terms "crowd," "obstruct," or "incommode" without statutorily defining the terms, and there is no case law on point. The revised blocking a public way statute uses the word "blocks" to avoid confusion with other offenses referring to broader "obstruction" conduct (e.g. with respect to a law enforcement investigation). The revised blocking a public way statute uses the term

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[11] RCC § 22E-4204.
[12] D.C. Code § 22-932(1).
[13] D.C. Code § 22-3214.01(a)(1) ("'Audiovisual works' means material objects 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, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.").
[14] RCC § 22E-2105.
[15] RCC § 22E-2207.
[16] D.C. Code § 22-3214.01(a)(1).
[17] D.C. Code § 22-1307.
[18] RCC § 22E-4203.
[19] D.C. Code § 22-1307.

"blocks" to include all conduct that would[20] substantially interfere with motor traffic or foot traffic on public grounds. This does not include minor incommoding that poses no risk to passers-by, such as standing or sitting on part of a sidewalk, causing pedestrians to step around. However, blocking does include conduct that would render the public way impassable, but for the intervention of a law enforcement officer. Whether a hazard is reasonable or unreasonable is a question for the factfinder. Use of the term "blocks" applies consistent, clearly articulated definitions and improves the clarity of the revised offense.

"Bodily injury" means physical pain, illness, or any impairment of physical condition.

Explanatory Note. The term "bodily injury" is the lowest of the three levels of physical injury defined in the RCC. No minimum threshold of pain is specified for "physical pain." "Illness" includes any viral, bacterial, or other physical sickness or physical disease.[21] "Any" impairment of physical condition is intended to be construed broadly and includes cuts, scratches, bruises, and abrasions.[22] The definition does not require a minimum threshold of impairment. Subject to causation requirements, the definition of "bodily injury" may include indirect causes of pain, illness, or impairment, such as exposing another individual to inclement weather or administration of a drug or narcotic that has a negative effect.

The RCC definition of "bodily injury" replaces the current statutory definition of "bodily injury" in D.C. Code § 22-3001(2),[23] applicable to provisions in Chapter 30, Sexual Abuse, and undefined references to "bodily injury" in the current child cruelty,[24] obstruction of a police report,[25] and animal cruelty statutes.[26] Similar terms are used in

[20] The offense does not require that anyone actually attempt to make use of the public way and be unable to do so.

[21] For example, "bodily injury" would include sexually transmitted diseases.

[22] *Compare State v. Jarvis*, 665 N.W.2d 518, 521-22 (Minn. 2003) (concluding that "any impairment of physical condition" in the definition of "bodily harm" means "any injury that weakens or damages an individual's physical condition" and finding the evidence sufficient for bodily harm when the complaining witness involuntarily ingested drugs), *and Hanic v. State*, 406 N.E.2d 335, 337-38 (Ind. Ct. App. 1980) (finding that red marks and bruises on a woman's arms and "minor scratches" on her breast area were sufficient evidence for "bodily injury."), *with Harris v. State*, 965 A.2d 691, 694 (Del. 2009) (holding that a red mark on complainant's skin from being elbowed to the forehead and scratches on the complainant's knee did not constitute impairment of physical condition as required by the definition of "physical injury" because they "did not reduce the [complainant's] ability to use the affected parts of his body."), *and State v. Higgins*, 165 Or.App. 442 (2000) (holding that "scratches and scrapes that go unnoticed by the victim, that are not accompanied by pain and that do not result in the reduction of one's ability to use the body or a bodily organ for any period of time, do not constitute an impairment of physical condition" as required by the definition of "physical injury.").

[23] 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.").

[24] D.C. Code § 22-1101 ("creates a grave risk of bodily injury to a child, and thereby causes bodily injury").

[25] D.C. Code § 22-1931 ("It shall be unlawful for a person to knowingly … block access to any telephone…with a purpose to obstruct, prevent, or interfere with…[t]he report of any bodily injury.")

[26] D.C. Code § 22-1001(c) ("'serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, mutilation, or protracted loss or impairment of the function of a bodily member or organ.").

other Title 22 statutes,[27] and there is a definition[28] and several uses[29] of "serious bodily injury" in the current D.C. Code. The RCC definition of "bodily injury" is used in the RCC definitions of "significant bodily injury"[30] and "serious bodily injury,"[31] as well as the revised offenses of robbery,[32] assault,[33] menacing,[34] criminal threats,[35] kidnapping,[36] criminal restraint,[37] first degree sexual assault,[38] third degree sexual assault,[39] criminal abuse of a minor,[40] criminal abuse of a vulnerable adult or elderly person,[41] burglary,[42] disorderly conduct,[43] rioting,[44] and failure to disperse.[45]

Relation to Current District Law. *The RCC definition of "bodily injury" makes two clear changes to the statutory definition of "bodily injury" in D.C. Code § 22-3001(2).*[46] First, the RCC definition of "bodily injury" does not require "significant" pain. Eliminating the current limitation of "significant" pain avoids difficult and subjective assessments[47] as to the appropriate degree of pain and improves the clarity of the revised definition. Second, the RCC definition of "bodily injury" no longer specifically includes loss or impairment of a "mental faculty," although such an injury may be included to the extent that it otherwise satisfies the definition of "bodily injury." It is unclear whether "mental faculty" refers to the physical condition of the brain or more generally to psychological distress, and deleting it improves the consistency of the revised definition. The remaining changes to the current sex offense definition of "bodily

[27] *See, e.g.*, D.C. Code §§ 22-407 ("Whoever is convicted in the District of threats to do bodily harm…."); 22-933(1) (criminal abuse of a vulnerable adult or elderly person statute prohibiting, in part, "inflict[ing] or threat[ening[to inflict physical pain or injury by hitting, slapping, kicking, pinching, biting, pulling hair or other corporal means.").

[28] D.C. Code § 22-3001(7) ("'Serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.").

[29] *See, e.g.*, D.C. Code § 22-404.01 ("A person commits the offense of aggravated assault if: (1) By any means, that person knowingly or purposely causes serious bodily injury to another person….").

[30] RCC § 22E-701.

[31] RCC § 22E-701.

[32] RCC § 22E-1201.

[33] RCC § 22E-1202.

[34] RCC § 22E-1203.

[35] RCC § 22E-1204.

[36] RCC § 22E-1402.

[37] RCC § 22E-1404.

[38] RCC § 22E-1301(a).

[39] RCC § 22E-1301(c).

[40] RCC § 22E-1501.

[41] RCC § 22E-1503.

[42] RCC § 22E-2701.

[43] RCC § 22E-4201.

[44] RCC § 22E-4301.

[45] RCC § 22E-4302.

[46] D.C. Code § 22-3001(2).

[47] The difficulty in assessing pain thresholds at the low end of the spectrum is similar to such assessments at the high end, which the DCCA has criticized in the context of interpreting "extreme physical pain" in the definition of "serious bodily injury." *Swinton v. United States*, 902 A.2d 772, 777 (D.C. 2006) ("The term [extreme physical pain] is regrettably imprecise and subjective, and we cannot but be uncomfortable having to grade another human being's pain.").

injury" are clarificatory.[48] Despite the substantive revisions to the definition of "bodily injury," it is unclear whether the RCC definition actually changes current District law for the current sexual abuse offenses due to the broad definition of "force" for these offenses. The commentary to the RCC sexual assault offense (RCC § 22E-1301) discusses further the effect of the revised definition of "bodily injury" on current District law.

The RCC definition of "bodily injury" is generally consistent with the limited District case law interpreting the term "bodily injury" in non-sexual offenses, where there is no statutory definition of the term.[49] This limited case law does not generally discuss the meaning of the term. However, the RCC definition of "bodily injury" results in changes to current District law as applied to particular offenses. For example, the RCC assault statute (RCC § 22E-1202) is graded, in part, based in part on whether "bodily injury" was inflicted. Physical contacts that do not cause physical pain or otherwise satisfy the RCC definition of "bodily injury" are criminalized by the RCC offensive physical contact offense (RCC § 22E-1205), whereas current District law would criminalize these physical contacts as assault.[50] The commentaries to relevant RCC offenses against persons discuss further the effect of the RCC definition of "bodily injury" on current District law. The revised definition of "bodily injury" improves the consistency and proportionality of revised offenses.

The commentaries to relevant RCC offenses against persons discuss further the effect of the RCC definition of "bodily injury" on current District law.

"Building" means a structure affixed to land that is designed to contain one or more natural persons.

Explanatory Note. The RCC definition of "building" is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "building" are in several current property offenses[51]). The RCC definition of "building" is used in the revised definitions of "correctional facility," "dwelling," "halfway house," and "secure juvenile detention facility," as well as the revised offenses of trespass,[52] burglary,[53] arson,[54] and reckless burning.[55]

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[48] The RCC definition of "bodily injury" makes several non-substantive clarifications to the current definition of "bodily injury" in D.C. Code § 22-3001(2). The references to impairment of a "bodily member" or "organ," and "physical disfigurement" in the current definition are deleted as superfluous to the more inclusive term of "impairment of physical condition" in the RCC definition. Similarly, the current definition's references to "disease, sickness" are covered by the RCC definition's reference to "illness."

[49] *See, e.g.*, *Jones v. United States*, 67 A.3d 547, 548, 550 (finding the evidence sufficient for second degree child cruelty when the child sustained a "large raised bump on her head.").

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

[51] *E.g.*, trespass (D.C. Code § 22-3302), burglary (D.C. Code § 22-801).

[52] RCC § 22E-2601.

[53] RCC § 22E-2701.

[54] RCC § 22E-2501.

[55] RCC § 22E-2502.

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

"Business yard" means securely fenced or walled land where goods are stored or merchandise is traded.

Explanatory Note. The RCC definition of "business yard" is new; the term is not currently defined in Title 22 of the D.C. Code (although similar language is used in the current burglary statute[56]). The RCC definition of "business yard" is used in the revised offense of burglary.[57]

Relation to Current District Law. The RCC definition of "business yard" is new and does not substantively change District law.

As applied in the revised burglary statute, the term "business yard" may substantively change District law. The current burglary statute uses the phrase "any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade."[58] Case law has clarified that the phrase is limited to sites that store items for the purpose of a future commercial transaction.[59] The revised code uses the words "goods" and "merchandise," which are more common in modern English usage and broadly encompass lumber, coal, and chattels for trade. The revised code specifies that the yard must be walled or fenced, so as to distinguish a yard from open land. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

"Check" means any written instrument for payment of money by a financial institution.

Explanatory Note. The RCC definition of "check" is new, the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "check" are in several current offenses[60]). The RCC definition of "check" is used in the revised definition of value,[61] as well as the revised offense of check fraud.[62]

Relation to Current District Law. The RCC definition of "check" is new and does not substantively change District law. There is no case law defining "check" where the term is used in current property offenses.

"Circumstance element" has the meaning specified in RCC § 22E-201.

Explanatory Note. The definition of "circumstance element" is addressed in the Commentary accompanying RCC § 22E-201.

"Class A contraband" means:

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[56] D.C. Code § 22-801.
[57] RCC § 22E-2701.
[58] D.C. Code § 22-801.
[59] *Sydnor v. United States*, 129 A.3d 909, 913 (D.C. 2016) (finding a construction site could not be burglarized).
[60] Making, drawing, or uttering check, draft, or order with intent to defraud; proof of intent; "credit" defined, D.C. Code § 22-1510; Definition of "value" for Chapter 32, D.C. Code §22-3201; Forgery D.C. Code §§ 22-3241; 22-3242;
[61] RCC § 22E-701.
[62] RCC § 22E-2203.

(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 law enforcement officer's uniform, medical staff clothing, or any other uniform.

Explanatory Note. The RCC definition of "Class A contraband" replaces the current definition of "Class A contraband" in D.C. Code § 22-2603.01(2)(A),[63] applicable to the unlawful possession of contraband offense and related provisions. The terms "dangerous weapon," "imitation dangerous weapon," and "law enforcement officer" that are used in the definition of "Class A contraband" are defined elsewhere in RCC § 22E-701. The RCC definition of "Class A contraband" is used in the revised offense of correctional facility contraband.[64]

The RCC defines "Class A contraband" to include contraband that may be used to cause an injury or facilitate an escape more readily than other prohibited items.

[63] D.C. Code § 22-2603.01(2)(A) ("'Class A Contraband' means: (i) Any item, the mere possession of which is unlawful under District of Columbia or federal law; (ii) Any controlled substance listed or described in Unit A of Chapter 9 of Title 48, or any controlled substance scheduled by the Mayor pursuant to § 48-902.01; (iii) Any dangerous weapon or object which is capable of such use as may endanger the safety or security of a penal institution or secure juvenile residential facility or any person therein, including,: (I) A firearm or imitation firearm, or any component of a firearm; (II) Ammunition or ammunition clip; (III) A stun gun, as defined in § 7-2501.01(17A); (IV) Flammable liquid or explosive powder; (V) A knife, screwdriver, ice pick, box cutter, needle, or any other object or tool that can be used for cutting, slicing, stabbing, or puncturing a person; (VI) A shank or homemade knife; or (VII) Tear gas, pepper spray, or other substance that can be used to cause temporary blindness or incapacitation; (iv) Any object designed or intended to facilitate an escape; (v) Handcuffs, security restraints, handcuff keys, or any other object designed or intended to lock, unlock, or release handcuffs or security restraints; (vi) A hacksaw, hacksaw blade, wire cutter, file, or any other object or tool that can be used to cut through metal, concrete, or plastic; (vii) Rope; or (viii) When possessed by, given to, or intended to be given to an inmate or securely detained juvenile, a correctional officer's uniform, law enforcement officer's uniform, medical staff clothing, any other uniform, or civilian clothing. (B) The term "Class A contraband" does not include any object or substance which a person is authorized to possess in the penal institution or secure juvenile residential facility by the director of the penal institution or secure juvenile residential facility and that is in the form or quantity for which it was authorized.").

[64] RCC § 22E-3403.

Relation to Current District Law. *The RCC definition of "Class A contraband" makes several substantive changes to the current definition of "Class A contraband" in D.C. Code § 22-2603.01(2).*

First, the revised definition does not classify controlled substances as Class A contraband. The current D.C. Code definition of "Class A contraband" includes "[a]ny controlled substance listed or described in Unit A of Chapter 9 of Title 48 [§ 48-901.01 et seq.] or any controlled substance scheduled by the Mayor pursuant to § 48-902.01."[65] In contrast, the revised code classifies contraband according to the danger presented into: (A) weapons and escape implements; and (B) alcohol, drugs, drug paraphernalia, and cellular phones. This change improves the proportionality of the revised definition.

Second, the revised definition does not classify clothing, other than uniforms, as Class A contraband. The current D.C. Code definition of "Class A contraband" includes "civilian clothing."[66] In contrast, the revised definition includes a law enforcement officer's uniform, medical staff clothing, or any other uniform. The term "law enforcement officer" is defined in RCC § 22E-701 to include Department of Corrections employees, probation officers, and others. If disallowed by a facility, possession of civil clothing may still subject an incarcerated person to administrative sanctions. This change improves the proportionality of the revised definition.

Third, the revised definition does not classify unlawful items other than weapons as Class A contraband. The current D.C. Code definition of "Class A contraband" includes "[a]ny item, the mere possession of which is unlawful under District of Columbia or federal law."[67] There is no case law on point. However, the language would seem to include items that pose no apparent threat to the safety or order of a correctional facility.[68] In contrast, the revised definition of Class A contraband is limited to items that pose a clear security or escape risk. This change improves the clarity and proportionality of the revised definition.

Fourth, the current statute also classifies as Class A contraband, "Any object designed or intended to facilitate an escape."[69] There is no case law on point. In contrast, the revised code refers more specifically to "A tool created or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door." The revised language creates a more objective basis for identifying contraband—rather than making the subjective intent to facilitate escape the sole criterion for whether any object is Class A contraband—and is consistent with language in the revised possession of tools to commit property crime offense.[70] This change improves the clarity, consistency, and proportionality of the revised definition.

"Class B contraband" means:

(A) Any controlled substance or marijuana;

(B) Any alcoholic liquor or beverage;

[65] D.C. Code § 22-2603.01(2)(A)(ii).
[66] D.C. Code § 22-2603.01(2)(A)(viii).
[67] D.C. Code § 22-2603.01(2)(A)(i).
[68] *See, e.g.*, 16 U.S.C. § 668 (criminalizing possession of a bald eagle feather).
[69] D.C. Code § 22-2603.01(2)(A)(iv).
[70] *See* RCC § 22E-2702.

(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.

Explanatory Note. The RCC definition of "Class B contraband" replaces the current definition of "Class B contraband" in D.C. Code § 22-2603.01(3)(A),[71] applicable to the unlawful possession of contraband offense and related provisions. The term "controlled substance" used in the definition of "Class B contraband" is defined elsewhere in RCC § 22E-701. The RCC definition of "Class B contraband" is used in the revised offense of correctional facility contraband.[72]

The RCC defines "Class B contraband" to include contraband that may impede a facility's ability to provide an orderly, safe, and humane environment more readily than other items prohibited under administrative regulations. The phrase "item that can be used for the administration of a controlled substance" means an object that could be used to assist a user to introduce the drug into the body.[73] "Accessories" refers to devices that "enable or facilitate the use of a mobile telephone or other portable communication device. It is difficult to be exhaustive in light of changing technology, but accessories include chargers and batteries."[74]

Relation to Current District Law. The RCC definition of "Class B contraband" makes one substantive change to the current definition of "Class B contraband" in D.C. Code § 22-2603.01(3)(A): it reclassifies controlled substances, including marijuana,[75] which are classified as Class A contraband under current law[76] as Class B contraband. The current statute roughly classifies contraband as (A) any item prohibited by law, weapons, escape implements, and drugs; (B) alcohol, drug paraphernalia, and cellular phones; and (C) any item prohibited by rule (only administrative sanctions are authorized for Class C contraband). In contrast, the revised code classifies contraband according to the danger presented into: (A) weapons and escape implements; and (B) alcohol, drugs, drug paraphernalia, and cellular phones. This change improves the proportionality of the revised definition.

"Close relative" means a parent, grandparent, sibling, child, grandchild, aunt, or uncle.

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[71] D.C. Code § 22-2603.01(3)(A) ("'Class B Contraband' means: (i) Any alcoholic liquor or beverage; (ii) A hypodermic needle or syringe or other item that can be used for the administration of unlawful controlled substances; or (iii) A cellular telephone or other portable communication device and accessories thereto. (B) The term "Class B contraband" does not include any object or substance which a person is authorized to possess in the penal institution or secure juvenile residential facility by the director of the penal institution or secure juvenile residential facility and that is in the form or quantity for which it was authorized.").

[72] RCC § 22E-3403.

[73] For example, a pipe may be included, whereas aluminum foil is not.

[74] Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-151, "Omnibus Public Safety and Justice Amendment Act of 2009," (June 26, 2009) at page 16.

[75] [Definitions of marijuana, cannabis, and cannabinoids will be reviewed and revised when the Commission issues recommendations for drug offenses.]

[76] D.C. Code § 22-2603.01(2)(A)(ii) classifies as Class A contraband "[a]ny controlled substance listed or described in Unit A of Chapter 9 of Title 48 [§ 48-901.01 et seq.] or any controlled substance scheduled by the Mayor pursuant to § 48-902.01."

Explanatory Note. The RCC definition of "close relative" is new, the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "close relative" is used in the revised kidnapping[77] and criminal restraint[78] offenses.

Relation to Current District Law. The RCC definition of "close relative" is new and does not substantively change District law.

As applied in the revised kidnapping statute, the term "close relative" substantively changes current District law. The current kidnapping statute contains an exception to liability "in the case of a minor, by a parent thereof," but otherwise does not address kidnapping by close relatives.[79] In contrast, the revised statute codifies a defense to kidnapping if the accused is a "close relative" of the complainant, acted with intent to assume custody of the complainant and did not cause bodily injury or threaten to cause bodily injury. This change improves the proportionality of the revised offense.

"Coercive threat" means a threat, express or implicit, that, unless the complainant complies, any person will do any of the following:

(A) Engage in conduct that, in fact, constitutes:

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

(2) 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;

(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:

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

(2) 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.

Explanatory Note. The RCC defines "coercive threat" as consisting of seven forms of threatened behavior—six *per se* types of "coercive threat" and one flexible standard to what constitutes a "coercive threat." A person making a coercive threat may threaten to carry out the coercive conduct himself or herself, but that need not be the

[77] RCC § 22E-1401.
[78] RCC § 22E-1402.
[79] D.C. Code § 22-2001.

case.[80] A coercive threat may come in the form of a verbal or written communication, however gestures or other conduct may also suffice.[81] In addition, coercive threats need not be explicit. Communications and conduct that are implicitly threatening given the circumstances may constitute a coercive threat.[82]

Paragraph (A) specifies that coercive threats include threatening that any person will engage in conduct that constitutes a criminal offense against persons as defined in subtitle II of Title 22E, or a property offense as defined in subtitle III of Title 22E. This form of coercive threat does not include threats to commit any other types of criminal offenses.[83] The use of "in fact" indicates that no culpable mental state is required as to whether the threatened conduct constitutes an offense against persons or a property offense, or a criminal offense. However, all the elements of the predicate offense against persons or property offense, including their culpable mental states, must be proven.

Paragraph (B) specifies that coercive threats include threatening to take or withhold action as a government official, or to cause a government official to take or withhold action. This form of coercive threat includes threats to cite someone for violation of a regulation, make an arrest, or deny the award of a government contract or permit.

Paragraph (C) specifies that coercive threats include threatening to accuse another person of a crime. Under this form of coercive threat it is immaterial whether the accusation is accurate.

Paragraph (D) specifies that coercive threats include threatening to expose a secret, publicize an asserted fact, or distribute a photograph, video or audio recording, regardless of the truth or authenticity of the secret, fact, or item, that tends to subject another person to, or perpetuate hatred, contempt, ridicule, or other significant injury to personal reputation, or a significant injury to credit or business reputation. This paragraph does not require that the asserted secret or fact be true or false. This form of "coercive threat" is intended to include threats to expose secrets or assert facts that would have traditionally constituted blackmail.[84] This form of coercive threat also includes threats to expose secrets, assert facts, etc., that would tend to *perpetuate* hatred, contempt, ridicule, or other significant injury to personal reputation. A person who is already subject to hatred, contempt, and ridicule may still be the target of this form of coercive threat.[85]

Paragraph (E) specifies that coercive threats include threatening to notify a federal, state, or local government agency or official of, or to publicize, another person's immigration or citizenship status. The definition of "coercive threat" includes these

[80] For example, a person may compel another person to perform labor by threatening that a third party will injure the laborer if he or she refuses to perform.

[81] For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a coercive threat when that person makes similar demands of others. In addition ongoing infliction of harm may constitute a coercive threat, if it communicates that harm will continue in the future.

[82] For example, depending on the context, saying "it would be a shame if anything happened to your store," may constitute an implicit threat of property damage.

[83] For example, threatening to commit a controlled substance offense would not constitute coercion.

[84] D.C. Code § 22-3252.

[85] For example, even if it is well known that a person has engaged in numerous acts of infidelity, a threat to reveal an additional act of infidelity may still constitute a coercive threat under this paragraph.

threats because of the unique, often life-changing consequences stemming from a person's immigration or citizenship status becoming publicized.

Paragraph (F) specifies that coercive threats include threatening to restrict a person's access to a controlled substance that the person owns, or to prescription medication that the person owns. As this form of coercive threat requires that the other person already owns the controlled substance or prescription medication, a threat to refuse to sell or provide a controlled substance or prescription medication does not constitute a coercive threat under this paragraph.[86]

Paragraph (G) specifies that coercive threats include threatening to cause any harm that is sufficiently serious under all the surrounding circumstances to compel a reasonable person of the same background and in the same circumstances as the complainant to comply. This is a catch-all provision intended to capture potential harms that are not *per se* included in the RCC's coercive threats definition. In determining whether the harm was sufficiently serious, fact finders should consider the nature of the harm, the complainant's particular circumstances and background, and the conduct demanded by the defendant. A threat may be coercive to a particular complainant, but not another.[87] In addition, harms that may constitute a coercive threat when used to compel certain conduct may not necessarily constitute a coercive threat when used to compel different conduct.[88]

The RCC definition of "coercive threat" is new, the term is not currently defined in Title 22 of the D.C. Code (although the close-related term "coercion" is currently defined for the human trafficking statutes[89] and other statutes[90] use the undefined term "coercion"). The RCC definition of "coercive threats" replaces the current definition of "coercion" in D.C. Code § 22-1831(3),[91] applicable to provisions in Chapter 18A, Human Trafficking. The RCC definition of "coercive threat" is used in the revised definition of "effective consent"[92] and the many statutes which use that term,[93] including the revised

[86] However, in some cases refusal to sell or provide a controlled substance of prescription medication may constitute a coercive threat under the catch-all provision set forth in paragraph (13)(G).

[87] For example, threatening to leave a small child alone in an unknown part of a city may constitute coercion, but would not if the same threat were made to an adult.

[88] For example, some harms that would compel a reasonable person to perform basic tasks may not necessarily be sufficient to compel a reasonable person to engage in sexual activity.

[89] D.C. Code § 22-1831(3).

[90] Criminal street gangs (D.C. Code § 22-951); definition of "Act of terrorism" (D.C. Code § 22-3152).

[91] D.C. Code § 22-1831(3) ("'Coercion' means any one of, or a combination of, the following: (A) Force, threats of force, physical restraint, or threats of physical restraint; (B) Serious harm or threats of serious harm; (C) The abuse or threatened abuse of law or legal process; (D) Fraud or deception; (E) Any scheme, plan, or pattern intended to cause a person to believe that if that person did not perform labor or services, that person or another person would suffer serious harm or physical restraint; (F) Facilitating or controlling a person's access to an addictive or controlled substance or restricting a person's access to prescription medication; or (G) Knowingly participating in conduct with the intent to cause a person to believe that he or she is the property of a person or business and that would cause a reasonable person in that person's circumstances to believe that he or she is the property of a person or business.").

[92] RCC § 22E-701.

[93] RCC §§ 22E-1202 (assault); 22E-1203 (menace); 22E-1204 (criminal threats); 22E-1205 (offensive physical contact); 22E-1301 (sexual assault); 22E-1307 (nonconsensual sexual conduct); 22E-1401 (kidnapping); 22E-1402 (criminal restraint); 22E-1503 (abuse of a vulnerable adult or elderly person); 22E-1504 (neglect of a vulnerable adult or elderly person).

offenses of forced labor or services,[94] forced commercial sex,[95] trafficking in labor or services,[96] trafficking in commercial sex,[97] and first degree,[98] second degree,[99] third degree,[100] and fourth degree sexual assault.[101]

Relation to Current District Law. The RCC definition of "coercive threats" makes several substantive, possibly substantive, and clarificatory changes to the current definition of "coercion" in D.C. Code § 22-1831(3). As applied to the revised sexual assault offense in RCC § 22E-1301, the RCC definition of "coercive threats" may change current law.

The revised coercive threat definition makes two changes that constitute substantive changes to current District law in D.C. Code § 22-1831(3).

First, the revised "coercive threat" definition excludes fraud, deception, or causing a person to believe he or she is property of another. The current D.C. Code coercion definition for human trafficking offenses includes as one form "fraud or deception."[102] Similarly, the current D.C. Code states that coercion includes "knowingly participating in conduct with the intent to cause a person to believe that he or she is the property of a person or business and that would cause a reasonable person in that person's circumstance to believe that he or she is the property of a person or business."[103] There is no DCCA case law interpreting the meaning of these provisions. In contrast, the RCC definition of coercive threat does not specifically address frauds or deceptions. Leading someone to believe that they are property of another appears to be a particular form of deception.[104] Although deceiving another person for personal gain is wrongful and may be subject to criminal liability,[105] it is not equivalent to the coercive behavior listed in this definition when it is the sole form of wrongdoing.[106] This change improves the clarity and proportionality of the revised statute.

Second, the revised "coercive threat" definition includes threatening to "restrict a person's access to a controlled substance that the person owns," or to "prescription medication that the person owns." The current D.C. Code definition of "coercion" for human trafficking offenses refers to "*facilitating or controlling*" a person's access to "an addictive or controlled substance" or "restricting a person's access to prescription

[94] RCC § 22E-1601.
[95] RCC § 22E-1602.
[96] RCC § 22E-1603.
[97] RCC § 22E-1604.
[98] RCC § 22E-1301.
[99] RCC § 22E-1301.
[100] RCC § 22E-1301.
[101] RCC § 22E-1301.
[102] D.C. Code § 22-1831(3)(D).
[103] D.C. Code § 22-1831(3)(G).
[104] As a matter of practice, in most cases in which a reasonable person would believe that he or she was the property of another, that person may also be subject to threats of physical injury or other form of abuse that would satisfy other forms of coercive threat included in the revised definition.
[105] E.g., using deception to cause another person to provide labor is punishable under the RCC's revised fraud statute. RCC § 22E-2201.
[106] Deception may be a critical part of a human trafficking scheme involving other types of coercion that would trigger liability. For example, a person may deceive a person with the false promise of high wages to entice a person to begin providing labor, and then use threats of bodily harm to compel the person to continue providing labor.

medication." There is no DCCA case law interpreting the meaning of these terms. In contrast, the revised definition of coercive threats is narrower in three respects. First, this form of coercive threat requires that the defendant *restricts* another person's access to a controlled substance or prescription medication. This form of coercive threat does not include facilitating or controlling a person's access to controlled substances.[107] Second, this form of coercive threat requires that the accused threaten to restrict a person's access to a controlled substance *that the person owns*, or to a prescription medication *that the person owns*. This form of coercive threat excludes a refusal to sell or provide a controlled substance or prescription medication that the other person does not already own. Third, this form of coercive threat does not include limiting a person's access to addictive but legal substances like alcohol and tobacco. Including threats to restrict access to any addictive substance as a form of coercive threat creates the possibility of criminalizing conduct that is comparatively less harmful than other forms of coercive threats included in the revised definition.[108] These changes improve the clarity and proportionality of the revised statute.

In addition, the revised coercive threat definition makes six changes that may constitute substantive changes to current District law in D.C. Code § 22-1831(3).

First, the revised "coercive threat" definition includes threatening to engage in "any criminal offense against persons as defined in subtitle II of Title 22E, or a property offense as defined in subtitle III of Title 22E" or 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." The current D.C. Code definition of "coercion" for human trafficking offenses includes "force, threats of force, physical restraint, or threats of physical restraint,"[109] conduct that generally would constitute the criminal offenses of assault or kidnapping. The current D.C. Code also references any scheme intended to cause a person to believe that someone would suffer "serious harm or physical restraint."[110] The current definition of "coercion" also includes "serious harm or threats of serious harm,"[111] and "serious harm" is defined, in relevant part, as "harm . . . that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm."[112] It is unclear under the current D.C. Code whether threatening to commit other offenses against persons or property offenses would constitute "serious harm." There is no DCCA case law interpreting the meaning of these terms. However, the revised

[107] However, a person can satisfy this subsection by facilitating or controlling a person's access a controlled substance, when doing so constitutes an implicit threat that future access will be limited. For example, a person may behave coercively by giving heroin to a heroin addict if by doing so he or she implicitly threatens that access to heroin will be limited in the future.

[108] For example, under current law inducing a person who is a regular tobacco user to perform any service by offering cigarettes in exchange arguably may constitute forced labor, an offense punishable by up to 20 years imprisonment. In addition, although alcohol is an addictive substance, it is not a controlled substance and is relatively easier to obtain. Restricting a person's access to alcohol is not as inherently coercive as restricting a person's access to a controlled substance, as it is relatively easy for a person to obtain alcohol by other means.

[109] D.C. Code § 22-1831(3)(A).

[110] D.C. Code § 22-1831(3)(E).

[111] D.C. Code § 22-1831(3)(B).

[112] D.C. Code § 22-1831(7).

definition clarifies that threats to commit a criminal offense against persons or a property offense suffices to establish a coercive threat, while at the same time preserving an explicit catch-all provision for other sufficiently serious harms. These changes improve the clarity and consistency[113] of the revised statutes.

Second, the revised coercive threat definition does not specifically include "force," "physical restraint," or "serious harm." The revised coercive threat definition includes threatening that another person will "commit any criminal offense against persons as defined in subtitle II of Title 22E[.]" Although the use of force, physical restraint, and serious harm may constitute offenses against persons[114], the revised definition requires that the accused *threatens* that another person will commit a criminal offense against persons or to inflict serious harm. Committing an offense against persons without an implicit or explicit threat of further criminal activity would not constitute a coercive threat under the revised definition. However, in almost any case in which a person coerces a person by using force or physical restraint, there is at least an implicit threat to commit an additional crime against persons. This change clarifies and improves the consistency of the revised statute.

Third, the revised coercive threat definition specifically includes threatening to notify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status. The current D.C. Code coercion definition does not explicitly refer to threats to reveal a person's immigration or citizenship status. However, such conduct or threats may constitute "serious harm" as that term is used in the current human trafficking offenses,[115] or may constitute "[t]he abuse or threatened abuse of law or legal process" which is included in the current coercion definition.[116] There is no relevant case law interpreting what constitutes "serious harm." The revised definition clarifies that any threat to notify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status constitutes a coercive threat. This change clarifies and improves the consistency of the revised statute.

Fourth, the revised definition includes threatening to "expose a secret, publicize an asserted fact, or distribute a photograph, video or audio recording, regardless of the truth or authenticity of the secret, fact, or item, that tends to subject another person to, or perpetuate: Hatred, contempt, ridicule, or other significant injury to personal reputation; or significant injury to credit or business reputation." The current D.C. Code "coercion" definition does not explicitly refer threats to cause significant reputational harms. However, such threats may constitute "serious harm" as that term is used in the current human trafficking offenses.[117] There is no relevant case law interpreting what constitutes "serious harm." The revised definition clarifies that such severe reputational harms constitutes a coercive threat. This change clarifies and improves the consistency of the revised statute.

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[113] *See*, sex offenses RCC §§ 22E-1301 through 22E-1309; and extortion § 22E-2301.
[114] Force and physical restraint could constitute assault, kidnapping, or criminal restraint.
[115] D.C. Code § 22-1831(3)(B); D.C. Code § 22-1831(7).
[116] D.C. Code § 22-1831(3)(C).
[117] D.C. Code § 22-1831(3)(B); D.C. Code § 22-1831(7). Note that the current D.C. Code definition of "serious harm specifically includes certain sufficiently serious "reputational harm." D.C. Code § 22-1831(7).

Fifth, the revised coercive threat definition does not specifically include "the abuse or threatened abuse of law or legal process." The current D.C. Code definition of "coercion" for human trafficking offenses includes "the abuse or threatened abuse of law or legal process."[118] There is no relevant case law, or legislative history that provides examples of what would constitute abuse of law or legal process. The RCC definition of coercive threat omits specific reference to the abuse of law or legal process, although such conduct may still constitute a coercive threat if it involves threats to accuse a person of a crime, threats to reveal a person's immigration or citizenship status, or other harm sufficiently serious to compel a reasonable person to comply. [119] This change improves the clarity of the revised offense.

Sixth, the revised coercive threat definition does not explicitly include making a "wrongful threat of economic injury." The current extortion statute[47] includes the phrase "wrongful threat of economic injury," but the phrase is not defined in the statute, and there is no relevant DCCA case law. The legislative history notes that this language was "not intended to cover the threat of labor strikes or other labor activities," or "consumer boycotts,"[120] but is intended to cover "a leader of an organization [who] threatens to strike or boycott in order to extort anything of value for his personal benefit, unrelated to the interest of the group he represents."[49] However, the RCC's definition of "coercive threats" does not specifically include a "wrongful threat of economic injury." While the revised coercive threat definition is not intended to include threats of labor strikes or consumer boycotts, certain types of threats of economic injury may still satisfy the catch-all provision. However, because it is not clear exactly what constitutes a "wrongful threat of economic injury under current law," it is unclear whether the catch-all provision would necessarily cover all such threats. This change clarifies and improves the consistency of the revised statute.

The remaining changes to the revised coercive threat definition are clarificatory and are not intended to change current District law in D.C. Code § 22-1831(3).

First, the revised coercive threat definition does not specifically include "threats of force" or "threats of physical restraint." This change is not intended to change current law. The revised coercive threat definition includes threatening that another person will "commit any criminal offense against persons as defined in subtitle II of Title 22E[.]" Threats of force and threats of physical restraint involve threatening to engage in a criminal offense against persons.[121]

Second, the revised coercive threat definition does not specifically include "threats of serious harm." Omitting this language is not intended to change current

[118] D.C. Code § 22-1831(3)(C).

[119] Whether threats to abuse law or legal process would satisfy the requirements of the catch-all provision would be determined on a case by case basis. It is possible that only certain abuses of law or legal process would be sufficiently harmful given the surrounding circumstances to constitute coercion. For example, a threat to file a suit in small claims court for very minor damages against a wealthy complainant may not necessarily be sufficiently harmful to satisfy the catch-all provision. Similarly, it is unclear whether threatening to file a civil noise complaint would be sufficiently coercive to satisfy the revised definition's catch-all provision.

[120] Judiciary Committee, Report on Bill No. 4-193, the D.C. Theft and White Collar Crime Act of 1982, at 69 (hereinafter, "Judiciary Committee Report").

[121] Force, threats of force, physical restraint, or threats of physical restraint could constitute assault, criminal threats, kidnapping, or criminal restraint.

District law. The revised coercive threat definition includes "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." The language in this catch-all provision in the revised coercive threat definition is intended to include threats of all harms that constitute threats of "serious harm" under current law.[122]

Third, the revised coercive threat definition does not specifically include "any scheme, plan, or pattern intended to cause a person to believe that if that person did not perform labor or services, that person or another person would suffer serious harm or physical restraint[.]" Omitting this language is not intended to change current District law. The revised coercive threat definition includes threatening to commit a criminal offense against persons, or cause any harm sufficiently serious to compel a reasonable person to comply. An explicit or implicit threat may be established by a single act, or a scheme, plan, or pattern of behavior.[123]

As applied to the revised sexual assault offense in RCC § 22E-1301, the RCC definition of "coercive threats" may change current law. The current D.C. Code sexual abuse statutes do not use the term "coercion," but second degree and fourth degree sexual abuse broadly prohibit causing a complainant to engage in sexual activity "by threatening or placing that other person in reasonable fear (other than by threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping)."[124] However, as discussed further in the commentary to the revised sexual assault statute (RCC § 22E-1301), second degree and fourth degree of the revised sexual assault statute prohibit causing a complainant to engage in sexual activity by a "coercive threat." The use of "coercive threat" in the revised sexual assault statute's second and fourth degrees is not limited to threats "other than by threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping," and thereby is a lesser included offense of those specific kinds of threats which remain a basis of liability in first and third degree sexual assault. Otherwise, the RCC definition of "coercive threat" captures the breadth of the plain language of the current second degree and fourth degree sexual abuse statutes as well as limited DCCA case law interpreting these statutes.

"Commercial sex act" means any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person.

Explanatory Note. The RCC definition of "commercial sex act" replaces the definition of "commercial sex act" in D.C. Code § 22-1831. The RCC definition of "commercial sex act" is copied verbatim from the definition in D.C. Code § 22-1831,

[122] The DCCA has never issued an opinion interpreting the definition of "serious harm" under current law. However, federal courts interpreting analogous provisions in federal human trafficking statutes have approved jury instructions defining "serious harm" as "any consequences, whether physical or non-physical, that are sufficient under all of the surrounding circumstances to compel or coerce a reasonable person in the same situation to provide or to continue providing labor or services." *United States v. Bradley*, 390 F.3d 145, 150 (1st Cir. 2004) *cert. granted, judgment vacated on other grounds*, 545 U.S. 1101, 125 S. Ct. 2543, 162 L. Ed. 2d 271 (2005).

[123] For example, if a person routinely beats laborers, causing other laborers to fear that they will face similar beatings if they refuse to work, that person would satisfy the requirements of coercion even without an explicit threatening language.

[124] D.C. Code §§ 22-3003(1), 22-3005(1).

except that it does not include violations of various Chapter 27 offenses.[125] The terms "sexual act" and "sexual contact" are defined in RCC § 22E-701. The RCC definition of "commercial sex act" is used in the revised forced commercial sex,[126] trafficking in commercial sex,[127] sex trafficking of minors,[128] and commercial sex with a trafficked person[129] offenses.

Relation to Current District Law. The revised definition of "commercial sex act" changes current District law in two main ways.

First, violations of offenses under Chapter 27 do not constitute commercial sex acts, unless they involve a sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person.[130]

Second, the RCC definition of "commercial sex" act uses the terms "sexual act" and "sexual contact," which are also defined in RCC § 22E-701. The current definition of "commercial sex act" also uses the terms as they are defined in D.C. Code § 22-3001. To the extent that the RCC definitions of "sexual act" and "sexual contact" change current District law, the RCC definition of "commercial sex act" also changes current District law.

"Comparable offense" means a crime committed against the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, with elements that would necessarily prove the elements of a corresponding District crime.

Explanatory Note. The RCC definition of "comparable offense" is new; the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "comparable offense" is used in the revised offense of stalking.[131]

Relation to Current District Law. The RCC definition of "comparable offense" is new and does not substantively change District law.

As applied in the revised stalking offense, the term "comparable offense" may substantively change District law. The current stalking statute defines a "course of conduct" and provides an extensive list of activities that already are separately criminalized in the D.C. Code, such as efforts to "threaten," "[i]nterfere with, damage, take, or unlawfully enter an individual's real or personal property or threaten or attempt to do so," and "[u]se another individual's personal identifying information."[132] Case law on the stalking statute has not addressed whether the listed conduct differs from their corresponding separate criminal offenses in the District or elsewhere. The revised statute refers to the term "comparable offense" to clarify that these separate crimes serve as a

[125] "The term "commercial sex act" includes a violation of § 22-2701, § 22-2704, §§ 22-2705 to 22-2712, §§ 22-2713 to 22-2720, and § 22-2722." D.C. Code § 22-1831 (4).
[126] RCC § 22E-1602.
[127] RCC § 22E-1604
[128] RCC § 22E-1605.
[129] RCC § 22E-1608.
[130] For example, D.C. Code 22-2713 states that "[w]hoever shall erect, establish, continue, maintain, use, own, occupy, or release any building . . . for the purpose of lewdness, assignation, or prostitution in the District of Columbia is guilty of a nuisance[.]" This conduct does not constitute a "commercial sex act" as defined in the RCC.
[131] D.C. Code § 22E-1206.
[132] D.C. Code § 22-3132(8).

predicate for stalking, even if committed outside the District of Columbia. This change improves the clarity, consistency, and completeness of the revised offense.

"Complainant" means person who is alleged to have been subjected to any criminal offense.

Explanatory Note. **The term "**complainant" is used in many RCC offenses to avoid both the confusion that may arise from multiple references to a "person" and the potential bias that may arise from other references to the alleged victim in a criminal case. Use of the term "complainant" is a drafting convention that is not intended to substantively affect any provision in the RCC.

The RCC definition of "complainant" is new, the term is not currently defined in Title 22 of the D.C. Code (although similar language is inconsistently[133] used in the provisions in Chapter 30, Sexual Abuse, through the definition of "victim" in D.C. Code § 22-3001(11)).[134] The RCC definition of "complainant" replaces the current definition of "victim" in D.C. Code § 22-3001(11) and is used in the RCC definition of "protected person,"[135] as well as the revised offenses of assault,[136] offensive physical contact,[137] criminal abuse of a minor,[138] criminal neglect of a minor,[139] criminal abuse of a vulnerable adult or elderly person,[140] criminal neglect of a vulnerable adult or elderly person,[141] as well as all sex offenses in RCC Chapter 13.

Relation to Current District Law. The RCC definition of "complainant" is substantively identical to the definition of "victim"[142] provided in the current sex offense statutes under current law.

"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.

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[133] Only three of the current sex offense statutes use the term "victim." The consent defense for first degree through fourth degree and misdemeanor sexual abuse (D.C. Code § 22-3007), the defense statute for sexual abuse of a ward and sexual abuse of a patient or client (D.C. Code § 22-3017), and the aggravating circumstances statute (D.C. Code § 22-3020). Instead of "victim," the other current sex offense statutes use terms like "another person" or "child," "ward," etc.

[134] D.C. Code § 22-3001(11) ("'Victim' means a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter.").

[135] RCC § 22E-701.

[136] RCC § 22E-1202.

[137] RCC § 22E-1205.

[138] RCC § 22E-1501.

[139] RCC § 22E-1502.

[140] RCC § 22E-1503.

[141] RCC § 22E-1505.

[142] D.C. Code § 22-3001(11).

Explanatory Note. The RCC defines "consent" to mean that a person has expressed (by word or act) an agreement to particular conduct or to a particular result and the person is generally competent to give such agreement. "Consent" generally means to agree to some act or to choose some act. The RCC relies on civil law principles of agency to determine when an individual is authorized to give "consent" on behalf of another person.[143]

Per subsection (A), typically, a word or words, such as saying, "Yes, I agree," or writing the same in an email, or an act or acts, such as nodding or gesturing positively will constitute consent. However, the word or act is not limited to a literal "yes," and includes other, indirect types of agreement, such as the use of well-recognized customs.[144] Inaction at a certain point in time may indicate agreement if there was a prior word or act that indicated ongoing agreement.[145] However, in the absence of any communication or prior communication establishing ongoing agreement, inaction necessarily means that no consent was given.[146] The word or act also must be to some particular conduct or to a particular result.[147] Typically, in the RCC's offenses against persons, the particular conduct is defined by the use of consent within an offense definition or within an affirmative defense.

Notably, "consent" in subsection (A) can be conditioned or unconditioned.[148] This means that "consent" can be the product of completely free decision making

[143] Thus, an employee may sell her employer's merchandise by giving "consent" on behalf of the employer to a transaction. RCC § 22E-40X addresses whether and under what circumstances a person may consent, on behalf of another person, to conduct constituting an offense against person. Generally, it would be improper for one person to give consent to conduct on behalf of another where that conduct harms the person. However, there may be categorical exceptions to this general rule for offenses against persons. For example, it may be that a parent or guardian may consent to an elective medical procedure, ear piercing, or participation in a karate lesson on behalf of their child or ward.

[144] For example, raising one's fists or assuming a fighting stance may be commonly understood to indicate that the person has agreed to mutual combat, and handing a merchant currency or a method of payment is commonly understood to indicate that the person has agreed to the transaction.

[145] Determining whether inaction at a given is consenual based on a prior word or act is a context-sensitive factual inquiry that may require examination of the parties' relationship and prior experiences with one another, as well as the nature of the conduct that is the object of the alleged consent. For example, absent a prior act or word indicating ongoing consent, the inaction of a coworker to say or do anything would not constitute consent if, when taking one of several inexpensive pens from the worker's desk the coworker says "you don't mind if I borrow your pen?" However, if a coworker at one time asks if she can borrow a person's expensive pen and returns it, then five minutes later takes the pen again while the owner is absent or passively watches, the relevant question is whether the earlier consent to borrowing constituted an ongoing grant of permission.

[146] For example, imagine a case of assault where a person is walking down a street late at night, and the defendant sees the person and strikes him from behind. There would be no evidence in this case that the victim consented to mutual combat, because the victim gave no words or actions that indicated consent to the defendant's strikes. Or, imagine a case of theft where a person leaves his laptop out on a table at a café while he goes to use the restroom. A thief sees the person step away from the laptop, and promptly takes it. The taking would be completely without consent, because the owner gave no words or actions that indicated consent to the taking.

[147] For example, a person may agree to particular conduct (e.g. playing football) or a particular result (getting pushed to the ground). The distinction may be important in some cases where there is consent to one aspect but not the other. For instance, a complainant may give consent to sexual intercourse but not to anal penetration.

[148] This characteristic of consent is important: often, the term "consent" used both casually and in the law can mean one of two things. It can mean "agreeing to something," and it can also mean, "agreeing to

(unconditioned),[149] or it can be the product of decision making driven by external pressures placed on the person giving consent (conditioned).[150] Conditioned "consent" may be present even when there is an extreme or normatively disturbing condition that induces a person's agreement, which makes the "consent" not freely given.[151] In the RCC, the degree to which "consent" may be subject to conditions is specified by the elements of particular offenses or by the requirement of "effective consent."[152]

Per subsection (B), consent must be not be given by a person who is legally incompetent to authorize the conduct charged to constitute the offense or to the result thereof or 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. What precise

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something with sufficient freedom and knowledge." Imagine, for example, a person who is tricked by a fraudster into giving over her life savings. It would be correct in one sense to say that she consented to giving the money, because she voluntarily handed over her fortune. On the other hand, it could also be correct to say that she did not consent to the transaction, because her consent was vitiated by the fraudster's deception.

Both descriptions are arguably correct: if one takes "consent" to mean "agreement," then the victim has consented because she has agreed. But if one takes "consent" to mean "agreement given pursuant to certain normative conditions, such as having sufficient knowledge about the nature of the transaction," then the victim has not given consent, because she did not have sufficient knowledge about the actual nature of the transaction. She had no idea, after all, that her money was getting put in a fraudulent scheme. Both descriptions of the hypothetical are equally valid depending on what the definition of "consent" in use.

Unfortunately, having dual, competing, and equally valid meanings for a single term is a recipe for confusion. How can one know which sense of "consent" is being used at a given time? It is impossible to say. Therefore, rather than persist in confusing these two distinct but useful concepts by employing a single word to describe them, the Revised Criminal Code distinguishes them. "Consent" is employed to refer to mere agreement, while "effective consent" is employed to refer to consent given under sufficient conditions of knowledge and freedom (i.e., consent free from problematic coercion and deception).

[149] E.g., if a person went to a store and said, "I am going to buy the largest television in this store, no matter the cost!" This is an expression of an unconditional preference - the person has stated that he or she will purchase the property no matter what.

[150] E.g., if a person went to a store and said, "I would like to buy the largest television in this store - but because the largest television is too expensive, I'll settle for this smaller one." The person here has an unconditional preference for the largest television, just as the person in the previous footnote does; but here, the person's budget is an external condition that has pressured the person to choose something other than his or her unconditional preference.

[151] E.g., a defendant walks into the victim's store and says, "You better pay me some protection money, or you might find you suffer an unfortunate accident!" The victim's preference in this situation may well be to pay the protection money, rather than risk being murdered or assaulted -- therefore, the victim hands the cash over to the extortionist. In this case, the victim has given consent to the transaction. Admittedly, the victim's unconditioned preference is likely that he have to provide the money at all. But faced with either giving the money or suffering a physical harm, the person may well consent to giving the money. This is not to say that the extortionist in this hypothetical will avoid liability, of course: under the RCC, the extortionist would have obtained the victim's consent by means of coercion.

[152] The RCC defines "effective consent" in RCC § 22E-701 as agreements that are obtained by means other than the use of a coercive threat, or deception. Thus, an agreement that is not freely or voluntarily given may constitute "consent," but it would not constitute "effective consent." The commentary to the RCC definition "effective consent" further discusses the definition and its role in the RCC.

age, mental illness, intoxication, etc. is sufficient to undermine consent is a highly fact-dependent inquiry, and may vary according to the nature of the conduct at issue.[153]

"Consent" is statutorily defined in D.C. Code § 22-3001(4)[154] for sexual abuse offenses and related provisions in Chapter 30, Sexual Abuse, although the undefined term is used in other statutes[155] in Title 22. The RCC definition of "consent" replaces in relevant part[156] the definition of "consent" in in D.C. Code § 22-3001(4), applicable to provisions in Chapter 30, Sexual Abuse, and undefined references in other statutes revised in the RCC. The RCC definition of "consent" is used in the RCC definition of "effective consent,[157] defenses to various revised statutes,[158] as well as the revised offenses of theft,[159] fraud,[160] payment card fraud,[161] identity theft,[162] financial exploitation of a vulnerable adult,[163] and extortion.[164]

Relation to Current District Law. The RCC breaks the current definition of "consent" in D.C. Code § 22-3001(4) and the general concept of consent into two terms. The RCC definition of "consent" refers to the bare fact of an agreement between parties obtained by any means, while the RCC definition of "effective consent" (see commentary entry below) refers to agreements that are obtained by means other than the use of physical force, a coercive threat, or deception.[165] While the RCC definition of "effective

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[153] For example, with respect to an agreement to play a game of touch football, a thirteen year old may be both legally competent and able to make a reasoned judgment as to participation, while a three year old would be neither legally competent nor able to make a reasoned judgment about such conduct.

[154] 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.").

[155] *See, e.g.*, Voyeurism, D.C. Code § 22-3001(3) ("Except as provided in subsection (e) of this section, it is unlawful for a person to electronically record, without the express and informed consent of the individual being recorded, an individual who is…."); First degree and second degree unlawful publication, D.C. Code §§ 22-3053, 3054 ("It shall be unlawful in the District of Columbia for a person to knowingly publish one or more sexual images of another identified or identifiable person when . . . the person depicted did not consent to the disclosure or publication of the sexual image . . . ."); Exception to abuse and neglect of vulnerable adults provisions, D.C. Code § 22-935 ("'A person shall not be considered to commit an offense of abuse or neglect under this chapter for the sole reason that he provides or permits to be provided treatment by spiritual means through prayer alone in accordance with a religious method of healing, in lieu of medical treatment, to the vulnerable adult or elderly person to whom he has a duty of care with the express consent or in accordance with the practice of the vulnerable adult or elderly person.").

[156] The RCC definition of "consent" corresponds to the first part of the first sentence of the current definition of "consent" in D.C. Code § 22-3001(4) ("'Consent' means words or overt actions indicating a … agreement to the sexual act or contact in question."). Meanwhile the RCC definition of "effective consent" corresponds to the later part of the first sentence and the second sentence of the current definition of "consent" in D.C. Code § 22-3001("'Consent' means … a freely given agreement…. 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.").

[157] RCC § 22E-701.

[158] [RCC § 22E-40X.]

[159] RCC § 22E-2101.

[160] RCC § 22E-2201.

[161] RCC § 22E-2202.

[162] RCC § 22E-2205.

[163] RCC § 22E-2208.

[164] RCC § 22E-2301.

[165] The RCC definition of "consent" corresponds to the first part of the first sentence of the current definition of "consent" in D.C. Code § 22-3001(4) ("'Consent' means words or overt actions indicating a

consent" may change current District law with respect to some aspects of "consent" per D.C. Code § 22-3001(4) and other current statutory provisions, the revised definition of "consent" does not substantively change these aspects of current District law.

The RCC definition of "consent" makes several clarificatory changes to the current definition of "consent" in D.C. Code § 22-3001(4), which applies only to sex offense provisions. First, the revised definition omits the word "overt" in the current definition as redundant. The plain meaning of the current and RCC definitions of "consent" is that there must be something that "indicates" that there is an "agreement," precluding any reliance on covert words or actions. Second, the RCC defines "consent" as a "word" or "act" instead of "words" or "actions." This revision clarifies that a single word or act may suffice for "consent." Third, the RCC specifies that the word or act may express agreement either expressly or implicitly. This revision clarifies that the word or act is not limited to a "yes" or a nod in response, but includes any other words or acts that indirectly indicate agreement. Fourth, the RCC defines consent to include consent to a "particular result" in addition to "particular conduct," whereas the current definition of "consent" for the sex offense statutes requires consent to "the sexual act or sexual contact in question," and it is unclear whether this includes the result, conduct, or both. Fifth, the RCC restrictions in subsection (B) codifies District sex offense case law indicating that at some age, a minor's age simply prohibits them from giving consent to certain actions. The DCCA, relying on various indications of legislative intent, has held that persons under 16 years of age categorically cannot consent to the use of force by an adult that is at least four years older in a sexual encounter.[166]

The RCC definition of "consent" also clarifies uses of the term in various offenses against persons in current Title 22 of the D.C. Code. Current District law does not codify a definition of "consent" for offenses against persons outside of Chapter 30 Sex Offenses, however the term has been used in case law concerning some offenses against persons. For example, two DCCA rulings state that, in certain circumstances, "consent" is a defense to the District's simple assault statute and is not a defense to the District's felony assault statute,[167] but the rulings do not define the precise meaning of "consent."

… agreement to the sexual act or contact in question."). Meanwhile the RCC definition of "effective consent" corresponds to the later part of the first sentence and the second sentence of the current definition of "consent" in D.C. Code § 22-3001("'Consent' means … a freely given agreement…. 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.").

[166] The DCCA has held that in a prosecution under the current general sexual abuse statutes, if the complainant is a "child" under the age of 16 years "an adult defendant who is at least four years older than the complainant may not assert a "consent" defense. In such a case, the child's consent is not valid." *Davis v. United States*, 873 A.2d 1101, 1106 (D.C. 2005). "Child" is defined in D.C. Code § 22-3001 as "a person who has not yet attained the age of 16 years." D.C. Code § 22-3001(3). "Adult" is not statutorily defined in the current sex offenses, and the DCCA does not provide a definition in *Davis*. The DCCA further noted that the four-year age gap requirement in the current child sexual abuse statutes "appears [to] modify the traditional rule [that a child is legally incapable of consenting to sexual conduct with an adult] so as to allow *bona fide* consent of a child victim to be a potential defense where the defendant is less than four years older than the child." *Id.* at 1105 n.8.

[167] *Guarro v. United States*, 237 F.2d 578, 581 (D.C. Cir. 1956) ("Generally where there is consent, there is no assault."); see also *Woods v. United States*, 65 A.3d 667, 668 (D.C. 2014) (declining to determine "whether and when consent is an affirmative defense to charges of simple assault" while rejecting consent as a defense to assault in a street fight resulting in significant bodily injury [i.e., felony assault]).

Regarding a consent defense to the non-violent sexual touching form of simple assault, case law has said the consent may be "actual or apparent"[168] without discussing the difference between these terms.[169] The RCC definition of "consent" is consistent with and further clarifies existing the meaning of the term for offenses against persons.

The RCC definition of "consent" also clarifies references to the term in connection with various property offenses in current Title 22 of the D.C. Code. Current District law has not codified a definition of "consent" for property offenses, nor does case law discuss the term or concept at length in property offenses. However, there are similar terms and phrases in current property statutes and case law. On a few occasions, the DCCA has recognized the relevance of consent in proving many property offenses.[170] Consent is also an explicit element in several of the District's current property offenses, such as the current extortion offense[171] and unauthorized use of a motor vehicle offense.[172] Further, the current definition of "appropriate" in Chapter 30 of the D.C. Code makes use of "without authority or right," which is roughly in line with the RCC's definition of consent.[173] Additionally, DCCA case law has acknowledged that an agent's consent is relevant to determining whether a defendant has been given consent by the actual owner of the property,[174] and some current offense definitions explicitly include

[168] *Guarro*, 237 F.2d at 581.

[169] The language, however, suggests that "actual consent" refers to the internal, subjective wishes of the person giving consent, whereas the "apparent consent" refers to the *expressed* wishes or desires of the person giving consent. *See Guarro*, 237 F.2d at 581 ("In a case like the present, to *let the suspect think there is consent* in order to encourage an act which furnishes an excuse for an arrest will defeat a prosecution for assault.") (emphasis added). To the extent that "apparent consent" refers to expressed consent, the RCC definition is consistent with current District case law.

[170] *See McKinnon v. United States*, 644 A.2d 438, 442 (D.C. 1994) ("In this case, [the victim] acquiesced in the entry during which she was assaulted, but her acquiescence was obtained by ruse . . . ."); *Jeffcoat v. United States*, 551 A.2d 1301, 1304 n.5 (D.C. 1988) ("To be valid, consent must be informed, and not the product of trickery, fraud, or misrepresentation."); *United States v. Kearney*, 498 F.2d 61, 65 (D.C. Cir. 1974) ("They had both obtained consent to their entry into the premises under the pretext that they were looking for another person who was expected to arrive shortly."). All of these cases distinguish "consent" from the conditions used to obtain consent ("ruse" in *McKinnon*, "trickery, fraud, or misrepresentation" in *Jeffcoat*, and "pretext" in *Kearney*). See also, *Fussell v. United States*, 505 A.2d 72, 73 (D.C. 1986).

[171] D.C. Code § 22-3251(a) ("A person commits the offense of extortion if: (1) That person obtains or attempts to obtain the property of another with the other's consent which was induced by wrongful use of actual or threatened force or violence or by wrongful threat of economic injury; or (2) That person obtains or attempts to obtain property of another with the other's consent which was obtained under color or pretense of official right.").

[172] D.C. Code § 22-3215(b)(" A person commits the offense of unauthorized use of a motor vehicle under this subsection if, without the consent of the owner, the person takes, uses, or operates a motor vehicle, or causes a motor vehicle to be taken, used, or operated, for his or her own profit, use, or purpose.").

[173] D.C. Code § 22-3201. *See* D.C. Crim. Jur. Instr. § 5.300. According to the Redbook, theft requires proof of "taking . . . property against the will or interest of" the owner. The Redbook Committee "included 'against the will'" because "the [Judiciary] Committee report making clear that the concept of 'taking control' was supposed to cover common law larceny, which only could be committed by taking property against the will of the complainant." *Id*. Indeed, the Judiciary Committee report states that "the term 'wrongfully' [in theft] is used to indicate a wrongful intent to obtain or use the property without the consent of the owner or contrary to the owner's rights to the property." Committee on the Judiciary, Extend Comments on Bill 4-133, the D.C. Theft and White Collar Crime Act of 1982, at 16-17.

[174] *Russell v. United States*, 65 A.3d 1172, 1174 (D.C. 2013).

agents.[175] The RCC definition of "consent" is consistent with and further clarifies existing the meaning of the term for property offenses.

The commentaries to relevant RCC provisions further discuss the effect of the RCC definition of "consent" on current District law.

"Conduct element" has the meaning specified in RCC § 22E-201.

Explanatory Note. The definition of "conduct element" is addressed in the Commentary accompanying RCC § 22E-201.

"Controlled substance" has the meaning specified in D.C. Code 48-901.02.

Explanatory Note. The RCC definition of "controlled substance" is new, the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "controlled substance" are in some current offenses,[176] and some current offenses[177] use the term "controlled substance" and refer to D.C. Code § 48-901.02[178]). The RCC definition of "controlled substance" replaces the undefined references to "controlled substance" in D.C. Code Title 22 offenses. The RCC definition of "controlled substance" is used in the revised definition of "coercive threat,"[179] as well as the revised offenses of forgery[180] and correctional facility contraband.[181]

Relation to Current District Law. The RCC definition of "controlled substance" is new, but does not substantively change current District law. The RCC definition merely cross-references to the statutory definition in D.C. Code § 48-901.02.

"Correctional facility" means 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.

Explanatory Note. Building grounds refers to the area of land occupied by the correctional facility and its yard and outbuildings, with a clearly identified perimeter. The word "secure" makes clear that a placement in an unsecured inpatient drug treatment program or independent living program is excluded. The definition does not include facilities such as behavioral health hospitals that are principally concerned with providing medical care. The definition does not include buildings used by private businesses to detain suspected criminals, such as a booking room in a retail store.

The RCC definition of "correctional facility" is new; the term is not currently defined in Title 22 of the D.C. Code (although similar language is used in the current escape from institution or officer[182] and unlawful possession of contraband[183] offenses). The term "building" that is used in the definition of "correctional facility" is defined

[175] E.g., D.C. Code § 22-3302. Trespass requires that entry into land be "against the will of the lawful occupant or of the person lawfully in charge thereof." *Id*.
[176] E.g., D.C. Code § 22-1831(3)(F), Definitions, Chapter 18A Human Trafficking.
[177] E.g., D.C. Code § 22-811(a)(2), Contributing to the delinquency of a minor.
[178] D.C. Code § 48-901.02(4) ("'Controlled substance' means a drug, substance, or immediate precursor, as set forth in Schedules I through V of subchapter II of this chapter.").
[179] RCC § 22E-701.
[180] RCC § 22E-2204.
[181] RCC § 22E-3403.
[182] D.C. Code § 22-2601.
[183] D.C. Code D.C. Code § 22-2603.01, et seq.

elsewhere in RCC § 22E-701. The RCC definition of "correctional facility" is used in the revised escape from a correctional facility or officer[184] and correctional facility contraband[185] offenses.

Relation to Current District Law. The RCC definition of "correctional facility" is new and does not substantively change District law.

As applied in the revised escape from a correctional facility or officer offense, the term "correctional facility" may substantively change District law. D.C. Code § 22-2601 uses the phrase "penal or correctional institution or facility" but does not define it. Case law has held that the phrase includes the District's halfway houses.[186] In contrast, the revised code separately defines "correctional facility," "halfway house," and "secure juvenile detention facility" to be used universally throughout the RCC. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

As applied in the revised correctional facility contraband offense, the term "correctional facility" may substantively change District law. D.C. Code § 22-2603.01 defines "penal institution" to mean "any penitentiary, prison, jail, or secure facility owned, operated, or under the control of the Department of Corrections, whether located within the District of Columbia or elsewhere." It defines "grounds" to mean "the area of land occupied by the penal institution or secure juvenile residential facility and its yard and outbuildings, with a clearly identified perimeter." In contrast, the revised code separately defines "correctional facility," "halfway house," and "secure juvenile detention facility" to be used universally throughout the RCC. Each definition includes buildings (also defined in RCC § 22E-701) and building grounds. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

"Court" means the Superior Court of the District of Columbia.

Explanatory Note. "Court" is currently defined in D.C. Code § 22-932(2)[187] for offenses and provisions regarding criminal abuse and neglect of vulnerable adults.[188] The RCC definition is used in the revised identity theft civil provisions,[189] the revised financial exploitation of a vulnerable adult or elderly person civil provisions,[190] the duty to report a sex crime involving a person under 16 years of age provision,[191] the admission of evidence in sexual assault and related cases provision,[192] as well as the revised offenses of escape,[193] unlawful creation or possession of a recording,[194] unlawful

[184] RCC § 22E-3401.
[185] RCC § 22E-3403.
[186] *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).
[187] D.C. Code § 22-932(2) ("'Court' means the Superior Court of the District of Columbia.").
[188] D.C. Code § 22-932.
[189] RCC § 22E-2206.
[190] RCC § 22E-2209.
[191] RCC § 22E-1309(a).
[192] RCC § 22E-1311.
[193] RCC § 22E-3401.
[194] RCC § 22E-2105.

operation of a recording device in a motion picture theater,[195] unlawful labeling of a recording,[196] trespass,[197] and other RCC provisions referring to jury demandability.[198]

Relation to Current District Law. The RCC definition of "court" is identical to the statutory definition under current law.[199]

"Culpable mental state" has the meaning specified in RCC § 22E-205.

Explanatory Note. The definition of "culpable mental state" is addressed in the Commentary accompanying RCC § 22E-205.

"Culpability requirement" has the meaning specified in RCC § 22E-201.

Explanatory Note. The definition of "culpability requirement" is addressed in the Commentary accompanying RCC § 22E-201.

"Custody" means full submission after an arrest or substantial physical restraint after an arrest.

Explanatory Note. Custody may include, for example, being detained by an officer on the street, being securely confined to a holding cell, and being securely transported to a court appearance or medical facility. Custody is not established merely because officers tell a suspect he is under arrest or seize him for investigative purposes.[200] There must be a completed arrest.[201] A defendant is in custody when he is physically restrained by an officer pursuant to a lawful arrest or when he fully[202] submits to a lawful arrest.[203]

The RCC definition of "custody" is new; the term is not currently defined in Title 22 of the D.C. Code (although an undefined reference to "custody" appears in the escape from institution or officer offense[204]). The RCC definition of "custody" is used in the revised escape from a correctional facility or officer[205] offense.

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

As applied in the revised Escape from a Correctional Facility or Officer offense, the term "custody" does not substantively change District law. Case law has interpreted the term to require physical restraint.[206] The revised code adds a definition of "custody" that incorporates this current District case law. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

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[195] RCC § 22E-2106.
[196] RCC § 22E-2207.
[197] RCC § 22E-2601.
[198] *See, e.g.*, RCC § 22E-4204 (Unlawful Demonstration).
[199] D.C. Code § 22-932(3).
[200] *Davis v. United States*, 166 A.3d 944, 947 (D.C. 2017).
[201] *Id*. (reversing an escape conviction where police told the defendant he was arrested and touched his arm and the defendant lunged free and began running).
[202] *Mack v. United States*, 772 A.2d 813, 817 (D.C. 2001) (reversing an escape conviction where police ordered the defendant to kneel and grabbed him by his jacket and the defendant kneeled, sprang up, removed his jacket, threw punches, and ran away).
[203] *Id*.
[204] D.C. Code § 22-3401.
[205] RCC § 22E-3401.
[206] *Mack v. United States*, 772 A.2d 813, 817 (D.C. 2001).

"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;

(C) A sword, razor, or a knife with a blade over 3 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.

Explanatory Note. The RCC defines "dangerous weapon" to include enumerated weapons and any object that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury. The phrase "[a]ny object or substance" is to be interpreted broadly, including, for example, not only solid objects but fluids and gases. Body parts such as teeth, nails, hands, and feet are not dangerous weapons, regardless of how they are used. However, objects used by a person's hands or feet (e.g., brass knuckles, steel-toed boots) or expelled from the body (e.g., bodily fluids) potentially may be dangerous weapons. 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 definition of "dangerous weapon" is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "dangerous weapon" are in the possession of dangerous weapons offense[207] and the unlawful possession of contraband offense,[208] and an apparently non-exhaustive list of "dangerous or deadly" weapons is in the penalty enhancement provision for committing crime while armed[209]). The terms "prohibited weapon" and "serious bodily injury" that are used in the definition of "dangerous weapon" are defined elsewhere in RCC § 22E-701. The RCC definition of "dangerous weapon" is used in the revised definitions of "Class A contraband" and "imitation dangerous weapon" as well as the revised offenses of robbery,[210] assault,[211] menacing,[212] sexual assault,[213] kidnapping,[214] criminal restraint,[215]

[207] D.C. Code § 22-4514 makes it unlawful to possess with intent to use unlawfully against another "an imitation pistol, or a dagger, dirk, razor, stiletto, or knife with a blade longer than 3 inches, or other dangerous weapon." However, the phrase "other dangerous weapon" is not defined.
[208] D.C. Code § 22-2603.01(2)(A)(iii).
[209] D.C. Code § 22-4502 provides a heightened penalty where a person commits a crime of violence or dangerous crime while armed with (or having readily available) "any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, stun gun, dirk, bowie knife, butcher knife, switchblade knife, razor, blackjack, billy, or metallic or other false knuckles)." However, the statute does not specify that the list provided is exhaustive.
[210] RCC § 22E-1201.
[211] RCC § 22E-1202.
[212] RCC § 22E-1203.
[213] RCC § 22E-1301.
[214] RCC § 22E-1401.
[215] RCC § 22E-1402.

and correctional facility contraband.[216] [The Commission has not yet issued recommendations for weapon possession offenses.]

Relation to Current District Law. The RCC definition of "dangerous weapon" is new and does not substantively change District law.

As applied in the revised offenses of robbery, assault, menacing, sexual assault, kidnapping, and criminal restraint, the term "dangerous weapon" is generally consistent with, but in several ways changes or may change, current District law.

First, subsections (A) - (E) of the revised definition specify a complete list of items which constitute inherently "dangerous weapons." The "dangerous weapons" in subsection (A) are limited to firearms, including unloaded firearms. The "dangerous weapons" in subsection (B) are limited to "prohibited weapon[s]," a defined term in RCC § 22E-701. Prohibited weapons are items that are extremely dangerous or contraband with no use other than use as a weapon. Subsection (C) is limited to knives of significant length and swords, subsection (D) is limited to billy clubs, and subsection (E) is limited to stun guns. Together, subsections (A) - (E) include nearly all the objects specifically listed in the District's current possession of a prohibited weapon offense[217] and while armed penalty enhancement.[218] However, there are various differences[219] between the items listed in these current statutes and the RCC statute, with perhaps the most significant being the omission of "imitation pistols"[220] and "imitation firearms."[221] For the RCC offenses against persons subtitle, an "imitation dangerous weapon" is a separately defined term in RCC § 22E-701 and is not a *per se* dangerous weapon.[222] District case law has recognized that many of the objects listed in the possession of a prohibited weapon offense and while armed penalty enhancement are inherently dangerous.[223] However, District case law has been unclear as to what other weapons may

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[216] RCC § 22E-3403.

[217] D.C. Code § 22-4514.

[218] D.C. Code § 22-4502(a).

[219] Specifically, D.C. Code § 22-4502(a) mentions an "imitation" firearm, "dirk," "bowie knife," and "butcher knife" which are not specifically included in subsections (A) - (E) of the RCC definition of "dangerous weapon." References to a dirk, bowie knife, and butcher knife are omitted as they will typically have blades at least three inches in length, and be covered by subsection (C). D.C. Code § 22-4514(a) items are all within the RCC definition of "dangerous weapon." D.C. Code § 22-4514(b) references an "imitation pistol," a "dagger," "dirk," and a "stiletto" which are not specifically included in subsections (A) - (E) of the RCC definition of "dangerous weapon." References to a dagger, dirk, and stiletto are omitted as they will typically have blades at least three inches in length, and be covered by subsection (C). Swords are added to the RCC list of inherently dangerous items because even though they are not referenced in current District statutes, they have been cited as per se dangerous weapons in case law. *See Williamson v. United States*, 445 A.2d 975, 979 (D.C. 1982).

[220] D.C. Code § 22-4514(b).

[221] D.C. Code § 22-4502(a). The same is also true for the definition of "dangerous weapon" in ADW. *Washington v. United States*, 135 A.3d 325, 330 (D.C. 2016).

[222] The commentaries for relevant RCC offenses against persons discuss further, below, how excluding imitation firearms affects current District law. Besides the current while-armed penalty enhancement statute, DCCA case law currently establishes that an imitation pistol may be sufficient for ADW liability. *Harris v. United States*, 333 A.2d 397, 400 (D.C. 1975).

[223] *See Dade v. United States*, 663 A.2d 547, 553 (D.C. 1995) ("The only grammatical way to construe this statute [D.C. Code § 22-4502(a)] is to read it, first, as including all pistols and other firearms (or imitations thereof) within the category of dangerous or deadly weapons, and second, as identifying a dozen other objects as dangerous or deadly weapons, in addition to pistols and other firearms. Thus any pistol or other firearm is, by statutory definition, a dangerous or deadly weapon, and the jury need not find specifically

be per se dangerous weapons besides those listed in the statutes, and at times has appeared to say that inherently dangerous weapons, even those included in the statutes, are actually dangerous only in certain circumstances and ordinarily the matter of weather a weapon is dangerous is a question of fact.[224] Under the RCC "dangerous weapon" definition, only the items listed in subsections (A) - (E) are considered inherently or per se dangerous weapons, based on their design rather than the manner of their use.[225] Providing a single, complete list of items that are inherently dangerous clarifies District law.

Second, the RCC definition in Subsection (F) provides a functional list of ways an item may be deemed a dangerous weapon. Any "object or substance, other than a body part" can be a "dangerous weapon" if "the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury." The DCCA has said that, to determine whether an item is a dangerous weapon, "the manner [in which an item] is used, intended to be used, or threatened to be used"[226] should be considered. However, there is also District case law which suggests that "intended use" may be the same as "attempted use."[227] Subsection (F) of the RCC definition of "dangerous weapon" codifies actual use, threatened use, and "attempted use" (instead of "intended use"). Under the RCC definition, a mere "intended use" of an item as a dangerous weapon (separate from an actual, threatened, or attempted use) still may be sufficient to make that item a dangerous weapon, but only if such an intended use of the weapon is sufficient to

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that a particular pistol is a dangerous or deadly weapon in order to find the defendant guilty of an armed offense."); *Jones v. United States*, 67 A.3d 547, 550–51 (D.C. 2013) ("We have acknowledged that § 22–4515(b) includes a "non-exhaustive list of weapons readily classifiable as dangerous per se." (citing *In re D.T.*, 977 A.2d 346, 349, 353 (D.C.2009)).

[224] *See Williamson v. United States*, 445 A.2d 975, 979 (D.C. 1982) ("Some weapons, under appropriate circumstances, are so clearly dangerous that it is prudent for the court to declare them to be such, as a matter of law. Included in this class are rifles, pistols, swords, and daggers, when used in the manner that they were designed to be used and within striking distance of the victim. Whether an object or material which is not specifically designed as a dangerous weapon is a "dangerous weapon" under an aggravated assault statute, however, is ordinarily a question of fact to be determined by all the circumstances surrounding the assault. See generally 2 C. Torcia, Wharton's Criminal Law § 200 (14th ed. 1979). The trier of fact must consider whether the object or material is known to be "likely to produce death or great bodily injury" in the manner it is used, intended to be used, or threatened to be used. The jurors' knowledge of the dangerous character of the weapon used generally can be based on "familiar and common experience." [citation omitted].)"

[225] The design of an object may be an important fact in determining whether the object is a "dangerous weapon" per subsection (F), but it is not determinative.

[226] *See, e.g., Williamson v. United States*, 445 A.2d 975, 979 (D.C. 1982) (emphasis in original omitted) (internal quotations omitted). Although *Williamson* is an ADW case, several cases use the same standard to determine whether an object is a "dangerous weapon" under the "while armed" enhancement in D.C. Code § 22-4502. its standard for determining whether an object is a "dangerous weapon" is used in "while armed" enhancement cases under D.C. Code § 22-4502. *See, e.g., Arthur v. United States*, 602 A.2d 174, 177-78 (D.C. 1992) (discussing *Williamson v. United States*, 445 A.2d 975 (D.C. 1982) and other District precedent for determining whether an object is a "dangerous weapon" in an assault with intent to kill while armed case charged under the "while armed" enhancement in D.C. Code § 22-4502).

[227] *McGill v. United States*, 270 F.2d 329, 331 (D.C. Cir. 1959) ("A pistol [used as a club] is undoubtedly a dangerous weapon; and the fact that the attempt to pistol-whip the complaining witness did not result in physical injury does not make the action any less an assault with a dangerous weapon.").

satisfy the requirements of a criminal attempt.[228] Notably, current District practice with respect to charges of assault with a dangerous weapon does not appear to distinctly recognize as dangerous weapons either objects that are "intended to be used" or are involved in an "attempted" use to cause serious bodily injury or death.[229] Creating a functional test as to whether an item is a dangerous weapon based on its actual, attempted, or threatened use clarifies District law with respect to attempts, and may provide a more objective basis for determining liability as compared to a general inquiry, per current law, as to the defendant's intent for the item.

Third, under the RCC definition of "dangerous weapon" in subsection (F) the object or substance must be "likely" to cause death or serious bodily injury. The DCCA has discussed whether an object or substance is a "dangerous weapon" both in terms of whether it is "capable" of producing death or serious bodily injury, as well as "likely" to produce death or serious bodily injury.[230] However, no case law discusses what difference, if any, there is between "capable" and "likely." The RCC definition adopts a "likely" standard as is consistent with current District practice[231] and long-established case law.[232] This change clarifies District law.

Fourth, the RCC definition of dangerous weapon in subsection (F) refers to the revised definition for "serious bodily injury." Current DCCA case law has discussed whether an object or substance is a "dangerous weapon" both in terms of causing death or "great bodily injury,"[233] and death or "serious bodily injury."[234] The DCCA has explicitly stated that in this context the terms "great" and "serious" are interchangeable.[235] Using "serious bodily injury" does not appear to constitute a change in District law, except to the extent the RCC definition of "serious bodily injury" differs from the current definition.[236] Referencing "serious bodily injury" in the RCC definition

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[228] *See* RCC § 22E-301. For example, if a person carries an iron spike in their pocket with intent to use that object as a weapon to cause serious bodily injury to an enemy, that person may be guilty of an attempted assault with a dangerous weapon if the person satisfies the requirements for attempt liability, including the requisite intent as to the result (i.e. causing serious bodily injury by means of the spike) and being "dangerously close" to completing the offense.

[229] *See*, D.C. Crim. Jur. Instr. § 4-101. ("An object is a dangerous weapon if it designed to be used, actually used, or threatened to be used, in a manner likely to produce death or serious bodily injury.").

[230] *Powell v. United States*, 485 A.2d 596, 601 (D.C. 1984) ("A deadly or dangerous weapon is an object 'which is *likely* to produce death or great bodily injury by the use made of it.' Thus, an instrument capable of producing death or serious bodily injury by its manner of use qualifies as a dangerous weapon whether it is used to effect an attack or is handled with reckless disregard for the safety of others.") (internal citations omitted)).

[231] D.C. Crim. Jur. Instr. §§ 4.101 (jury instruction for ADW); 8.101 (jury instruction for "while armed" enhancement under D.C. Code § 22-4502).

[232] *See, e.g.*, *Tatum v. United States*, 110 F.2d 555, 556 (D.C. Cir. 1940) ("A dangerous weapon is one likely to produce death or great bodily injury.")

[233] *See, e.g.*, *Williamson v. United States*, 445 A.2d 975, 979 (D.C. 1982).

[234] *Arthur v. United States*, 602 A.2d 174, 177 (D.C. 1992) ("Similarly, "an instrument capable of producing death or serious bodily injury *by its manner of use* qualifies as a dangerous weapon, whether it is used to effect an attack or is handled with reckless disregard for the safety of others.").

[235] *In re D.T.*, 977 A.2d 346, 356 (D.C. 2009) ("This court has interpreted the term "great bodily injury" to be equivalent to the term "serious bodily injury…") (citing *Alfaro v. United States*, 859 A.2d 149, 161 (D.C. 2004).

[236] *See* Commentary to "serious bodily injury" below.

of "dangerous weapon" improves the consistency of language and definitions across offenses.

Fifth, the RCC definition of a dangerous weapon excludes items that a complaining witness incorrectly perceives as a dangerous weapon, changing current District law.[237] Imitation dangerous weapons are now separately defined in RCC § 22E-701 and do not constitute per se dangerous weapons. Liability for use of such apparently dangerous objects is provided in specified RCC offenses, such as the revised menacing offense in (RCC § 22E-1203). Excluding these objects from the scope of "dangerous weapon" does not change District case law holding that circumstantial evidence may be sufficient to establish an object or substance is a dangerous weapon.[238] These changes clarify and improve the proportionality of the definition of a dangerous weapon, basing the definition on objective criteria and increasing penalties based on the actual increased risk of harm.

Sixth, the RCC definition of a "dangerous weapon" in subsection (F) precludes a body part from being deemed a dangerous weapon. A panel of the DCCA has specifically upheld a conviction for assault of a police officer using a deadly or dangerous weapon based on the defendant's use of his teeth to bite an officer's leg.[239] Dicta in the case indicated that any other body part could similarly be a deadly or dangerous weapon depending on its usage,[240] although there does not appear to be an appellate ruling to date in the District on whether other body parts may be considered dangerous weapons. The DCCA ruling that some uses of a person's body parts—without an external item—may constitute use of a dangerous weapon creates uncertainty as to what types of physical contacts should and should not be subject to enhanced liability. The RCC definition, by contrast, clarifies that a person's integral body parts, including teeth, nails, feet, hands, etc., categorically cannot constitute a dangerous weapon.[241] This change clarifies the law by providing a bright-line distinction as to what may be a dangerous weapon, penalizing more severely a defendant's use of external objects to inflict damage.

The revised definition of a "dangerous weapon" does not change other DCCA case law as to whether certain objects—be they cars,[242] flip flops[243] or stationary

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[237] D.C. Code § 22-4502(a) ("Any person who commits a crime of violence, or a dangerous crime in the District of Columbia when armed with or having readily available any pistol or other firearm (or imitation thereof)…"). *See, also 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."); *Harris v. United States*, 333 A.2d 397, 400 (D.C. 1975) ("[P]resent ability of the weapon to inflict great bodily injury is not required to prove an assault with a dangerous weapon. Only apparent ability through the eyes of the victim is required.").

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

[239] *In re D.T.*, 977 A.2d 346 (D.C. 2009).

[240] *In re D.T.*, 977 A.2d 346, 352 (D.C. 2009) ("We no more implied that bare feet were not dangerous weapons in our shod foot cases by highlighting the presence of the shoe, than we intimated that a cold clothes iron could not be a dangerous weapon when we held that a "hot" one was.").

[241] However, as noted above, bodily fluids are not considered a body part and may constitute a "dangerous weapon" under the RCC definition. For example, a defendant who recklessly exposes another person to infectious bodily fluids that results in harm to that person may be liable for assault by means of a dangerous weapon—his or her own bodily fluid.

[242] *See, e.g., Frye v. United States*, 926 A.2d 1085, 1097 (D.C. 2005) ("The complainant's testimony concerning the manner in which appellant used his vehicle, trying to run her off the road and force her into oncoming traffic, over a substantial stretch of roadway was sufficient to permit the jury to find reasonably

bathroom fixtures[244]—constitute dangerous weapons under the facts in those cases. Inoperable and unloaded firearms also remain dangerous weapons under subsection (A) of the RCC definition.

As applied in the revised correctional facility contraband statute, the term "dangerous weapon" clarifies, but does not substantively change, District law. The current statute uses the phrase "dangerous weapon" but does not define it.[245]

"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.

Explanatory Note. This definition enumerates means by which a person can deceive another. Although other conduct may be deemed deceptive in the ordinary use of the word, for purposes of the RCC, "deceive" and "deception" only include the means listed in this definition.

Subsection (A) defines "deception" to include creating or reinforcing a false impression. It is not necessary that the defendant create the false impression. Even if another person has a pre-conceived false impression, a person can deceive by merely reinforcing that false impression. "Deception" requires a false impression, but not necessarily false statements. A person can "deceive" by making statements that are

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that appellant used his vehicle as a dangerous weapon in committing an assault against [the complaining witness]."); *Powell v. United States*, 485 A.2d 596, 601 (D.C. 1984) (finding the evidence sufficient for ADW and the "while armed" enhancement because the "evidence adduced at trial permitted the jury to conclude beyond a reasonable doubt that the Cadillac, driven at the speeds and in the manner that appellant employed, was likely to produce death or serious bodily injury because of the wanton and reckless manner of its use in disregard of the lives and safety of others.").

[243] *Stroman v. United States*, 878 A.2d 1241, 1245 (D.C. 2005) ("Even viewing the evidence in a light most favorable to the government, we hold as a matter of law that the flip flop was not a prohibited weapon under § 22-4514(b) [possession of a dangerous weapon]."

[244] *Edwards v. United States*, 583 A.2d 661, 662 (D.C. 1990) ("We hold that the evidence was insufficient to support the jury's finding that Edwards inflicted his wife's injuries while armed, within the meaning of Section 22–3202, when his alleged weapon consisted of one or more fixed or stationary plumbing fixtures against which he hurled his hapless wife.").

[245] D.C. Code § 22-2603.01(2)(A)(iii).

factually true to create or reinforce a false impression. Creating or reinforcing a false impression does not require any oral or written communications. Acts and gestures that create or reinforce false impressions can also constitute deception under this definition.

Subsection (A) also requires that the creation or reinforcement of a false impression be about a material fact, a fact that a reasonable person would deem relevant under the circumstances. A material fact can include a false impression as to law[246] or the value of the property.

Subsection (A) also defines "deception" to include creating or reinforcing false impressions as to an intention to perform future actions. However, mere failure to perform the promised future action does not constitute deception. The defendant must have had the requisite mental state as to whether he would not perform at the time he made the promise.[247]

Subsection (B) defines "deception" to include preventing a person from acquiring material information.[248]

Subsection (C) includes two exceptions to the general rule that there is no duty to correct a false impression. Ordinarily, a person has no duty to correct another's pre-existing false impression, and is free to take advantage of that false impression.[249] However, if a person had previously created or reinforced a false impression, even if innocently, that person can "deceive" by later failing to correct that false impression. Subsection (C) also states that a person can "deceive" if he or she has a fiduciary or other confidential relationship with another person, and fails to correct a false impression held by that person.

Subsection (D) defines "deception" to include 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 the impediment is a matter of official record. This is a specialized form of deception that only arises in the context of real estate transactions.

Subsection (E) provides one limitation to the definition of "deception," and an evidentiary rule regarding false intentions to perform a future act. First, "deception" excludes puffery that is unlikely to deceive ordinary persons. Such statements that exaggerate or heighten the attractiveness of a product or service do not go so far as to constitute deception. When representations go beyond mere exaggeration to actually create or reinforce an explicit false impression, however, then an actor may cross the line into criminal deception. In many cases, this exception is unnecessary as puffery ordinarily does not, and is not intended to, actually create or reinforce a false impression. However, advertising may include puffing statements that will create a false impression

[246] For example, a person can deceive another by creating a false impression that a car for sale is street-legal, when in fact it is not.

[247] *See Warner v. United States*, 124 A.3d 79 (D.C. 2015) (the trial judge noted that whether a promise is fraudulent or not depended on "whether or not at the time the defendant made the promise, he knew he was going to [fail to perform the promise.]").

[248] For example, if a person selling a car that had been seriously damaged in an accident hides or destroys records of the accident to prevent a buyer from learning that information, he may have deceived the other person, even if he did not actually create or reinforce the false impression that the car had never been in an accident.

[249] For example, if a person is selling a ring that he believes is made of fool's gold, but a buyer realizes that the ring is made of real gold, the buyer has no obligation to correct the seller's false impression.

in at least some listeners. In this context, there is no "deception" if the puffery is unlikely to deceive ordinary persons. With non-puffing statements however, there is no requirement that the deception be likely to fool an ordinary person.

Notably, the "deception" definition does not itself require any culpable mental state. If a person creates a false impression, it is not required that he knew that the impression was false. However, specific statutes in the RCC that use the "deception" definition may specify a mental state for that particular offense. For example, if an offense requires a culpable mental state of "knowingly", and the deception is premised on creating or reinforcing a false impression, then the defendant must have been practically certain that the impression was actually false. If another offense requires a culpable mental state of "recklessly," and the deception is premised on creating or reinforcing a false impression, then the defendant must only have been consciously aware of a substantial and unjustifiable risk that the impression was actually false.

The RCC definition of "deceive" and "deception" is new; the terms are not statutorily defined in Title 22 of the D.C. Code (although the undefined terms are used in other statutes[250] in Title 22. The RCC definitions of "deceive" and "deception" are used in the revised definition of "effective consent,"[251] as well as the revised offenses of fraud,[252] forgery,[253] identity theft,[254] and nonconsensual sexual conduct.[255]

Relation to Current District Law. The RCC "deception" definition is new and does not itself change current District law, but may result in changes of law as applied to particular offenses (including through the definition of "effective consent").

As applied to the current D.C. Code fraud and theft offenses which specifically criminalize taking property of another by means of creating a false impression,[256] there is no substantive change to District law. The D.C. Court of Appeals (DCCA) has not explicitly held whether fraud or theft include obtaining property by reinforcing a false impression, preventing another from obtaining information, failing to correct a false impression that the defendant first created or when a person has a fiduciary or confidential relationship with another[257], or failing to disclose a lien or other adverse claim to property. However, the "deception" definition appears consistent with current theft and fraud law in several respects. First, the DCCA has held that both fraud and theft

[250] E.g., Financial exploitation of a vulnerable adult or elderly person (D.C. Code § 22-933.01); Definitions for Chapter 18A (D.C. Code § 22-1831).
[251] RCC § 22E-701.
[252] RCC § 22E-2201.
[253] RCC § 22E-2204.
[254] RCC § 22E-2205.
[255] RCC § 22E-1307.
[256] The current theft statute states that the offense "includes conduct previously known as . . . larceny by trick, larceny by trust . . . and false pretenses." D.C. Code § 22-3211. The current fraud statute criminalizes "engag[ing] in a scheme ort systematic course of conduct with intent to defraud or to obtain property of another by means of false or fraudulent pretense, representation, or promise[.]" D.C. Code 22-3221.
[257] Some federal courts however, have held that "[mail fraud statutes] are violated by affirmative misrepresentations or by omissions of material information that the defendant has a duty to disclose." *United States v. Autuori*, 212 F.3d 105, 118 (2d Cir. 2000).

criminalize taking property of another by means of "false representation."[258] Second, the current fraud statute explicitly includes using a false promise to obtain property of another.[259] Third, the U.S. Supreme Court has held that the federal mail fraud statute, which served as a model for the District's current fraud statute,[260] "require[es] a misrepresentation or concealment of *material* fact."[261] Although the DCCA has never squarely held that fraud or theft requires a false impression as to a material fact, the Redbook Jury Instructions for fraud state that a "false representation or promise is any statement that concerns a material or important fact or a material or important aspect of the matter in question."[262]

"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.

Explanatory Note. The RCC definition of "demonstration" is substantively identical[263] to the definition of "demonstration" in D.C. Code § 22-1307(b)(2). The RCC definition of "demonstration" is used in the revised offense of unlawful demonstration.[264]

Relation to Current District Law. The RCC definition of "demonstration" is identical to the definition of "demonstration" in D.C. Code § 22-1307(b)(2) and does not substantively change current District law.

"Deprive" means:

(A) 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 the owner; or

(B) Dispose of the property, or use or deal with the property so as to make it unlikely that the owner will recover it.

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[258] *United States v. Blackledge*, 447 A.2d 46 (D.C. 1982) ("To convict a defendant for the crime of false pretenses, the government must prove that the defendant made a false representation"); *see also Youssef v. United States*, 27 A.3d 1202, 1207-08 (D.C. 2011) ("To convict for fraud, the jury had to conclude that the appellant engaged in 'a scheme or systematic course of conduct' composed of at least two acts calculated to deceive, cheat, or falsely obtain property."); *See also* D.C. Crim. Jur. Instr. § 5-300 (stating that "deception" is any act or communication made by [the defendant] she s/he knows to be false[.]").

[259] D.C. Code § 22-3221.

[260] Commentary to the District of Columbia Theft and White Collar Crime Act of 1982 at 40 ("The language 'obtain property of another by means of false or fraudulent pretense, representation, or promise' is basically derived from the federal mail fraud statute.").

[261] *Neder v. United States*, 527 U.S. 1, 22 (1999) (emphasis original). See also, Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. CIN. L. REV. 1 (1998); LAFAVE, WAYNE. 3 SUBST. CRIM. L. § 19.7.

[262] D.C. Crim. Jur. Instr. § 5-200.

[263] The sole difference between the RCC definition and the current definition of "demonstration" in D.C. Code § 22-1307(b)(2) is that the former deletes the circular reference to "demonstrating" in the latter. Currently, D.C. Code § 22-1307(b)(2) states: "Demonstration" means marching, congregating, standing, sitting, lying down, parading, *demonstrating*, or patrolling by one or more persons, with or without signs, for the purpose of persuading one or more individuals, or the public, or to protest some action, attitude, or belief." (emphasis added).

[264] RCC § 22E-4204.

Explanatory Note.

The RCC definition includes "owner," itself a defined term in RCC § 22E-701 that means a person holding an interest in property that the actor is not privileged to interfere with.

The RCC definition of "deprive" replaces the current statutory definition of "deprive" in D.C. Code § 22-3201(2),[265] applicable to provisions in Chapter 32 of title 22.[266] The RCC definition of "deprive" is used in the revised offenses of robbery,[267] theft,[268] fraud,[269] financial exploitation of a vulnerable adult,[270] possession of stolen property,[271] and extortion.[272]

Relation to Current District Law. The revised definition of "deprive" makes one clear change to the statutory definition of "deprive" in in D.C. Code § 22-3201(2), applicable to certain property offenses.[273] Subsection (A) of the current definition of "deprive" requires, in part, that the property be withheld "for so extended a period or under such circumstances as to acquire a substantial portion of its value." It is unclear whether this language includes a situation where the actor does not actually gain any value or benefit from the property, but causes an owner to lose value or benefit. In contrast, subsection (A) of the revised definition of "deprive" replaces "as to acquire a substantial portion of its value" in the current definition with "that a substantial portion of its value or its benefit is lost to the owner." The revised definition clearly includes situations where the actor does not actually gain any value or benefit, but causes an owner to lose it. In the rare situation where an actor gains a substantial portion of the value or benefit of the property without causing an owner to lose it a substantial portion of its value or benefit,[274] the revised definition of "deprive" is not satisfied and the conduct would be covered by unauthorized use of property in RCC § 22E-2102.

The remaining changes to the statutory definition of "deprive" in in D.C. Code § 22-3201(2)[275] are clarificatory and not intended to change District law. The revised definition of "deprive" replaces two references to "a person" with "an owner," a defined term in 22E-701 meaning a person holding an interest in property with which the accused is not privileged to interfere without consent. Subsection (b) of the current definition of

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[265] D.C. Code 22-3201(2) ("'Deprive' means: (A) To withhold property or cause it to be withheld from a person permanently or for so extended a period or under such circumstances as to acquire a substantial portion of its value; 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.").

[266] *See* D.C. Code Title 22, Chapter 32. Theft; Fraud; Stolen Property; Forgery; and Extortion.

[267] RCC § 22E-1201.

[268] RCC § 22E-2101.

[269] RCC § 22E-2201.

[270] RCC § 22E-2208.

[271] RCC § 22E-2401.

[272] RCC § 22E-2503.

[273] *See* D.C. Code Title 22, Chapter 32. Theft; Fraud; Stolen Property; Forgery; and Extortion.

[274] For example, in theft of intellectual property there may be situations that do not result in a substantial loss to the owner. Such unlawful uses of another's property would remain criminalized under unauthorized use of property in 22E-2102.

[275] D.C. Code 22-3201(2) ("'Deprive' means: (A) To withhold property or cause it to be withheld from a person permanently or for so extended a period or under such circumstances as to acquire a substantial portion of its value; 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.").

"deprive" uses the term "owner,"[276] but it is not a statutorily defined term in the current D.C. Code. Replacing the two references to "a person" with "an owner" clarifies the revised definition.

"Detection device" means any wearable equipment with electronic monitoring capability, global positioning system, or radio frequency identification technology.

Explanatory Note. The RCC defines "detection device" to mean any wearable equipment with electronic monitoring capability, global positioning system ("GPS"), or radio frequency identification ("RFID") technology. A detection device is any technology installed on a person's body or clothing that is capable of monitoring the person's whereabouts. It includes mechanisms such as bracelets, anklets, tags, and microchips. It explicitly includes the GPS that is currently used by the Pretrial Services Agency, Court Services and Offender Supervision Agency, and Court Social Services. It also explicitly includes the RFID technology that is currently used by the Department of Corrections.[277] It is also intended to capture other wearable equipment that may be developed in the future.

The word "wearable" modifies "electronic monitoring," "global positioning system," and "radio frequency identification technology." Accordingly, the definition does not include surveillance devices that are not worn, such as video cameras, infrared cameras, and international mobile subscriber identity-catchers (which intercept cellular phone traffic). The term refers to the physical device itself and does not include the records or reports that it generates.

The RCC definition of "detection device" replaces the current definition of "device" in D.C. Code § 22-1211(a)(2),[278] applicable to the offense tampering with a detection device. The RCC definition of "detection device" is used in the revised offense of tampering with a detection device.[279]

Relation to Current District Law. The RCC definition of "detection device" may change the current definition of "device" in D.C. Code § 22-1211(a)(2) in one main way. Current law defines the term "device" to "includes a bracelet, anklet, or other equipment with electronic monitoring capability or global positioning system or radio frequency identification technology." Case law has not addressed the term's meaning. The revised code completely defines the meaning of the term instead of providing a partial definition as to what is included, and specifies that a detection device means any "wearable" monitoring equipment. This change improves the clarity of the revised offense.

"District official" has the same meaning as "public official" in D.C. Code § 1-1161.01(47).

Explanatory Note. The RCC definition of "District official" is new, the term is not currently defined in Title 22 of the D.C. Code (although the current protection of

[276] D.C. Code 22-3201(2).
[277] *See* Report on Bill 18-963, the "Criminal Code Amendment Act of 2010," Committee on Public Safety and the Judiciary (December 6, 2010) at Page 3.
[278] D.C. Code § 22-1211(a)(2) ("For the purposes of this subsection, the term "device" includes a bracelet, anklet, or other equipment with electronic monitoring capability or global positioning system or radio frequency identification technology.").
[279] RCC § 22E-3402.

District public officials statute defines "official or employee" in D.C. Code § 22-851[280]). The RCC definition of "District official" replaces the current definition of "official or employee" in D.C. Code § 22-851, applicable to the current protection of District public officials statute. The RCC definition of "District official" is used in the RCC definition of a "protected person,"[281] and in the revised offenses of murder,[282] manslaughter,[283] assault,[284] aggravated kidnapping,[285] and aggravated criminal restraint.[286]

Relation to Current District Law. The RCC definition of "District official" makes one clear change to the statutory definition of "official or employee" in D.C. Code § 22-851.[287] The current definition of "District employee or official" is "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."[288] In contrast, the revised definition, by incorporating the definition of "public official" in D.C. Code § 1-1161.01(47),[289] is limited to District officials and employees that have special obligations in District government.[290] The RCC definition of "District official" improves the proportionality of the revised offenses against persons.

As applied to several RCC offenses against persons, the RCC definition of "District official" substantively changes current District law. For example, the RCC assault statute

[280] D.C. Code § 22-851(a)(2) ("'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.").
[281] RCC § 22E-701.
[282] RCC § 22E-1101.
[283] RCC § 22E-1102.
[284] RCC § 22E-1202.
[285] RCC § 22E-1401.
[286] RCC § 22E-1403.
[287] D.C. Code § 22-851(a)(2).
[288] D.C. Code § 22-851(a)(2).
[289] D.C. Code § 1-1161.01(47) ("'Public official' means: (A) A candidate for nomination for election, or election, to public office; (B) The Mayor, Chairman, and each member of the Council of the District of Columbia holding office under Chapter 2 of this title; (C) The Attorney General; (D) A Representative or Senator elected pursuant to § 1-123; (E) An Advisory Neighborhood Commissioner; (F) A member of the State Board of Education; (G) A person serving as a subordinate agency head in a position designated as within the Executive Service; (G-i) Members of the Washington Metropolitan Area Transit Authority Board of Directors appointed appointed by the Council pursuant to § 9-1107.01(5)(a); (G-ii) A Member or Alternate Member of the Washington Metrorail Safety Commission appointed by the District of Columbia pursuant to Article III.B. of the Metrorail Safety Commission Interstate Compact enacted pursuant to D.C. Law 21-250; (H) A member of a board or commission listed in § 1-523.01(e); (I) A District of Columbia Excepted Service employee, except an employee of the Council, paid at a rate of Excepted Service 9 or above, or its equivalent, who makes decisions or participates substantially in areas of contracting, procurement, administration of grants or subsidies, developing policies, land use planning, inspecting, licensing, regulating, or auditing, or acts in areas of responsibility that may create a conflict of interest or appearance of a conflict of interest; and any additional employees designated by rule by the Board of Ethics and Government Accountability who make decisions or participate substantially in areas of contracting, procurement, administration of grants or subsidies, developing policies, land use planning, inspecting, licensing, regulating, or auditing, or act in areas of responsibility that may create a conflict of interest or appearance of a conflict of interest; and (J) An employee of the Council paid at a rate equal to or above the midpoint rate of pay for Excepted Service 9.").
[290] For example, many of the individuals in the definition of "public official" are required to file annual public financial disclosures, D.C. Code § 1-1162.24, and all public officials are subject to possible censure for certain ethical violations. D.C. Code § 1-1162.22(a).

(RCC § 22E-1202) incorporates enhanced penalties for assaults committed against a "District official" while in the course of official duties (through the RCC definition of "protected person"), as well as for assaults committed "with the purpose of harming" a "District official" due to his or her status as a "District official." The District's current assault and related statutes do not have any such enhanced penalties, although such assaultive conduct is prohibited under D.C. Code § 22-851.[291] In contrast, the RCC assault statute incorporates enhanced penalties for assaults against a "District official" directly into the gradations of the offense, part of the general repeal of D.C. Code § 22-851. The revised definition of "District official," limited to District officials and employees that have special obligations in District government,[292] improves the consistency and proportionality of the revised offense.

The commentaries to relevant RCC offenses against persons discuss in detail the effect of the RCC definition of "District official" on current District law.

"Domestic partner" has the meaning as provided in D.C. Code § 32-701(3).

Explanatory Note. The RCC definition of "domestic partner" replaces the current definition of "domestic partner" in D.C. Code § 22-3001(4A),[293] applicable to the applicable to the provisions in Chapter 30, Sexual Abuse. The RCC definition of "domestic partner" is used in is used in the RCC definition of "position of trust with or authority over."[294]

Relation to Current District Law. The RCC definition of "domestic partner" is identical to the statutory definition in current law.[295]

"Domestic partnership" shall have the same meaning as provided in D.C. Code § 32-701(4).

Explanatory Note. Explanatory Note. The RCC definition of "domestic partnership" replaces the current definition of "domestic partnership" in D.C. Code § 22-3001(4B),[296] applicable to the provisions in Chapter 30, Sexual Abuse. The RCC

[291] D.C. Code § 22-851(c) ("A person who . . . injures any official or employee . . . while the official or employee is engaged in the performance of his or her duties or on account of the performance of those duties, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 3 years, or both, in addition to any other penalties authorized by law."); D.C. Code § 22-851(a)(2) ("'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.").

[292] For example, many of the individuals in the definition of "public official" are required to file annual public financial disclosures, D.C. Code § 1-1162.24, and all public officials are subject to possible censure for certain ethical violations. D.C. Code § 1-1162.22(a).

[293] D.C. Code § 22-3001(4A) ("'Domestic partner' shall have the same meaning as provided in § 32-701(3)."). The current definition of "domestic partner" in D.C. Code § 32-701(3) is: "'Domestic partner' means a person with whom an individual maintains a committed relationship as defined in paragraph (1) of this section and who has registered under § 32-702(a) or whose relationship is recognized under § 32-702(i). Each partner shall: (A) Be at least 18 years old and competent to contract; (B) Be the sole domestic partner of the other person; and (C) Not be married."

[294] RCC § 22E-701.

[295] D.C. Code § 22-3001(4A).

[296] D.C. Code § 22-3001(4B) ("'Domestic partnership' shall have the same meaning as provided in § 32-701(4)."). D.C. Code § 32-701(4) defines "domestic partnership" as: "the relationship between 2 persons

definition of "domestic partnership" is used in is used in the RCC definition of "position of trust with or authority over"[297] as well as in the revised sexual abuse of a minor statute,[298] the revised sexual exploitation of an adult statute,[299] the revised sexually suggestive contact with a minor statute,[300] and the revised enticing a minor statute.[301]

Relation to Current District Law. The RCC definition of "domestic partner" is identical to the statutory definition in current law.[302]

"Dwelling" means a structure that is either designed for lodging or residing overnight at the time of the offense, or that is actually used for lodging or residing overnight. In multi-unit buildings, such as apartments or hotels, each individual unit is a dwelling.

Explanatory Note. The word "structure" is notably broader than the term "building," which is also defined in RCC § 22E-701. A structure need not be affixed to land and includes vehicles and tents, if used as housing.

The RCC definition of "dwelling" is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "dwelling" are in several current property offenses[303]). The RCC definition of "dwelling" is used in the revised definition of "position of trust with or authority over,"[304] as well as the revised offenses of arson,[305] reckless burning,[306] trespass,[307] and burglary.[308]

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

As applied in the revised burglary statute, the term "dwelling" clarifies, but does not substantively change, District law. The current burglary statute does not define the term. Case law has not directly addressed its meaning, but has interpreted the phrase "dwelling, or room used as a sleeping apartment."[309] The revised code adds a definition of "dwelling" to be used universally throughout the RCC. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

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who become domestic partners by registering in accordance with § 32-702(a) or whose relationship is recognized under § 32-702(i)."

[297] RCC § 22E-701.

[298] RCC § 22E-1302.

[299] RCC § 22E-1303.

[300] RCC § 223-1304.

[301] RCC § 22E-1305.

[302] D.C. Code § 22-3001(4B) ("'Domestic partnership' shall have the same meaning as provided in § 32-701(4)."). D.C. Code § 32-701(4) defines "domestic partnership" as: "the relationship between 2 persons who become domestic partners by registering in accordance with § 32-702(a) or whose relationship is recognized under § 32-702(i).").

[303] *E.g.*, trespass (D.C. Code § 22-3302), burglary (D.C. Code § 22-801).

[304] RCC § 22E-701.

[305] RCC § 22E-2501.

[306] RCC § 22E-2502.

[307] RCC § 22E-2601.

[308] RCC § 22E-2701.

[309] *See Newman v. United States*, 705 A.2d 246, 264 (D.C. 1997) (finding a reasonable jury could have concluded that an apartment was a sleeping apartment, not merely a base for prostitution).

"Effective consent" means consent other than consent induced by physical force, a coercive threat, or deception.

Explanatory Note. The RCC definition of "effective consent" is new, the term is not currently defined in Title 22 of the D.C. Code (although the closely-related term "consent" is currently codified in D.C. Code § 22-3001(4),[310] applicable to provisions in Chapter 30, Sexual Abuse, and the undefined term is used in numerous other Title 22 statutes[311]). The RCC definition of "effective consent" replaces, in relevant part,[312] the current definition of "consent" in D.C. Code § 22-3001(4) and is used in several defense statutes in the RCC,[313] as well as the revised offenses of unauthorized use of property,[314] unauthorized use of a motor vehicle,[315] unlawful creation or possession of a recording,[316] unlawful operation of a recording device in a motion picture theater,[317] criminal damage to property,[318] criminal graffiti,[319] sexual assault,[320] nonconsensual sexual conduct,[321] criminal abuse of a vulnerable adult or elderly person,[322] and criminal neglect of a vulnerable adult or elderly person.[323]

Relation to Current District law. The RCC breaks the current D.C. Code definition of "consent" in D.C. Code § 22-3001(4), applicable to sex offense provisions, and the general concept of consent into two terms. The RCC definition of "consent" (see commentary entry above) refers to the bare fact of an agreement between parties obtained by any means, while the RCC definition of "effective consent" refers to agreements that are obtained by means other than the use of physical force, a coercive threat, or deception.[324] While the RCC definition of "consent" does not substantively change

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[310] D.C. Code § 22-3001 ("'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.").

[311] *See, e.g.*, Voyeurism, D.C. Code § 22-3001(3) ("Except as provided in subsection (e) of this section, it is unlawful for a person to electronically record, without the express and informed consent of the individual being recorded, an individual who is…."); First degree and second degree unlawful publication, D.C. Code §§ 22-3053, 3054 ("It shall be unlawful in the District of Columbia for a person to knowingly publish one or more sexual images of another identified or identifiable person when . . . the person depicted did not consent to the disclosure or publication of the sexual image . . . .").

[312] The RCC definition of "consent" corresponds to the first part of the first sentence of the current definition of "consent" in D.C. Code § 22-3001(4) ("'Consent' means words or overt actions indicating a … agreement to the sexual act or contact in question."). Meanwhile the RCC definition of "effective consent" corresponds to the later part of the first sentence and the second sentence of the current definition of "consent" in D.C. Code § 22-3001("'Consent' means … a freely given agreement…. 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.").

[313] [RCC § 22E-40X.]

[314] RCC § 22E-2102.

[315] RCC § 22E-2103.

[316] RCC § 22E-2105.

[317] RCC § 22E-2106.

[318] RCC § 22E-2503.

[319] RCC § 22E-2504.

[320] RCC § 22E-1301.

[321] RCC § 22E-1309.

[322] RCC § 22E-1503.

[323] RCC § 22E-1504.

[324] The RCC definition of "consent" corresponds to the first part of the first sentence of the current definition of "consent" in D.C. Code § 22-3001(4) ("'Consent' means words or overt actions indicating a

current District law with respect to D.C. Code § 22-3001(4) and does not substantively change District law referencing the term in connection with other statutory provisions, the RCC definition of "effective consent" may substantively change these aspects of current District law.

The RCC definition of "effective consent" makes one possible substantive change to the current definition of "coercion" in D.C. Code § 22-3001(4), applicable to sex offense provisions. The current definition of "consent" in D.C. Code § 22-3001(4) for the sex offense statutes requires that the agreement between the actor and the complainant to engage in sexual conduct be "freely given." The meaning of "freely given" is ambiguous as to whether it includes agreements based on deception, and DCCA case law does not address the matter. The RCC definition of "effective consent" resolves this ambiguity by stating that an agreement caused by deception is *not* "effective consent." "Deception" is a defined term in RCC § 22E-701 that explicitly excludes minor "puffery."[325] To the extent that a person agrees to conduct based on a deception, it is questionable whether there is an "agreement," let alone one that is "freely given" under current District law. This change clarifies and improves the consistency of the revised statutes.

The RCC definition of "effective consent" also clarifies the current definition of "consent" in D.C. Code § 22-3001(4), which apply to sex offense provisions in Chapter 30. The current statute, besides saying that consent must be "freely given," states separately that: "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."[326] However, the RCC definition of "effective consent" eliminates this second sentence as unnecessary and potentially confusing. The sentence in the current statute appears to provide a specific example of when a "freely given agreement" is not reached—namely, when there is a "lack of verbal or physical resistance or submission by the victim resulting from the use of force, threats, or coercion…." The RCC definition of "effective consent" generally excludes consent obtained by physical force, a coercive threat, and deception, and communicates the same point in a more general way that is applicable to all offenses in the RCC. This change clarifies the revised statute.

The RCC definition of "effective consent" also clarifies references to the term "consent" in various offenses against persons in Title 22 of the current D.C. Code. Current District law has not codified a definition of "consent" for offenses against persons outside of Chapter 30 Sex Offenses, however the term has been used in case law concerning some offenses against persons. For example, two DCCA rulings state that, in certain circumstances, "consent" is a defense to the District's simple assault statute and is

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… agreement to the sexual act or contact in question."). Meanwhile the RCC definition of "effective consent" corresponds to the later part of the first sentence and the second sentence of the current definition of "consent" in D.C. Code § 22-3001("'Consent' means … a freely given agreement…. 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.").

[325] In addition, the RCC nonconsensual sexual conduct offense (RCC § 22E-1307) limits liability for engaging in a sexual act or sexual contact by deception to instances where the actor used deception as to the nature of the sexual act or sexual contact. Examples of deception as to the nature of the sexual act or sexual contact include deceptions as to: the object or body part that is used to penetrate the other person; a person's current use of birth control (e.g. use of a condom or IUD); and a person's health status (e.g. having a sexually transmitted disease). See commentary to RCC § 22E-1307 for further discussion.

[326] D.C. Code § 22-3001(4).

not a defense to the District's felony assault statute.[327] Although the rulings do not define the precise meaning of "consent," there was a recognition in one case that forms of forced consent are clearly not intended to be a defense to assaultive conduct.[328] Regarding a consent defense to the non-violent sexual touching form of simple assault, case law has said the consent may be "actual or apparent"[329] without discussing the difference between these terms.[330] The RCC definition of "effective consent" is consistent with and further clarifies existing the meaning of the term "consent" for offenses against persons.

The RCC definition of "effective consent" also clarifies references to the term "consent" in current Title 22 property offenses. Current District law has not codified a definition of either "effective consent" or "consent" for property offenses, nor does case law discuss these terms or concepts at length in property offenses. However, there are similar terms and phrases in current property statutes and case law. On a few occasions, the DCCA has recognized the relevance of consent in proving many property offenses.[331] Consent is also an explicit element in several of the District's current property offenses, such as the current extortion offense[332] and unauthorized use of a motor vehicle offense.[333] Further, the current definition of "appropriate" in Chapter 30 of the D.C. Code makes use of "without authority or right,"[334] which is roughly in line with the

[327] *Guarro v. United States*, 237 F.2d 578, 581 (D.C. Cir. 1956) ("Generally where there is consent, there is no assault."); see also *Woods v. United States*, 65 A.3d 667, 668 (D.C. 2014) (declining to determine "whether and when consent is an affirmative defense to charges of simple assault" while rejecting consent as a defense to assault in a street fight resulting in significant bodily injury [i.e., felony assault]).

[328] *Woods v. United States*, 65 A.3d 667, 672 (D.C. 2014) ("Taken to its logical conclusion, appellant's argument that consent should be a defense to assault where there is significant bodily injury would render non-prosecutable acts that are an affront to the public peace and order, such as a loan shark lending money on the condition that non-payment authorizes a beating or gang members who agree to settle old scores by a shootout.").

[329] *Guarro*, 237 F.2d at 581.

[330] The language, however, suggests that "actual consent" refers to the internal, subjective wishes of the person giving consent, whereas the "apparent consent" refers to the *expressed* wishes or desires of the person giving consent. *See Guarro*, 237 F.2d at 581 ("In a case like the present, to *let the suspect think there is consent* in order to encourage an act which furnishes an excuse for an arrest will defeat a prosecution for assault.") (emphasis added). To the extent that "apparent consent" refers to expressed consent, the RCC definition is consistent with current District case law.

[331] *See McKinnon v. United States*, 644 A.2d 438, 442 (D.C. 1994) ("In this case, [the victim] acquiesced in the entry during which she was assaulted, but her acquiescence was obtained by ruse . . . ."); *Jeffcoat v. United States*, 551 A.2d 1301, 1304 n.5 (D.C. 1988) ("To be valid, consent must be informed, and not the product of trickery, fraud, or misrepresentation."); *United States v. Kearney*, 498 F.2d 61, 65 (D.C. Cir. 1974) ("They had both obtained consent to their entry into the premises under the pretext that they were looking for another person who was expected to arrive shortly."). All of these cases distinguish "consent" from the conditions used to obtain consent ("ruse" in *McKinnon*, "trickery, fraud, or misrepresentation" in *Jeffcoat*, and "pretext" in *Kearney*). See also, *Fussell v. United States*, 505 A.2d 72, 73 (D.C. 1986).

[332] D.C. Code § 22-3251(a) ("A person commits the offense of extortion if: (1) That person obtains or attempts to obtain the property of another with the other's consent which was induced by wrongful use of actual or threatened force or violence or by wrongful threat of economic injury; or (2) That person obtains or attempts to obtain property of another with the other's consent which was obtained under color or pretense of official right.").

[333] D.C. Code § 22-3215(b)(" A person commits the offense of unauthorized use of a motor vehicle under this subsection if, without the consent of the owner, the person takes, uses, or operates a motor vehicle, or causes a motor vehicle to be taken, used, or operated, for his or her own profit, use, or purpose.").

[334] D.C. Code § 22-3201. *See* D.C. Crim. Jur. Instr. § 5.300. According to the Redbook, theft requires proof of "taking . . . property against the will or interest of" the owner. The Redbook Committee "included

RCC's definition of consent. Additionally, DCCA case law has acknowledged that an agent's consent is relevant to determining whether a defendant has been given consent by the actual owner of the property,[335] and some current offense definitions explicitly include agents.[336] The RCC definition of "effective consent" is consistent with and further clarifies existing the meaning of the term for property offenses.

The commentaries to relevant RCC provisions further discuss the effect of the RCC definition of "effective consent" on current District law.

"Elderly person" means a person who is 65 years of age or older.

Explanatory Note. The RCC definition of "elderly person" replaces the current definition of "elderly person" in D.C. Code § 22-932(3),[337] applicable to provisions in Chapter 9A, Criminal Abuse and Neglect of Vulnerable Adults. The RCC definition of "elderly person" is used in the revised offenses of criminal abuse of a vulnerable adult or elderly person[338] and criminal neglect of a vulnerable adult or elderly person.[339]

Relation to Current District Law. The RCC definition of "elderly person" is identical to the statutory definition under current law.[340]

"Factual cause" has the meaning specified in RCC § 22E-204.

Explanatory Note. The definition of "factual cause" is addressed in the Commentary accompanying RCC § 22E-204.

"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.

'against the will'" because "the [Judiciary] Committee report making clear that the concept of 'taking control' was supposed to cover common law larceny, which only could be committed by taking property against the will of the complainant." *Id*. Indeed, the Judiciary Committee report states that "the term 'wrongfully' [in theft] is used to indicate a wrongful intent to obtain or use the property without the consent of the owner or contrary to the owner's rights to the property." Committee on the Judiciary, Extend Comments on Bill 4-133, the D.C. Theft and White Collar Crime Act of 1982, at 16-17.

[335] *Russell v. United States*, 65 A.3d 1172, 1174 (D.C. 2013).

[336] E.g., D.C. Code § 22-3302. Trespass requires that entry into land be "against the will of the lawful occupant or of the person lawfully in charge thereof." *Id*.

[337] D.C. Code § 22-932(3) ("'Elderly person' means a person who is 65 years of age or older."). The current penalty enhancement for certain crimes committed against senior citizens does not define the term "senior citizen" or "elderly person," but also requires that the victim be "65 years of age or older." D.C. Code § 22-3601(a). The current enhancement for certain crimes committed against senior citizens does not apply to the current abuse of a vulnerable adult or elderly person statute (D.C. Code § 22-933) or neglect of a vulnerable adult or elderly person statute (D.C. Code § 22-934).

[338] RCC § 22E-1503.

[339] RCC § 22E-1504.

[340] D.C. Code § 22-932(3) ("'Elderly person' means a person who is 65 years of age or older."). The current penalty enhancement for certain crimes committed against senior citizens does not define the term "senior citizen" or "elderly person," but also requires that the victim be "65 years of age or older." D.C. Code § 22-3601(a). The current enhancement for certain crimes committed against senior citizens does not apply to the current abuse of a vulnerable adult or elderly person statute (D.C. Code § 22-933) or neglect of a vulnerable adult or elderly person statute (D.C. Code § 22-934).

Explanatory Note. In the RCC, "fair market value" is defined as 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."

The RCC definition of "fair market value" is new, the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "fair market value" is used in the RCC definition of "value."[341]

Relation to Current District Law. The RCC definition of "fair market value" is may substantively change current District law in one way.

The RCC definition of "fair market value" is taken from *Nichols v. United States*,[342] a malicious destruction of property case. It is also the definition that the jury instructions use for "value."[343] However, he DCCA has recognized at least two other definitions of fair market value in the context of other property offenses.[344] These definitions of "fair market value" differ from the *Nichols* definition by not specifically requiring that the buyer and seller be willing, but not obligated, or that all reasonable uses of the property be considered. There is no DCCA case law that discusses whether the variations between the definitions of fair market value are substantive. Given the ambiguity of the case law, adopting the more expansive *Nichols* definition of "fair market value" could be viewed as a substantive change in law.

"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) Attorneys' fees.

Explanatory Note. The RCC defines "financial injury" to include all financial losses sustained as a result of a crime. The list of examples provided in the definition is not exhaustive. The loss may be incurred by any natural person, including the victim of

[341] RCC § 22E-701.
[342] 343 A.2d 336, 341 (D.C. 1975) (stating that the "normal definition" of "fair market value" is the price which a purchaser who is willing but not obliged to buy would pay an owner who is willing but not obliged to sell, considering all the uses to which the property is adapted and might reasonably be applied.").
[343] D.C. Crim. Jur. Instr. § 3.105 & cmt. at 3-12.
[344] In the context of receiving stolen property, the DCCA has stated that "property value is its market value at the time and place stolen, if there is a market for it. *Long v. United States*, 156 A.3d 698, 714 (D.C. 2017) (quoting *Hebron v. United States*, 837 A.2d 910, 913 n.3 (quoting Lafave, Criminal Law, § 8.4(b) (3d ed. 2000)), and has also applied the definition typically used in theft cases, *Curtis v. United States*, 611 A.2d 51, 52 and n.1. (D.C. 1992) (discussing the "fair market value" and citing to a theft case, *Williams v. United States*, 376 A.2d 442 (D.C. 1977)). The definition typically used in theft cases is the "price at which a willing seller and a willing buyer will trade." *Williams v. United States*, 376 A.2d 442, 444 (D.C. 1977); *see also Foreman v. United States*, 988 A.2d 505, 507 (D.C. 2010).

a crime, a person who is financially responsible for the victim, and a person other than the victim who is threatened by the criminal conduct.[345] However, the loss may not be incurred by an agency or organization.[346] The factfinder must determine that the expenditures were reasonably necessitated by the criminal conduct.[347]

The costs of clearing a record include the litigation costs necessitated by a civil or administrative proceeding. The costs of repairing or replacing property should be calculated based on the cost actually reasonably incurred and not limited by market value at the time of the loss. Medical bills include health expenses paid by a natural person but exclude expenses paid by an insurance company. Relocation costs may include penalties for breaking a lease. Lost wages or compensation includes salaries, other earnings, and benefits. Attorneys' fees must reasonably result from the criminal act and must be reasonable in amount.

The RCC definition of "financial injury" replaces the current definition of "financial injury" in D.C. Code §§ 22-3132(5) and 22-3227.01(1). The term "act" that is used in the definition of "financial injury" is defined elsewhere in RCC § 22E-701. The RCC definition of "financial injury" is used in the revised offenses of stalking,[348] identity theft,[349] and financial exploitation of a vulnerable adult.[350]

Relation to Current District Law. The RCC definition of "financial injury" makes two substantive changes to the current definition of "financial injury" in D.C. Code §§ 22-3132(5) and 22-3227.01(1).

First, the revised definition includes costs incurred by any natural person. Current D.C. Code § 22-3132(5) limits the calculation of financial injury to expenses incurred by the victim, a member of the victim's household, a person whose safety is threatened by the stalking, or a person who is financially responsible for the victim. In contrast, the revised definition includes costs incurred by anyone, so long as they are reasonably related to the criminal act. This change applies consistent, clearly articulated definitions, improves the clarity of the revised offenses, and fills an unnecessary gap in liability.

Second, the revised definition explicitly requires that the costs be "reasonably incurred" as a result of the criminal act. The current statutes do not specify that the calculation of financial injury must be objectively reasonable. In contrast, the revised statute explicitly requires a rational and justifiable nexus between the criminal act and the resulting expenditures. This change applies consistent, clearly articulated definitions and improves the clarity and proportionality of the revised offenses.

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[345] Consider, for example, a criminal offense in which an actor stalks a victim by repeatedly threatening to injure the victim's sibling, causing the sibling to relocate to a hidden residence. Although the sibling is not a victim of stalking conduct *per se*, the costs of relocation may qualify as a financial injury resulting from the stalking.

[346] For example, the costs incurred by a police department or court system are excluded from the calculation of a financial injury.

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

[348] RCC § 22E-1206.

[349] RCC § 22E-2205.

[350] RCC § 22E-2208.

"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.

Explanatory Note. Building grounds refers to the area of land occupied by the correctional facility and its yard and outbuildings, with a clearly identified perimeter. A work release program is a program established under D.C. Code § 24-241.01.

The RCC definition of "halfway house" is new; the term is not currently defined in Title 22 of the D.C. Code (although similar language is used in the current escape from institution or officer[351] offense). The term "building" that is used in the definition of "halfway house" is defined elsewhere in RCC § 22E-701. The RCC definition of "halfway house" is used in the revised escape from a correctional facility or officer[352] offense.

Relation to Current District Law. The RCC definition of "halfway house" is new and does not substantively change District law.

As applied in the revised escape from a correctional facility or officer offense, the term "halfway house" may substantively change District law. D.C. Code § 22-2601 uses the phrase "penal or correctional institution or facility" but does not define it. Case law has held that the phrase includes the District's halfway houses.[353] In contrast, the revised code separately defines "correctional facility," "halfway house," and "secure juvenile detention facility" to be used universally throughout the RCC. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

"Healthcare provider" means a person referenced in D.C. Code § 16–2801.

Explanatory Note. The RCC definition of "healthcare provider" is new, the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "healthcare provider" is used in the revised offense of sexual exploitation of an adult.[354]

Relation to Current District Law. The RCC definition of "healthcare provider" may substantively change current District law as applied to the revised sexual exploitation of an adult statute. The current sexual abuse of a patient or client statutes do not specify the medical professionals that fall within the scope of the statute.[355] The revised sexual exploitation of an adult statute, by using a defined term in current District civil law for "healthcare provider," clarifies the scope of the revised statute. The commentary to the revised sexual exploitation of an adult statute discusses this change further.

"Health professional" means a person required to obtain a District license, registration, or certification per D.C. Code § 3–1205.01.

[351] D.C. Code § 22-2601.
[352] RCC § 22E-3401.
[353] *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).
[354] RCC § 22E-1303.
[355] D.C. Code §§ 22-3015; 22-3016.

Explanatory Note. The RCC definition of "health professional" is new, the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "health professional" is used in the revised offense of sexual exploitation of an adult.[356]

Relation to Current District Law. The RCC definition of "health professional" may substantively change current District law as applied to the revised sexual exploitation of an adult statute. The current sexual abuse of a patient or client statutes do not specify the medical professionals that fall within the scope of the statute.[357] The revised sexual exploitation of an adult statute, by using a defined term in current District civil law for "health professional," clarifies the scope of the revised statute. The commentary to the revised sexual exploitation of an adult statute discusses this change further.

"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.

Explanatory Note. The RCC definition of "identification number" is taken verbatim from the current altering or removing motor vehicle identification numbers statute in D.C. Code § 22-3233(c)(1),[358] and is intended to have the same meaning as under current law. The RCC definition of a "identification number" replaces the definition of "identification number" in D.C. Code § 22-3233(c)(1). The RCC definition of "identification number" is used in the revised Alteration of Motor Vehicle Identification Number offense.[359]

Relation to Current District Law. The RCC definition of "identification number" does not change current District law.

"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.

Explanatory Note. The RCC definition of "imitation dangerous weapon" is new, the term is not currently defined in Title 22 of the D.C. Code (although the undefined term "imitation pistol" is used in two current statutes[360] and the undefined term "imitation firearm" is used in four others[361]). [The Commission has not yet issued recommendations for weapons offenses or enhancements.] The term "dangerous

[356] RCC § 22E-1303.
[357] D.C. Code §§ 22-3015; 22-3016.
[358] D.C. Code § 22-3233.
[359] RCC § 22E-2403.
[360] D.C. Code § 22-4510(a)(6) ("No pistol or imitation thereof or placard advertising the sale thereof shall be displayed…"); D.C. Code § 22-4514(b) ("No person shall within the District of Columbia possess, with intent to use unlawfully against another, an *imitation pistol*…").
[361] D.C. Code § 22-2603.01(2)(A) ("'Class A Contraband' means…A firearm or *imitation firearm*, or any component of a firearm;"); D.C. Code § 22-2803(b)(1) ("A person commits the offense of armed carjacking if that person, while armed with or having readily available any pistol or other *firearm (or imitation thereof*)…"); D.C. Code § 22-3020 ("The defendant was armed with, or had readily available, a pistol or other *firearm (or imitation thereof*)…"); D.C. Code § 22-4502(a) ("Any person who commits a crime of violence, or a dangerous crime in the District of Columbia when armed with or having readily available any pistol or other *firearm (or imitation thereof*)…"); D.C. Code § 22-4504(b) ("No person shall within the District of Columbia possess a pistol, machine gun, shotgun, rifle, or any other firearm or *imitation firearm* while committing a crime of violence or dangerous crime…").

weapon" that is used in the definition of "imitation dangerous weapon" is defined elsewhere in RCC § 22E-701. The RCC definition of "imitation dangerous weapon" is used in the revised definition of "Class A contraband" as well as the revised offenses of robbery,[362] assault,[363] menacing,[364] sexual assault,[365] kidnapping,[366] criminal restraint,[367] and correctional facility contraband.[368]

Relation to Current District Law. The RCC definition of "imitation dangerous weapon" is new and does not substantively change District law.

As applied in the revised offenses against persons of robbery, assault, menacing, sexual assault, kidnapping, and criminal restraint, the term "imitation dangerous weapon" is generally, but not entirely, consistent with current District case law defining an imitation pistol or firearm, and current District practice.

In several cases, the DCCA has upheld jury instructions stating, with minor variations, that "[a]n imitation [pistol] is any object that resembles an actual firearm closely enough that a person observing it in the circumstances would reasonably believe it to be a [pistol]."[369] District practice appears to rely on a similar definition at present.[370] The revised definition similarly provides that any object may be an imitation weapon if it is used or fashioned in a manner that would cause a reasonable person to believe that the article is a dangerous weapon. Codification of this definition clarifies District law. However, the definition of "imitation dangerous weapon" is not included in the list of per se (inherently) dangerous weapons in RCC § 22E-701. Combined with the fact that the revised assault and robbery statutes criminalize causing bodily injury by means of a dangerous weapon, the RCC imitation dangerous weapon definition often[371] will preclude penalty enhancements for assaults or robberies involving imitation dangerous weapons.[372] However, the RCC does provide enhanced liability for use of imitation dangerous weapons in the aggravated criminal menace statute, RCC § 22E-1203, and in fourth degree robbery based on displaying an imitation weapon, in RCC § 22E-1201. The RCC's manner of addressing the use of imitation dangerous weapons ensures that such weapons are penalized the same as real dangerous weapons when used with intent to frighten victims. However, imitation dangerous weapons are not treated as automatically equivalent to real dangerous weapons when grading more serious assault and robbery

[362] RCC § 22E-1201.
[363] RCC § 22E-1202.
[364] RCC § 22E-1203.
[365] RCC § 22E-1301.
[366] RCC § 22E-1401.
[367] RCC § 22E-1402.
[368] RCC § 22E-3403.
[369] *Smith v. United States*, 777 A.2d 801, 810 n. 15 (D.C.2001). *See also Washington v. United States*, 135 A.3d 325, 330 (D.C. 2016); Bates v. United States, 619 A.2d 984, 985 (D.C.1993).
[370] D.C. Crim. Jur. Instr. § 8.101 (jury instruction for "while armed" enhancement under D.C. Code § 22-4502, referring in comment to definition of "imitation firearm" in *Bates v. U.S.*, 619 A.2d 984, 985 (D.C. 1993)).
[371] Even though imitation weapons are not per se dangerous weapons in the RCC, it is still is possible, depending on the facts of a particular case, that an imitation weapon (e.g. a starter pistol) constitutes a dangerous weapon per RCC § 22E-1001(5)(F) due to the manner in which it is used (e.g. "pistol-whipping" a victim) to inflict injury.
[372] A defendant may still be liable for assault by virtue of causing the other person harm, even if the imitation weapon does not make the person liable for an enhanced assault gradation.

charges involving actual harms and actual risks of death or serious bodily injury. By confining penalty enhancements for imitation dangerous weapons to intent-to-frighten offenses, the proportionality of District offenses involving an imitation weapon is improved.[373]

As applied in the revised correctional facility contraband statute, the term "imitation dangerous weapon" clarifies, but does not substantively change, District law. The current statute uses the phrase "imitation firearm" but does not define it.[374]

"Innocent or irresponsible person" has the meaning specified in RCC § 22E-211.

Explanatory Note. The definition of "innocent or irresponsible person" is addressed in the Commentary accompanying RCC § 22E-211.

"In fact" has the meaning specified in RCC § 22E-207.

Explanatory Note. The definition of "in fact" is addressed in the Commentary accompanying RCC § 22E-207.

"Intentionally" has the meaning specified in RCC § 22E-206.

Explanatory Note. The definition of "intentionally" is addressed in the Commentary accompanying RCC § 22E-206.

"Intoxication" has the meaning specified in RCC § 22E-209.

Explanatory Note. The definition of "intoxication" is addressed in the Commentary accompanying RCC § 22E-206.

"Knowingly" has the meaning specified in RCC § 22E-206.

Explanatory Note. The definition of "knowingly" is addressed in the Commentary accompanying RCC § 22E-206.

"Law enforcement officer" means:

(A) A sworn member, officer, reserve officer, or designated civilian employee of the Metropolitan Police Department, including any reserve officer or designated civilian employee of the Metropolitan Police Department;

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[373] The RCC definition of "imitation weapon" resolves judicial concern that has been expressed over whether to distinguish an object designed as an imitation dangerous weapon (e.g., a starter gun) and an object that merely appears to the victim to be a dangerous weapon (e.g., a cell phone, metal pipe, or finger used in a manner that it reasonably appears to be a dangerous weapon) for purposes of assessing penalties. See Washington v. United States, 135 A.3d 325, 332 (D.C. 2016) (C.J. Washington, concurring)(Concluding from legislative history that the actual design of the object rather than a victim's perception is the critical consideration for whether an object is an imitation firearm for purposes of District's assault with a deadly weapon and possession of firearm during crime of violence statutes). Under the RCC definition of an imitation dangerous weapon, objects not fashioned or designed to look like a dangerous weapon (e.g., a finger jabbed into someone's back) may nonetheless be an "imitation dangerous weapon." However, such additional liability for the use of such "imitation dangerous weapons" is provided in the RCC only for aggravated criminal menace, second degree robbery based on an aggravated criminal menace, and [other revised offenses against persons], but not assault.

[374] D.C. Code § 22-2603.01(2)(A)(iii).

(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 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; and

(H) Any federal, state, county, or municipal officer performing functions comparable to those performed by the officers described in subparagraphs (A), (B), (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.

Explanatory Note. The RCC definition of "law enforcement officer" replaces the current statutory definitions of "law enforcement in D.C. Code § 22-405(a,)[375] applicable to assault on a police officer (APO), and D.C. Code § 22-2106(b)(1), applicable to murder of a law enforcement officer.[376] The RCC definition of "law enforcement officer" is used in the RCC definition of a "protected person,"[377] and in the revised

[375] D.C. Code § 22-405(a) ("For the purposes of this section, the term 'law enforcement officer' means any officer or member of any police force operating and authorized to act in the District of Columbia, including any reserve officer or designated civilian employee of the Metropolitan Police Department, any licensed special police officer, any officer or member of any fire department operating in the District of Columbia, any officer or employee of any penal or correctional institution of the District of Columbia, 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, any investigator or code inspector employed by the government of the District of Columbia, or any officer or employee of the Department of Youth Rehabilitation Services, Court Services and Offender Supervision Agency, the Social Services Division of the Superior Court, or Pretrial Services Agency charged with intake, assessment, or community supervision.").

[376] D.C. Code § 22-2106(b)(1) ("'Law enforcement officer' means: (A) A sworn member of the Metropolitan Police Department; (B) A sworn member of the District of Columbia Protective Services; (C) The Director, deputy directors, and officers of the District of Columbia Department of Corrections; (D) Any probation, parole, supervised release, community supervision, or pretrial services officer of the Court Services and Offender Supervision Agency or The Pretrial Services Agency; (E) Metro Transit police officers; and (F) 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.").

[377] RCC § 22E-701.

offenses of murder,[378] manslaughter,[379] assault,[380] aggravated kidnapping,[381] and aggravated criminal restraint.[382]

Relation to Current District Law. The RCC definition of "law enforcement officer" makes two clear changes to the statutory definition of "law enforcement officer" in D.C. Code § 22-405(a,)[383] applicable to assault on a police officer (APO). First, the RCC definition of "law enforcement officer" no longer includes officers or members of a fire department operating in the District of Columbia or investigators or code inspectors employed by the government of the District of Columbia. These categories of individuals are included in the current definition of "law enforcement officer" for the APO statute, but not for the current murder of a law enforcement officer statute.[384] In contrast, in the RCC, these categories of individuals are included in the definition of "public safety employee," defined in RCC § 22E-701. This change clarifies District law by distinguishing persons who are regularly involved with criminal law enforcement from others who are not, and creating one broad, consistent definition as to who constitutes a "law enforcement officer."

Second, the revised definition of "law enforcement officer" includes sworn members or officers of the District of Columbia Protective Services, Metro Transit police officers, and officers covered by the broad catch-all provision in subsection (H) of the revised definition. These categories of complainants are included in the current murder of a law enforcement officer statute,[385] but not the current APO statute.[386] This change improves the consistency and proportionality of the revised offenses against persons by creating a broad, consistent definition for "law enforcement officer."

The remaining changes to the definition of "law enforcement officer" in the current APO statute are non-substantive and clarificatory.[387] The RCC definition of "law

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[378] RCC § 22E-1101.
[379] RCC § 22E-1102.
[380] RCC § 22E-1202.
[381] RCC § 22E-1401.
[382] RCC § 22E-1403.
[383] D.C. Code § 22-405(a).
[384] D.C. Code § 22-2106(b)(1).
[385] D.C. Code § 22-2106(b)(1).
[386] D.C. Code § 22-405(a).
[387] The revised definition of "law enforcement officer" makes three non-substantive, clarificatory wording changes to the definition of "law enforcement officer" in the current APO statute. First, subsection (A) of the revised definition requires a "sworn" officer or member of the Metropolitan Police Department, whereas the current definition in the current APO statute requires "operating and authorized to act in the District of Columbia." Second, subsection (D) of the revised definition refers to the "Director, deputy directors, officers, or employees of the District of Columbia Department of Corrections," which is more specific than, but substantively identical to, the current definition in the current APO statute ("any officer or employee of any penal or correctional institution of the District of Columbia."). Third, subsection (F) of the revised definition of "law enforcement officer" refers to "[a]ny probation, parole, supervised release, community supervision, or pretrial services officer or employee" of the specified agencies, which is clearer than "any officer or employee" of the specified agencies "charged with intake, assessment, or community supervision" in the current definition in the current APO statute.
The remaining provisions in the RCC definition of "law enforcement officer," with the exception of subsection (B), subsection (G), and subsection (H), are taken directly from the definition of "law enforcement officer" in the current APO statute: 1) Any reserve officer or designated civilian employee of the Metropolitan Police Department (included in subsection (A)); 2) Any licensed special police officer

enforcement officer" is substantively identical to the definition in the District's murder of a law enforcement officer statute.[388]

As applied to certain RCC offenses, the RCC definition of "law enforcement officer" may substantively change current District law. For example, the revised assault statute, which replaces the District's current APO statute (D.C. Code § 22-405), varies in scope as compared to the current APO statute in terms of the complainants that constitute a "law enforcement officer." In addition, some RCC offenses against persons, such as robbery, include enhanced penalties for a complainant that is a "law enforcement officer" in certain circumstances through gradations for a "protected person," which is a change to current District law.

The commentaries to relevant RCC offenses against persons discuss in detail the effect of the RCC definition of "law enforcement officer" on current District law.

"Legal cause" has the meaning specified in RCC § 22E-204.

Explanatory Note. The definition of "legal cause" is addressed in the Commentary accompanying RCC § 22E-204.

"Meeting" has the meaning specified in D.C. Code § 2-574.

Explanatory Note. The RCC definition of "meeting" is new, the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "meeting" are in some current offenses[389]). The RCC definition of "meeting" cross-references the definition of "meeting" in D.C. Code § 2-574, the District's Open Meetings Act. The RCC definition of "meeting" is used in the revised offense of public nuisance.[390]

(subsection C)); and 3) Officers or employees charged with the supervision of juveniles being confined in any District of Columbia facility (subsection (E)).

[388] The majority of the categories in the RCC definition of "law enforcement officer" are taken, in whole or in part, directly from the definition of "law enforcement officer" in the District's current murder of a law enforcement officer statute (D.C. Code § 22-2106(b)). These categories are: 1) A sworn member of the Metropolitan Police Department (included in subsection (A) of the RCC definition); 2) A sworn member or officer of the District of Columbia Protective Services (subsection (B) of the RCC definition); 3) The Director, deputy directors, officers, or employees of the District of Columbia Department of Corrections (subsection (D) of the RCC definition); 4) Specified officers or employees of the Court Services and Offender Supervision Agency or Pretrial Services Agency (included in subsection (F) of the RCC definition); 5) Metro Transit police officers (subsection (G) of the RCC definition); and 6) the broad provision for categories of complainants that are not specifically included in the revised definition (subsection (H) of the RCC definition).

The remaining provisions in the RCC definition of "law enforcement officer" are not specifically included in the definition of "law enforcement officer" in the current murder of a law enforcement officer statute, but appear to be covered by the broad catchall provision in that definition (D.C. Code § 22-2106(b)(F)): 1) Any reserve officer or designated civilian employee of the Metropolitan Police Department (included in subsection (A) of the RCC definition); 2) A licensed special police officer (subsection (C) of the RCC definition); 3) Officers or employees charged with the supervision of juveniles being confined in any District of Columbia facility (subsection (E) of the RCC definition); and 4) Specified officers or employees of the Department of Youth Rehabilitation Services and the Family Court Social Services Division of the Superior Court (included in subsection (F) of the RCC definition).

[389] D.C. Code §§ 22-3312.03 (Wearing hoods or masks), 22-3226.05 (Exemptions from Telephone Fraud).

[390] RCC § 22E-4202.

Relation to Current District Law. The RCC definition of "meeting" cross-references the definition of "meeting" in D.C. Code § 2-574 and does not substantively change current District law.

As applied to the revised public nuisance offense, the term "meeting" clarifies, but does not substantively change, District law. The current disorderly conduct statute makes it unlawful to "engage in loud, threatening, or abusive language, or disruptive conduct in a public building with the intent and effect of impeding or disrupting the orderly conduct of business in that public building." The terms "orderly conduct," "business," and "public building" are not defined. Case law has not addressed their meanings. Legislative history indicates this provision was intended to forbid disruption of the D.C. Council or other public meetings, in a manner comparable to D.C. Code §10-503.15, which prohibits the disruption of Congress.[391] To resolve ambiguities about the scope of this provision, the revised code clarifies that it is the nature of the meeting as one of a public decision-making body that is controlling, and not the ownership or operation of the building. The revised code makes it unlawful to cause an unreasonable interruption of "the orderly conduct of a meeting by a public body" and incorporates the definitions of "public body" and "meeting" from the District's Open Meetings Act. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

"Motor vehicle" means any automobile, all-terrain vehicle, self-propelled mobile home, motorcycle, truck, 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.

Explanatory Note. The RCC defines "motor vehicle" to include most self-propelled vehicles used for the transportation of persons. "Other vehicle designed to be propelled only by an internal-combustion engine or electricity" is intended to include motorized boats and aircraft. The "designed to be" language includes vehicles that happen to be moved by human exertion in a given case, but are "designed" to be propelled only by an internal-combustion engine or electricity.[392]

The RCC definition of "motor vehicle" replaces the definitions of "motor vehicle" in D.C. Code § 22-3215(a),[393] applicable to the unauthorized use of a motor vehicle statute, and D.C. Code § 22-3233(c)(2),[394] applicable to the altering or removing motor vehicle identification numbers statute. The RCC definition of "motor vehicle" is used in the revised offenses of robbery,[395] theft,[396] unauthorized use of a motor vehicle,[397]

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[391] *See* Revising the District of Columbia Disorderly Conduct Statutes: A Report and Proposed Legislation Prepared by The Disorderly Conduct Arrest Project Subcommittee of the Council for Court Excellence (October 14, 2010) at Page 11.

[392] E.g., an electric bicycle, skateboard, or scooter that one can also operate manually.

[393] D.C. Code § 22-3215(a)("For the purposes of this section, the term "motor vehicle" means any automobile, self-propelled mobile home, motorcycle, truck, truck tractor, truck tractor with semitrailer or trailer, or bus.").

[394] D.C. Code § 22-3233(c)(2) ("'Motor vehicle' means any automobile, self-propelled mobile home, motorcycle, motor scooter, truck, truck tractor, truck semi trailer, truck trailer, bus, or other vehicle propelled by an internal-combustion engine, electricity, or steam, including any non-operational vehicle that is being restored or repaired.").

[395] RCC § 22E-1201.

arson,[398] reckless burning,[399] alteration of a motor vehicle identification number,[400] and trespass.[401]

Relation to Current District Law. The RCC definition of "motor vehicle" makes two clear changes to the statutory definitions of "motor vehicle" in D.C. Code § 22-3215(a)[402] and D.C. Code § 22-3233(c)(2).[403]

First, the revised definition of "motor vehicle" includes any vehicle "designed to be propelled only by an internal-combustion engine or electricity," which includes motorized boats and aircraft. The statutory definition of "motor vehicle" for the current unauthorized use of a motor vehicle (UUV) offense does not have such a provision.[404] The statutory definition for the alteration of a motor vehicle number (VIN) offense has a similar provision, but does not require that the vehicle be propelled "only" by internal-combustion engine or electricity.[405] In contrast, the revised definition of "motor vehicle" requires that the vehicle be "designed to be propelled only by an internal-combustion engine or electricity." This language includes motorized boats and aircraft and eliminates possible gaps in current District law.

Second, the revised definition of "motor vehicle" excludes vehicles such as mopeds, which are designed to be propelled, in whole or in part, by human exertion. The statutory definition of "motor vehicle" for the current UUV statute is limited to a list of specified vehicles,[406] although the DCCA has held that mopeds fall within this definition.[407] The statutory definition of "motor vehicle" for the VIN offense includes other vehicles "propelled by an internal-combustion engine, electricity, or steam."[408] In contrast, the revised definition of "motor vehicle" requires that the vehicle be "designed to be propelled only by an internal-combustion engine or electricity." This language excludes vehicles like mopeds, that are designed to be propelled, in part, by human

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[396] RCC § 22E-2101.
[397] RCC § 22E-2103.
[398] RCC § 22E-2501.
[399] RCC § 22E-2502.
[400] RCC § 22E-2403.
[401] RCC § 22E-2601.
[402] D.C. Code § 22-3215(a)(for the offense of unauthorized use of a motor vehicle, defining "motor vehicle" as "For the purposes of this section, the term "motor vehicle" means any automobile, self-propelled mobile home, motorcycle, truck, truck tractor, truck tractor with semitrailer or trailer, or bus.").
[403] D.C. Code § 22-3233(c)(2) (for the offense of altering or removing vehicle identification numbers, defining "motor vehicle" as "'Motor vehicle' means any automobile, self-propelled mobile home, motorcycle, motor scooter, truck, truck tractor, truck semitrailer, truck trailer, bus, or other vehicle propelled by an internal-combustion engine, electricity, or steam, including any non-operational vehicle that is being restored or repaired.").
[404] D.C. Code § 22-3215(a).
[405] D.C. Code § 22-3233(c)(2).
[406] D.C. Code § 22-3215(a).
[407] In *United States v. Stancil*, the DCCA held that "[a]fter considering the language and history of the UUV statute, and the characteristics of the vehicle in question, we hold that a moped is a 'motor vehicle' for the purposes" of the then-current UUV statute." 422 A.2d 1285, 1286 (D.C. 1980). *Stancil* was decided under an earlier version of the UUV statute, but the definition of "motor vehicle" in this earlier statute is substantively identical to the current definition of "motor vehicle" and the case is still good law. The jury instruction for UUV adopts the holding in *Stancil* and includes "moped" in the definition of "motor vehicle." D.C. Crim. Jur. Instr. § 5.302 cmt. at 5-42.
[408] D.C. Code § 22-3233(c)(2).

exertion. These types of vehicles are generally not as expensive and do not pose the same safety risks to others that a "motor vehicle" does. Unauthorized use of vehicles such as mopeds, that fall outside the RCC definition of "motor vehicle," remains criminalized by the RCC unauthorized use of property offense (RCC § 22E-2102). This revision improves the clarity, consistency, and proportionality of the revised definition.

Other changes to the statutory definitions of "motor vehicle" in D.C. Code § 22-3215(a) and D.C. Code § 22-3233(c)(2) are clarificatory and are not intended to change current District law.

First, the revised definition of "motor vehicle" no longer states that the definition includes "any non-operational vehicle that is being restored or repaired." This language is present in the current definition of "motor vehicle" for the VIN offense.[409] There is no DCCA case law interpreting this language. 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. Deleting this language improves the clarity of the revised definition without changing current District law.

Second, the revised definition includes a reference to all-terrain vehicles. The DCCA has held that all-terrain vehicles[410] fall within the current definition of "motor vehicle" for the purpose of the UUV statute, and such all-terrain vehicles would satisfy the current statutory definition of the VIN offense.[411] This revision improves the completeness of the revised definition without changing current District law.

Finally, the revised definition of "motor vehicle" includes a "truck tractor with or without a semitrailer or trailer." Both statutory definitions for "motor vehicle" in Title 22 of the current D.C. Code refer to a "truck tractor,"[412] and include a reference to either a truck tractor with a semitrailer or trailer[413] or with just a semitrailer.[414] The revised definition of "motor vehicle" deletes the reference to "truck tractor" and instead specifies that a truck tractor "with or without a semitrailer or trailer" constitutes a "motor vehicle." This language clarifies that the truck tractor, and not the semitrailer or trailer, is the "motor vehicle" and does not change current District law.

As applied to certain RCC offenses, the RCC definition of "motor vehicle" may substantively change current District law. For example, due to the revised definition of "motor vehicle," the revised unauthorized use of a motor vehicle offense (RCC § 22E-2103) no longer includes vehicles like mopeds that are designed to be propelled, in whole

[409] D.C. Code § 22-3233(c)(2).

[410] In *Gordon v. United States*, the DCCA stated that the "trial judge concluded correctly, as a matter of statutory interpretation, that an ATV—a vehicle propelled by a motor—is a motor vehicle under [the UUV statute]." *Gordon v. United States*, 906 A.2d 862, 885 (D.C. 2006) The jury instruction for UUV adopts the holding in *Gordon* and includes "moped" in the definition of "motor vehicle." D.C. Crim. Jur. Instr. § 5.302 cmt. at 5-42.

[411] D.C. Code § 22-3233(c)(2).

[412] D.C. Code §§ 22-3215(a) (for the offense of unauthorized use of a motor vehicle, defining "motor vehicle," in part, as "any . . . truck tractor . . . ."); 22-3233(c)(2) (for the offense of altering or removing vehicle identification numbers, defining "motor vehicle," in part, as "any . . . truck tractor, ...").

[413] D.C. Code § 22-3215(a).

[414] D.C. Code § 22-3233(c)(2).

or in part, by human exertion, although the DCCA has held explicitly held that mopeds[415] fall within the current definition of "motor vehicle."

The commentaries to relevant RCC offenses discuss in detail the effect of the RCC definition of "motor vehicle" on current District law.

"Negligently" has the meaning specified in RCC § 22E-206.

Explanatory Note. The definition of "negligently" is addressed in the Commentary accompanying RCC § 22E-206.

"Objective element" has the meaning specified in RCC § 22E-201.

Explanatory Note. The definition of "objective element" is addressed in the Commentary accompanying RCC § 22E-201.

"Offense element" has the meaning specified in RCC § 22E-201.

Explanatory Note. The definition of "offense element" is addressed in the Commentary accompanying RCC § 22E-201.

"Omission" has the meaning specified in RCC § 22E-202.

Explanatory Note. The definition of "omission" is addressed in the Commentary accompanying RCC § 22E-202.

"Open to the general public" means no payment or permission is required to enter.

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

The RCC definition of "open to the general public" is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "open to the general public" appear in the current disorderly conduct[416] and aggressive panhandling[417] statutes). The RCC definition of "open to the general public" is used in the revised offenses of burglary,[418] disorderly conduct,[419] and public nuisance.[420]

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[415] In *United States v. Stancil*, the DCCA held that "[a]fter considering the language and history of the UUV statute, and the characteristics of the vehicle in question, we hold that a moped is a 'motor vehicle' for the purposes" of the then-current UUV statute." *Stancil v. United States*, 422 A.2d 1285, 1286 (D.C. 1980). *Stancil* was decided under an earlier version of the UUV statute, but the definition of "motor vehicle" in this earlier statute is substantively identical to the current definition of "motor vehicle" and the case is still good law. The jury instruction for UUV adopts the holding in *Stancil* and includes "moped" in the definition of "motor vehicle." D.C. Crim. Jur. Instr. § 5.302 cmt. at 5-42.

[416] D.C. Code § 22-1321.

[417] D.C. Code § 22-2302.

[418] RCC § 22E-2701.

[419] RCC § 22E-4201.

[420] RCC § 22E-4202.

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

As applied in the revised burglary offense, the term "open to the general public" may change District law. The current burglary statute does not distinguish between public and private locations leading to some counterintuitive outcomes.[421] In contrast, the revised burglary statute requires a trespass into a dwelling or into a building or business yard that is not open to the general public at the time of the offense. The revised code adds a definition of "open to the general public" to be used universally throughout the RCC. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

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

"Owner" means a person holding an interest in property with which the actor is not privileged to interfere without consent.

Explanatory Note. The RCC definition of "owner" specifies the requirements for being considered an "owner" in the RCC. Under the RCC definition, there can be more than one "owner" for a given piece of property. The RCC definition also includes a person whose interest in property is possessory but otherwise unlawful. For example, it is possible for a third party to rob from a thief.[422]

The RCC definition of "owner" replaces the current statutory definition in D.C. Code § 22-3214(a)(1),[423] applicable to the commercial piracy statute, and undefined references to "owner" in several current Title 22 property provisions and offenses.[424] The RCC definition of "owner" is used in the revised offenses of robbery,[425] theft,[426] unauthorized use of property,[427] unauthorized use of a motor vehicle,[428] unlawful creation

[421] For example, a witness who enters a courthouse intending to commit perjury, a government official who enters her office intending to accept a bribe, a drug user who enters his friend's home to use drugs with his companion, and a shoplifter who enters a store intending to steal a candy bar would all be guilty of burglary under current District law, even though their presence in the specified location was invited.

[422] The thief has an unlawful, but superior, possessory interest in the third party as to the third party.

[423] D.C. Code § 22-3214 (a)(1) ("'Owner', with respect to phonorecords or copies, means the person who owns the original fixation of the property involved or the exclusive licensee in the United States of the rights to reproduce and distribute to the public phonorecords or copies of the original fixation. In the case of a live performance the term "owner" means the performer or performers.").

[424] *See, e.g.*, D.C. Code §§ 22-3201(2)(B) (definition of "deprive."); 22-3215 (unauthorized use of a motor vehicle); 22-3214.02 (unlawful operation of a recording device in a motion picture theater); 22-3218.03 (presumptions and rebuttal evidence provisions for theft of a utility service); 22-3312.01 (defacing public or private property)' 22-3312.05(4) (definition of "graffiti.").

[425] D.C. Code § 22E-1201.

[426] D.C. Code § 22E-2101.

[427] D.C. Code § 22E-2102.

[428] D.C. Code § 22E-2103.

or possession of a recoding,[429] unlawful operation of a recording device in a motion picture theater,[430] criminal damage to property[431] and criminal graffiti.[432]

Relation to Current District Law. Although several of the current property offenses in Title 22 of the D.C. Code use the term "owner," only one offense, commercial piracy, statutorily defines it. The RCC definition of "owner" may substantively change current District law for the commercial piracy offense, because the current definition[433] is very specific, referring either to the person who owns the original fixation, the exclusive licensee with reproduction and distribution rights, or in the case of a live performance, the performer. The revised unlawful creation or possession of a recording statute, through the RCC definition of "owner," is intended to more broadly identify the relevant person whose consent must be obtained. The definition of "owner" reduces potential gaps in the offense and improves the consistency of definitions across property offenses. The commentary to the revised unlawful creation or possession of a recording statute (RCC § 22E-2105) discusses this possible change further.

For the other current property offenses that use the term "owner" without statutorily defining it,[434] there is no D.C. Court of Appeals (DCCA) case law discussing the term "owner" or a similar term. As the commentaries to the RCC property offenses discuss, the RCC definition of "owner" does not appear to change current District law. It should also be noted that the RCC definition of "owner" is also consistent with District practice apparently recognizing that in robbery, the victim need not have strict legal ownership of the item taken, but merely some legally superior custody and control over the item.[435]

Codifying a definition of "owner" improves the clarity and consistency of District law.

"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

[429] D.C. Code § 22E-2105.
[430] RCC § 22E-2106.
[431] D.C. Code § 22E-2503.
[432] D.C. Code § 22E-2504.
[433] D.C. Code § 22-3214 (a)(1) ("'Owner', with respect to phonorecords or copies, means the person who owns the original fixation of the property involved or the exclusive licensee in the United States of the rights to reproduce and distribute to the public phonorecords or copies of the original fixation. In the case of a live performance the term "owner" means the performer or performers.").
[434] *See, e.g.*, D.C. Code §§ 22-3201(2)(B) (definition of "deprive."); 22-3215 (unauthorized use of a motor vehicle); 22-3214.02 (unlawful operation of a recording device in a motion picture theater); 22-3218.03 (presumptions and rebuttal evidence provisions for theft of a utility service); 22-3312.01 (defacing public or private property)' 22-3312.05(4) (definition of "graffiti.").
[435] D.C. Crim. Jur. Instr. § 4.300 commentary ("While larceny remains an offense against possession, robbery is essentially a crime against the person. *U.S. v. Dixon*, 469 F.2d 940 (D.C. Cir. 1972). Thus, "possession" under the robbery statute does not require strict legal ownership in the larcenous sense, but only some custody and control by the victim. *See, e.g., U.S. v. Spears*, 449 F.2d 946 (D.C. Cir. 1971) (although money stolen did not belong to foreman, it was in his control at the time of a robbery); *U.S. v. Bolden*, 514 F.2d 1301 (D.C. Cir. 1975) (where different parties owned property taken, it was nevertheless either in the control of the complainant or under his custody and control at the time it was stolen); *Jones v. U.S.*, 362 A.2d 718 (D.C. 1976) (it is not required to show that victim of robbery owned property that was taken but only that the victim had custody and control of the property).").

paying for property, or the number inscribed on such a card. "Payment card" includes the number or description of the instrument.

Explanatory Note. The RCC definition of "payment card" includes any instrument issued for use by the cardholder to pay for or obtain property. The definition includes credit cards and debit cards. The definition includes the physical cards themselves, and the number or description of the cards.

"Payment card" is not statutorily defined for Title 22 of the current D.C. Code. However, "credit card" is currently defined in D.C. Code § 22-3223(a)[436] for the current credit card fraud offense. The RCC definition of "payment card" replaces the definition of "credit card" in D.C. Code § 22-3223(a) and is used in the RCC definition of "value,"[437] as well as the revised offense of payment card fraud.[438]

Relation to Current District Law. The RCC definition of "payment card" clarifies, but makes no substantive changes, to current District law.

"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.

Explanatory Note. [Explanation of this term is forthcoming, in conjunction with RCC § 22E-40X]

Relation to Current District Law. [Forthcoming.]

"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.

Explanatory Note. [Explanation of this term is forthcoming, in conjunction with RCC § 22E-40X]

Relation to Current District Law. [Forthcoming.]

Personal identifying information shall include, but is not limited to the following:

(1) Name, address, telephone number, date of birth, or mother's maiden name;

(2) Driver's license or driver's license number, or non-driver's license or non-driver's license number;

(3) Savings, checking, or other financial account number;

[436] D.C. Code § 22-3223 ("the term 'credit card' means an instrument or device, whether known as a credit card, debit card, or by any other name, issued for use of the cardholder in obtaining or paying for property or services").

[437] RCC § 22E-701.

[438] RCC § 22E-2202.

(4) Social security number or tax identification number;
(5) Passport or passport number;
(6) Citizenship status, visa, or alien registration card or number;
(7) Birth certificate or a facsimile of a birth certificate;
(8) Credit or debit card, or credit or debit card number;
(9) Credit history or credit rating;
(10) Signature;
(11) 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;
(12) Biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
(13) Place of employment, employment history, or employee identification number; and
(14) 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.

Explanatory Note. The RCC definition of "personal identifying information" provides a non-exhaustive list of information that relates to a person's identity, and is taken verbatim from the current identity theft sub-chapter of the D.C. Code.[439] This definition is intended to have the same meaning as under current law.

"Personal identifying information" is currently defined in D.C. Code § 22-3227.01(3)[440] for the identity theft offense and related provisions. The RCC definition of "personal identifying information" replaces the definition of "personal identifying information" in D.C. Code § 22-3227.01(3) and is used in the revised identity theft statute.[441]

Relation to Current District Law. The RCC definition of "personal identifying information" does not substantively change current District law.

"Physically following" means maintaining close proximity to a person as they move from one location to another.

[439] D.C. Code § 22-3227.01

[440] D.C. Code § 22-3227.01(3) ("'Personal identifying information' includes, 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.").

[441] RCC § 22E-2205.

Explanatory Note. The phrase "close proximity" refers to the area near enough for the accused to see or hear the complainant's activities and does not require that the defendant be near enough to reach the complainant. Distances may vary widely, depending on facts including crowd density, noise, and height. Examples may include walking a couple of stores down the street from the complainant or driving near the complainant in a vehicle.

The RCC definition of "physically following" is new; the term is not currently defined in Title 22 of the D.C. Code (although similar language appears in the current stalking statute[442]). The RCC definition of "physically following" is used in the revised offense of stalking.[443]

Relation to Current District Law. The RCC definition of "physically following" is new and does not substantively change District law.

As applied in the revised offense stalking, the term "physically following" clarifies, but does not substantively change, District law. The current statute uses the word "follow" but does not define it. Case law has not directly addressed its meaning.[444] This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

"Physically monitoring" means being in close proximity to a person's residence, workplace, or school to detect the person's whereabouts or activities.

Explanatory Note. The phrase "close proximity" refers to the area near enough for the accused to see or hear the complainant's activities and does not require that the defendant be near enough to reach the complainant. Distances may vary widely, depending on facts including crowd density, noise, and height.

The RCC definition of "physically monitoring" is new; the term is not currently defined in Title 22 of the D.C. Code (although similar language appears in the current stalking statute[445]). The RCC definition of "physically monitoring" is used in the revised offense of stalking.[446]

Relation to Current District Law. The RCC definition of "physically monitoring" is new and does not substantively change District law.

As applied in the revised offense stalking, the term "physically monitoring" may change District law. The current statute uses the word "monitor" and the phrase "place

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[442] D.C. Code § 22-3132(8) ("To engage in a course of conduct" means directly or indirectly, or through one or more third persons, in person or by any means, on 2 or more occasions, to: (A) Follow…").

[443] RCC § 22E-1206.

[444] However, the District of Columbia Court of Appeals discussed an allegation of following in *Coleman v. United States*, 16-CM-345, 2019 WL 1066002, at *2–3 (D.C. Mar. 7, 2019). In that case, the defendant sprinted across a baseball field and stood eight feet in front of the complainant, in her pathway. When the complainant left the field and walked home, the defendant also exited and remained outside the complainant's home long enough for a neighbor and a family member to each come outside and tell the defendant to leave. The defendant testified that he had not been intentionally following the complainant but had simply been "follow[ing] everyone else off the field" and trying to go to his own home. During these events, the defendant and the complainant were near enough to one another to engage in a conversation. The revised code defines "physically following" to require maintaining a close enough proximity to see or hear the complainant. Remotely following or monitoring another person will be separately punished as Electronic Monitoring in RCC § 22E-1804.

[445] D.C. Code § 22-3132(8).

[446] RCC § 22E-1206.

under surveillance" but does not define these terms. Case law has not directly addressed their meanings. The revised code defines "physically monitoring" to require maintaining a close enough proximity to see or hear the complainant. Remotely following or monitoring another person will be separately punished as Electronic Monitoring in RCC § 22E-1804. This change applies consistent, clearly articulated definitions and improves the logical organization and clarity of the revised offenses.

"Position of trust with or authority over" 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 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 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.

Explanatory Note. The RCC definition of "position of trust with or authority over" replaces the term "significant relationship," currently defined in D.C Code § 22-3001(10),[447] (applicable to provisions in Chapter 30, Sexual Abuse). The RCC definition of "position of trust with or authority over" replaces the current definition of "significant relationship" in D.C Code § 22-3001(10), applicable to provisions in Chapter 30, Sexual Abuse, and is used in the penalty enhancements for the revised sexual assault statute,[448] as well as the revised offenses of sexual abuse of a minor,[449] revised sexually suggestive contact,[450] enticing a minor into sexual conduct,[451] and arranging sexual conduct with a minor.[452]

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[447] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").

[448] RCC § 22E-1301.

[449] RCC § 22E-1302.

[450] RCC § 22E-1304.

[451] RCC § 22E-1305.

[452] RCC § 22E-1306.

Relation to Current District Law. The RCC definition "position of trust with or authority over" makes two possible substantive changes to the current statutory definition of "significant relationship in D.C. Code § 22-3001(10).[453]

First, the RCC definition of "position of trust with or authority over" is close-ended and defines the term as "means" the specified individuals or "other person responsible under civil law for the care or supervision of the complainant." The current definition of "significant relationship" is open-ended and defines the term as "includ[ing]" the specified individuals or "any other person in a position of trust with or authority over" the complainant."[454] There is no DCCA case law interpreting the definition of "significant relationship" and it is unclear whether a job title or specified relationship to the complainant is sufficient, or if a substantive analysis of the relationship between the actor and the complainant is required. Instead of this ambiguity, the RCC definition is limited to the specified individuals or "other person responsible under civil law for the care or supervision of the complainant." By using "means," the RCC definition makes clear that no substantive analysis of the relationship between the actor and the complainant is necessary beyond determining if it fits into one of the specified categories. This revision improves the clarity and completeness of the RCC definition.

Second, the RCC definition of "position of trust with or authority over" includes "other person responsible under civil law for the care or supervision of the complainant." The current definition of "significant relationship" has a similar catchall provision of "any other person in a position of trust with or authority over" the complainant.[455] There is no DCCA case law interpreting the current definition of "significant relationship." "Other person responsible under civil law for the care or supervision of the complainant" is intended to include persons with a legal duty of care to the complainant, such as childcare providers. This revision improves the clarity and completeness of the revised definition.

The remaining changes to the current definition of "significant relationship" in D.C. Code § 22-3001(10) are clarificatory and are not intended to change current District law. The current definition of "significant relationship" includes "any other person in a position of trust with or authority over" the complainant.[456] Rather than include this language in the definition, the revised definition uses it as the defined term. "Position of trust with or authority over" is clearer than "significant relationship," and using the term does not substantively change current District law. The revised definition also substitutes "complainant" for "victim," consistent with the meaning of that term in the RCC.

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[453] D.C. Code § 22-3001(10).
[454] D.C. Code § 22-3001(10).
[455] D.C. Code § 22-3001(10)(D).
[456] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").

The commentaries to relevant RCC offenses against persons discuss in detail the effect of the RCC definition of "position of trust with or authority over" on current District law.

"Possess," and other parts of speech, including "possesses," "possessing," and "possession" means:

(A) Hold or carry on one's person; or

(B) Have the ability and desire to exercise control over.

Explanatory Note. Subsection (A) of the RCC definition addresses actual possession, while subsection (B) addresses constructive possession.

The RCC definition of "possess" is new, the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "possess" are in some current offenses[457]). The RCC definition of "possess" is used in the revised offenses of murder,[458] manslaughter,[459] robbery,[460] misuse of documents in furtherance of human trafficking,[461] unlawful creation or possession of a recording,[462] identity theft,[463] unlawful labeling of a recording,[464] possession of stolen property,[465] trafficking of stolen property,[466] possession of tools to commit property crime,[467] and correctional facility contraband.[468]

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

The RCC definition of "possess" closely follows current District practice in defining actual and constructive possession.[469] The definition of actual possession in

[457] D.C. Code §§ 22-3154 (Manufacture or possession of a weapon of mass destruction); 22-1835 (Unlawful conduct with respect to documents in furtherance of human trafficking); 22-2603.02 (Unlawful possession of contraband); 22-3102 (Prohibited acts); 22-4504.02 (Lawful transportation of firearms); 22-4510 (Licenses of weapons dealers; records; by whom granted; conditions); 22-902 (Trademark counterfeiting); 22-4515a (Manufacture, transfer, use, possession, or transportation of molotov cocktails, or other explosives for unlawful purposes, prohibited; definitions; penalties); 22-3214 (Commercial piracy); 22-2603.01 (Definitions); 22-4508 (Transfers of firearms regulated); 22-4507 (Certain sales of pistols prohibited); 22-3214.01 (Deceptive labeling); 22-3227.02 (Identity theft); 22-1006.01 (Penalty for engaging in animal fighting); 22-3312.04 (Penalties); 22-3231 (Trafficking in stolen property); 22-811 (Contributing to the delinquency of a minor); 22-1708 (Gambling pools and bookmaking; athletic contest defined); 22-1001 (Definitions and penalties); 22-1831 (Definitions); 22-3232 (Receiving stolen property); 22-4514 (Possession of certain dangerous weapons prohibited; exceptions); 22-2201 (Certain obscene activities and conduct declared unlawful; definitions; penalties; affirmative defenses; exception); 22-4504 (Carrying concealed weapons; possession of weapons during commission of crime of violence; penalty).

[458] RCC § 22E-1101.

[459] RCC § 22E-1102.

[460] RCC § 22E-1201.

[461] RCC § 22E-1607.

[462] RCC § 22E-2105.

[463] RCC § 22E-2205.

[464] RCC §22E-2207.

[465] RCC § 22E-2401.

[466] RCC § 22E-2402.

[467] RCC § 22E-2702.

[468] RCC § 22E-3403.

[469] *See* D.C. Crim. Jur. Instr. § 3-104. Possession-Defined. ("C.- WHERE THE GOVERNMENT ALLEGES JOINT ACTUAL POSSESSION OR CONSTRUCTIVE POSSESSION Possession means to

subsection (A) is rooted in longstanding District case law.[470] As under current law, subsection (B) of the RCC definition of "possess" requires both an ability and desire to control the item possessed in order to prove constructive possession.[471] Although District case law has frequently used the phrase "dominion or control"[472] or the phrase "dominion and control"[473] to describe constructive possession, the RCC follows current District practice in omitting reference to "dominion" as unnecessary and potentially confusing.[474]

"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.

Explanatory Note. The RCC defines "prohibited weapon" to include enumerated items that are designed to cause death or serious bodily injury, and accessories thereto, and lack other beneficial functions.

The RCC definition of "prohibited weapon" is new; the term is not currently defined in Title 22 of the D.C. Code (although the term has been used in District case law[475] and practice[476] to refer to weapons listed in D.C. Code § 22-4514(a)). The RCC definition of "prohibited weapon" is used in the revised definitions of "dangerous weapon" in RCC § 22E-701 [and will appear in 22E-41[XX] (Possession of a Prohibited Weapon, which will replace D.C. Code § 22-4514)]. [The Commission has not yet issued recommendations for weapons offenses or enhancements.]

Relation to Current District Law. The RCC definition of "prohibited weapon" is new and does not substantively change District law. The revised definition provides a discrete name for items listed in an existing statute. The items in the revised definition are substantively identical[477] to those currently listed in D.C. Code § 22-4514(a).[478] All

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have physical possession or to otherwise exercise control over tangible property. A person may possess property in either of two ways. First, the person may have physical possession of it by holding it in his or her hand or by carrying it in or on his or her body or person. This is called 'actual possession.' Second, a person may exercise control over property not in his or her physical possession if that person has both the power and the intent at a given time to control the property. This is called 'constructive possession.'").

[470] *United States v. Hubbard*, 429 A.2d 1334, 1338 (D.C. 1981) ("Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. *See United States v. Spears*, 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States*, 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940).").

[471] *Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc).

[472] *Id.*

[473] *Guishard v. U.S.*, 669 A.2d 1306, 1312 (D.C. 1995).

[474] *See* D.C. Crim. Jur. Instr. § 3-104. Possession-Defined. Comment. ("In previous editions, the Committee recommended deletion of the term "dominion" from this instruction. 'Dominion,' which is not used in everyday speech, may create misunderstanding, especially among lay jurors, and adds nothing intellectually distinct to the concept of 'control.' The Committee adheres to this view.").

[475] *See, e.g., Jones v. United States*, 67 A.3d 547, 549 (D.C. 2013).

[476] D.C. Crim. Jur. Instr. § 6.503. Possession of a Prohibited Weapon.

[477] For clarity, the RCC refers to a "sandbag" as a "sandbag cudgel," and simply refers to "any instrument, attachment, or appliance for causing the firing of any firearm to be silent or intended to lessen or muffle the

items listed are recognized in current District case law as being uniquely suspect, even as compared to other per se dangerous weapons listed in D.C. Code § 22-4514(b).[479] Codifying a definition of "prohibited weapon" improves the clarity and consistency of District law.

"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.

Explanatory Note. The RCC definition of "property" replaces the current definition of "property" in D.C. Code § 22-3201(3),[480] applicable to provisions in Chapter 32, Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and provisions. The RCC definition of "property" is used in the RCC definition of "property of another,"[481] the provision for aggregation to determine property offense grades,[482] as well as the revised offenses of theft,[483] unauthorized use of property,[484] shoplifting,[485] criminal damage to property,[486] criminal graffiti,[487] fraud,[488] payment card fraud,[489]

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noise of the firing of any firearms" as a "firearm silencer." These changes are not intended to change current District law.

[478] D.C. Code § 22-4514 ("(a) No person shall within the District of Columbia possess any machine gun, sawed-off shotgun, knuckles, or any instrument or weapon of the kind commonly known as a blackjack, slungshot, sand club, sandbag, switchblade knife, nor any instrument, attachment, or appliance for causing the firing of any firearm to be silent or intended to lessen or muffle the noise of the firing of any firearms."). Notably, the weapons listed in D.C. Code § 22-4502(b), mainly long knives, have the additional requirement that they be possessed with "intent to use unlawfully;" unlike the items in D.C. Code § 22-4502(a), current D.C. law does not prohibit their possession under all circumstances.

[479] *United States v. Brooks*, 330 A.2d 245, 247 (1974) ("The wording of subsection (a), which forbids the mere possession of certain specifically named items, is clearly distinguishable from subsection (b) by its total lack of any requirement that the possessor of these items intends to use them unlawfully. The weapons listed in subsection (a) are so highly suspect and devoid of lawful use that their mere possession is forbidden.").

[480] D.C. Code 22-3201(3) ("'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.").

[481] RCC § 22E-701.

[482] RCC § 22E-2002.

[483] RCC § 22E-2101.

[484] RCC § 22E-2102.

[485] RCC § 22E-2104.

[486] RCC § 22E-2503.

[487] RCC § 22E-2504.

[488] RCC § 22E-2201.

[489] RCC § 22E-2202.

check fraud,[490] forgery,[491] identity theft,[492] financial exploitation of a vulnerable adult,[493] possession of stolen property,[494] trafficking of stolen property,[495] and extortion.[496]

Relation to Current District Law. The RCC definition of "property" is identical to the statutory definition under current law.[497]

"Property of another" means any property that a person has an interest in with which the actor is not privileged to interfere without consent, regardless of whether the actor also has an interest in that property. The term "property of another" does not include any property in the possession of the actor with which the other person has only a security interest.

Explanatory Note. In the RCC, the revised definition of "property of another" generally builds upon separate, civil law determinations of property rights. With the exception of property in the possession of the accused that the other person has only a security interest, the definition of "property of another" follows civil law determinations of property rights.

Property is "property of another" when a person has an interest in the property with which the actor is not privileged to interfere without consent, regardless of whether the actor also has an interest in that property. It is irrelevant that the other person may be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband.[498] In addition, this language does not categorically determine issues of joint ownership, such as, for example, whether a spouse can steal from a spouse or a partner can steal from a partnership. The phrase "regardless of whether the accused also has an interest in that property" in the revised definition clarifies that having joint ownership or other property interests in an item does not necessarily mean it is not "property of another." The state of civil law as to whether a joint owner or person with a property interest has a right to interfere with the other joint owner's right to an item will continue to control whether that property is "property of another," as it does under current District law.

The second sentence of the revised definition of "property of another" establishes a narrow exclusion for security interests. Under this part of the revised definition, an individual who is a debtor cannot steal, misappropriate, or damage property in his or her possession in which the other person—the complainant—has only a security interest. Civil remedies such as contract liability, rather than criminal liability, address this situation between the debtor and creditor. However, under the revised definition, a third party can be criminally liable for stealing, misappropriating, or damaging property that is

[490] RCC § 22E-2203.
[491] RCC § 22E-2204.
[492] RCC § 22E-2205.
[493] RCC § 22E-2208.
[494] RCC § 22E-2401.
[495] RCC § 22E-2402.
[496] RCC § 22E-2301.
[497] D.C. Code 22-3201(3).
[498] For example, a second thief can steal previously stolen property or contraband from the first thief, even though the second thief may not be able to sue the first thief in civil court to recover the property or contraband.

in the possession of the debtor because the debtor does not have only a security interest in that property, the debtor also has a possessory interest.

The RCC definition of "property of another" replaces the current statutory definition of "property of another" in D.C. Code § 22-3201(4),[499] applicable to provisions in Chapter 32, Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and provisions. The RCC definition of "property of another" is used in the revised offenses of robbery,[500] theft,[501] unauthorized use of property,[502] shoplifting,[503] criminal damage to property,[504] criminal graffiti,[505] fraud,[506] forgery,[507] identity theft,[508] financial exploitation of a vulnerable adult,[509] and extortion.[510]

Relation to Current District Law. The RCC definition of "property of another" makes one clear change to the current statutory definition of "property of another" in current D.C. Code § 22-3201(4).[511] The RCC definition of "property of another" narrows the scope of the security interest exception that is in the current definition of "property of another." The last sentence of the current definition of "property of another" states that "property of another" excludes property in the possession of the accused as to which "any" person has only a security interest.[512] As a result, any offense that requires property to be "property of another" excludes from its coverage a broad category of property. The legislative history for the current definition of "property of another" contains conflicting explanations of the intended meaning of the exclusion of security interests.[513] The legislative history does not recognize that its explanations conflict with one another, which indicates that the Council likely did not intend to exclude all property in which another person has a security interest. In contrast, the revised definition of

[499] 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 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.").
[500] RCC § 22E-1201
[501] RCC § 22E-2101.
[502] RCC § 22E-2102.
[503] RCC § 22E-2104.
[504] RCC § 22E-2503.
[505] RCC § 22E-2504.
[506] RCC § 22E-2201.
[507] RCC § 22E-2204.
[508] RCC § 22E-2205.
[509] RCC § 22E-2208.
[510] RCC § 22E-2301.
[511] in D.C. Code § 22-3201(4).
[512] D.C. Code 22-3201(4) ("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.").
[513] The legislative history for the 1982 Theft Act notes that the definition of "property of another" "does not extend to *property in which the other person* has only a security interest. Thus, the ordinary credit transaction is not included in this definition." *Extension of Comments on Bill No. 4-193* at 17 (emphasis added). However, the legislative history also notes that "property of another" "is not intended to cover property that is in *a person's* possession and in which another person has only a security interest." *Id.* at 4 (emphasis added). Given the different wordings in the explanations of "property of another," it appears that the drafters of the 1982 Theft Act did not consider or realize that the definition of "property of another" may exclude *all* property that has a security interest from theft offenses.

"property of another" narrows the exclusion for security interests to situations where "the other person"—the complaining witness—is the party that has the security interest. Civil remedies such as contract liability, rather than criminal liability, address this situation. The revised definition of "property of another" does not change the limited D.C. Court of Appeals (DCCA) case law holding that the government does not have to prove the security interest exception as an element of shoplifting.[514] This change clarifies the definition and reduces a gap in District law.

The remaining changes to the revised definition are clarificatory and are not intended to change current District law.

First, the revised definition of "property of another" deletes the reference to "government" in the first sentence of the current definition.[515] The reference is surplusage because the revised definition of "property of another" incorporates the revised definition of "person." The revised definition of "person" in 22E-701 includes governments, corporations, and other legal entities, where such construction is reasonable. Deleting the reference to government clarifies the definition without changing District law.

Second, the revised definition deletes the sentence, "The term 'property of another' includes the property of a corporation or other legal entity established pursuant to an interstate compact" that is in the current definition.[516] The sentence is superfluous because the revised definition of "property of another" incorporates the revised definition of "person." The revised definition of "person" in 22E-701 includes corporations and other legal entities, where such construction is reasonable.

Third, the revised definition of "property of another" refers to "actor" instead of the "accused" that is in the current definition.[517] RCC § 22E-701 defines "actor" as a "person accused of any criminal offense." Using "actor" instead of "accused" is a drafting change and does not substantively change current District law.

Finally, the revised definition deletes "infringe upon" that is in the current definition of "property of another."[518] The revised definition specifies "not privileged to interfere," rendering "infringe upon" superfluous. Deleting "not privileged to interfere" does not change District law.

"Protected person" means a person who is:

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

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[514] *Alston v. United States*, 509 A.2d 1129, 1130-1131 (D.C. 1986) ("there was no intention [on the part of the Council] to transform the exception for property in which a security interest is held by another in the definitional section into an element of the offense of shoplifting which must be proved by the government in its case in chief. We therefore may not impose that requirement of prof on the government in shoplifting cases.").

[515] 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 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.").

[516] *Id*.

[517] D.C. Code § 22-3201(4).

[518] *Id*.

(B) 65 years of age 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 his or her official duties;
(E) A public safety employee, while in the course of his or her official duties;
(F) A transportation worker, while in the course of his or her official duties; or
(G) A District official, while in the course of his or her official duties.

Explanatory Note. The RCC definition of "protected person" is new, the term is not currently defined in Title 22 of the D.C. Code (although there are several similar terms and related provisions in Title 22 concerning crimes against minors,[519] elderly persons,[520] vulnerable adults,[521] law enforcement officers,[522] public safety employees,[523]

[519] D.C. Code § 22-3611 ("(a) Any adult, being at least 2 years older than a minor, who commits a crime of violence against that minor may be punished by a fine of up to 1 ½ times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to 1 ½ times the maximum term of imprisonment otherwise authorized for the offense, or both. (b) It is an affirmative defense that the accused reasonably believed that the victim was not a minor at the time of the offense. This defense shall be established by a preponderance of the evidence. (c) For the purposes of this section, the term: (1) "Adult" means a person 18 years of age or older at the time of the offense. (2) "Crime of violence" shall have the same meaning as provided in § 23-1331(4). (3) "Minor" means a person under 18 years of age at the time of the offense.").

[520] D.C. Code §§ 22-932(3) (abuse of a vulnerable adult or elderly person statutes defining "elderly person" as "a person who is 65 years of age or older."); 22-3601 ("(a) Any person who commits any offense listed in subsection (b) of this section against an individual who is 65 years of age or older, at the time of the offense, may be punished by a fine of up to 1 1/2 times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to 1 1/2 times the maximum term of imprisonment otherwise authorized for the offense, or both. (b) The provisions of subsection (a) of this section shall apply to the following offenses: Abduction, arson, aggravated assault, assault with a dangerous weapon, assault with intent to kill, commit first degree sexual abuse, or commit second degree sexual abuse, assault with intent to commit any other offense, burglary, carjacking, armed carjacking, extortion or blackmail accompanied by threats of violence, kidnapping, malicious disfigurement, manslaughter, mayhem, murder, robbery, sexual abuse in the first, second, and third degrees, theft, fraud in the first degree, and fraud in the second degree, identity theft, financial exploitation of a vulnerable adult or elderly person, or an attempt or conspiracy to commit any of the foregoing offenses. (c) It is an affirmative defense that the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed. This defense shall be established by a preponderance of the evidence.").

[521] D.C. Code § 22-932(5) (abuse of a vulnerable adult or elderly person statutes defining "vulnerable adult" as 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.").

[522] D.C. Code § 22-405 ("(a) For the purposes of this section, the term "law enforcement officer" means any officer or member of any police force operating and authorized to act in the District of Columbia, including any reserve officer or designated civilian employee of the Metropolitan Police Department, any licensed special police officer, any officer or member of any fire department operating in the District of Columbia, any officer or employee of any penal or correctional institution of the District of Columbia, 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

taxicab drivers,[524] transit operators and Metrorail station managers,[525] and District officials or employees.[526]). The RCC definition of "protected person" replaces these

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such institution or facility is located within the District, any investigator or code inspector employed by the government of the District of Columbia, or any officer or employee of the Department of Youth Rehabilitation Services, Court Services and Offender Supervision Agency, the Social Services Division of the Superior Court, or Pretrial Services Agency charged with intake, assessment, or community supervision. (b) Whoever without justifiable and excusable cause assaults a law enforcement officer on account of, or while that law enforcement officer is engaged in the performance of his or her official duties shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned not more than 6 months or fined not more than the amount set forth in § 22-3571.01, or both. (c) A person who violates subsection (b) of this section and causes significant bodily injury to the law enforcement officer, or commits a violent act that creates a grave risk of causing significant bodily injury to the officer, shall be guilty of a felony and, upon conviction, shall be imprisoned not more than 10 years or fined not more than the amount set forth in § 22-3571.01, or both. (d) It is neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful."); D.C. Code § 22-2106 "(a) Whoever, with deliberate and premeditated malice, and with knowledge or reason to know that the victim is a law enforcement officer or public safety employee, kills any law enforcement officer or public safety employee engaged in, or on account of, the performance of such officer's or employee's official duties, is guilty of murder of a law enforcement officer or public safety employee, and shall be sentenced to life without the possibility of release. It shall not be a defense to this charge that the victim was acting unlawfully by seizing or attempting to seize the defendant or another person. (b) For the purposes of subsection (a) of this section, the term: (1) "Law enforcement officer" means: (A) A sworn member of the Metropolitan Police Department; (B) A sworn member of the District of Columbia Protective Services; (C) The Director, deputy directors, and officers of the District of Columbia Department of Corrections; (D) Any probation, parole, supervised release, community supervision, or pretrial services officer of the Court Services and Offender Supervision Agency or The Pretrial Services Agency; (E) Metro Transit police officers; and (F) 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. (2) "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. (c) In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[523] D.C. Code § 22-2106 ("(a) Whoever, with deliberate and premeditated malice, and with knowledge or reason to know that the victim is a law enforcement officer or public safety employee, kills any law enforcement officer or public safety employee engaged in, or on account of, the performance of such officer's or employee's official duties, is guilty of murder of a law enforcement officer or public safety employee, and shall be sentenced to life without the possibility of release. It shall not be a defense to this charge that the victim was acting unlawfully by seizing or attempting to seize the defendant or another person. (b) For the purposes of subsection (a) of this section, the term: . . . (2) "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. (c) In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[524] D.C. Code § 22-3751 ("Any person who commits an offense listed in § 22-3752 against a taxicab driver who, at the time of the offense, has a current license to operate a taxicab in the District of Columbia or any United States jurisdiction and is operating a taxicab in the District of Columbia may be punished by a fine of up to one and 1/2 times the maximum fine otherwise authorized for the offense and may be imprisoned

terms and provisions and is used in the revised offenses of murder,[527] manslaughter,[528] robbery,[529] assault,[530] aggravated kidnapping,[531] and aggravated criminal restraint.[532]

Relation to Current District Law. The revised definition of "protected person" makes seven clear changes to the statutory language of the provisions in current Title 22 for crimes against minors,[533] elderly persons,[534] vulnerable adults,[535] law enforcement officers,[536] public safety employees,[537] taxicab drivers,[538] transit operators and Metrorail station managers,[539] and District officials or employees.[540]

First, subsection (A) requires at least a four year age gap between the actor and the complainant and, by use of the phrase "in fact," requires strict liability for the age gap. The District's current penalty enhancement for certain crimes against minors

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for a term of up to one and 1/2 times the maximum term of imprisonment otherwise authorized for the offense, or both.").

[525] D.C. Code § 22-3751.01 ("(a) Any person who commits an offense enumerated in § 22-3752 against a transit operator, who, at the time of the offense, is authorized to operate and is operating a mass transit vehicle in the District of Columbia, or against Metrorail station manager while on duty in the District of Columbia, may be punished by a fine of up to one and ½ times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to one and ½ times the maximum term of imprisonment otherwise authorized by the offense, or both. (b) For the purposes of this section, the term: (1) "Mass transit vehicle" means any 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. (2) "Metrorail station manager" means any Washington Metropolitan Area Transit Authority employee who is assigned to supervise a Metrorail station from a kiosk at that station. (3) "Transit operator" means a person who is licensed to operate a mass transit vehicle.").

[526] D.C. Code § 22-851 ("(a) For the purposes of this section, the term: . . . (2) "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 . . . (c) A person who stalks, threatens, assaults, kidnaps, or injures any official or employee or vandalizes, damages, destroys, or takes the property of an official or employee, while the official or employee is engaged in the performance of his or her duties or on account of the performance of those duties, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 3 years, or both, in addition to any other penalties authorized by law. (d) A person who stalks, threatens, assaults, kidnaps, or injures a family member or vandalizes, damages, destroys, or takes the property of a family member on account of the performance of the official or employee's duties, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 3 years, or both, in addition to any other penalties authorized by law.").

[527] RCC § 22E-1101.

[528] RCC § 22E-1102.

[529] RCC § 22E-1201.

[530] RCC § 22E-1202.

[531] RCC § 22E-1401.

[532] RCC § 22E-1403.

[533] D.C. Code § 22-3611.

[534] D.C. Code § 22-932(3).

[535] D.C. Code § 22-932(5).

[536] D.C. Code §§ 22-405; 22-2106.

[537] D.C. Code § 22-2106.

[538] D.C. Code § 22-3751.

[539] D.C. Code § 22-3751.01.

[540] D.C. Code § 22-851.

requires only a two year age gap[541] between an actor that is 18 years of age or older and a complainant that is under 18 years of age.[542] The current penalty enhancement[543] does not specify any culpable mental state for the age gap and District practice[544] suggests that strict liability applies, although there is no case law on point. In contrast, subsection (A) of the RCC definition of "protected person" requires a four year age gap, which creates uniformity with the required age gap in several current District offenses[545] as well as several of the revised sex offenses in RCC chapter 13. Requiring strict liability for the age gap clarifies current District law and is consistent with several of the revised sexual offenses in RCC chapter 13. This change improves the clarity, consistency, and proportionality of the revised offenses against persons.

Second, subsection (B) requires that the actor be at least 10 years younger than the complainant and, by use of the phrase "in fact," applies strict liability to this requirement. Neither the current penalty enhancement for crimes committed against senior citizens[546] nor the current offenses for criminal abuse[547] and criminal neglect of an elderly person[548] require an age gap between the elderly complainant and the actor. In contrast, subsection (B) of the RCC definition of "protected person" requires that the actor be at least 10 years younger than the complainant and applies strict liability to this requirement. The age gap requirement for the actor reserves enhanced penalties for predatory behavior targeting the elderly, rather than violence between elderly persons,

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

[542] Subsection (A) of the RCC definition of "protected person" and the current penalty enhancement for crimes against minors have the same age requirements for the actor and the complainant. The current penalty enhancement defines "adult" as a "person 18 years of age or older at the time of the offense" and a "minor" as a "person under 18 years of age at the time of the offense." D.C. Code § 22-3601(c). Rather than separately defining the terms of "adult" and "minor" like the current statute, subsection (A) incorporates the definitions of these terms directly into the revised statute, improving the clarity of the definition.

[543] The current penalty enhancement does not specify any culpable mental state for the required age gap. In addition, the current enhancement contains an affirmative defense that the accused "reasonably believed" that the victim was not a minor at the time of the offense. D.C. Code § 22-3611(b). However, the affirmative defense does not apply to the required age difference.

[544] D.C. Crim. Jur. Instr. § 8.103.

[545] 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.

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

[547] D.C. Code §§ 22-933; 22-932(3) (defining "elderly person" as "a person who is 65 years of age or older.").

[548] D.C. Code §§ 22-934; 22-932(3) (defining "elderly person" as "a person who is 65 years of age or older.").

and is consistent with a penalty enhancement in the revised sexual assault statute (RCC § 22E-1303), as is the strict liability requirement. This change improves the consistency and proportionality of the revised offenses against persons statutes.

Third, subsection (C) of the RCC definition of "protected person" includes a complainant that is a "vulnerable adult," as that term is defined in RCC § 22E-701. Under current District law, a vulnerable adult is extended special protection under the criminal abuse of a vulnerable adult,[549] financial exploitation of a vulnerable adult,[550] and criminal neglect of a vulnerable adult[551] statutes, but those are the only offenses. In contrast, subsection (C) of the RCC definition of "protected person" consistently enhances penalties for harms to a "vulnerable adult" in certain RCC offenses against persons because vulnerable adults are among those most susceptible to criminal acts. This change improves the clarity, consistency, and proportionality of the revised offenses against persons.

Fourth, subsection (D) and subsection (E) of the RCC definition of "protected person" include complainants that are a "law enforcement officer" and a "public safety officer," as those terms are defined in RCC § 22E-701. Under current District law, harms to law enforcement officers receive enhanced penalties for assault and murder,[552] and harms to public safety employees receive enhanced penalties for murder.[553] In contrast, subsection (D) and subsection (E) of the RCC definition of "protected person" consistently enhance penalties for harms to law enforcement officers and public safety employees in certain RCC offenses against persons. This change improves these offenses' consistency and proportionality of statutes by treating persons in similarly protected positions equally.

Fifth, subsection (F) of the RCC definition of "protected person" includes complainants that are a "transportation worker," as that term is defined in RCC § 22E-701. Under current District law, certain harms to taxicab drivers,[554] transit operators, [555] and Metrorail station managers[556] receive enhanced penalties, but the enhancements apply to different offenses as compared to other current penalty enhancements in District law, such as the penalty enhancement for crimes committed against minors.[557] Current

[549] D.C. Code § 22-933.
[550] D.C. Code § 22-933.01.
[551] D.C. Code § 22-934.
[552] D.C. Code §§ 22-405 (assault on a police officer statute); 22-2106 (murder of a law enforcement officer statute). In addition to these specific offenses, D.C. Code § 22-851 prohibits committing specified crimes against a law enforcement officer while the law enforcement officer is engaged in the performance of his or her duties or on account of the performance of those duties, provided that the law enforcement officer is also a District "official or employee," as that term is defined in D.C. Code § 22-851. D.C. Code § 22-851(a)(2), (c).
[553] D.C. Code § 22-2106. In addition, D.C. Code § 22-851 prohibits committing specified crimes against a public safety employee while the public safety employee is engaged in the performance of his or her duties or on account of the performance of those duties, provided that the public safety employee is also a District "official or employee," as that term is defined in D.C. Code § 22-851. D.C. Code § 22-851(a)(2), (c).
[554] D.C. Code § 22-3751.
[555] D.C. Code § 22-3751.01.
[556] D.C. Code § 22-3751.01.
[557] For example, the current penalty enhancement for crimes committed against minors applies to any crime that is a "crime of violence," as that term is defined in D.C. Code § 22-1331(4). D.C. Code § 22-3611(a), (c)(2). The definition of "crime of violence" is broad and includes several crimes that are not included in the penalty enhancements for taxicab drivers, transit operators, and Metrorail station managers in D.C.

District law also does not have a penalty enhancement for crimes committed against private car service drivers. In contrast, subsection (F) of the RCC definition of "protected person, through the definition of "transportation worker" in RCC § 22E-701, consistently enhances penalties for harms to transportation workers, including private car service drives, in certain RCC offenses against persons. This change improves these offenses' consistency and proportionality of statutes by treating persons in similarly protected positions equally.

Sixth, subsection (G) of the RCC definition of "protected person" effectively repeals current D.C. Code § 22-851. Current D.C. Code § 22-851(b)[558] and (c)[559] prohibit committing specified crimes against any District "official or employee," broadly defined in D.C. Code § 22-851(a)[560] as "a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions."[561] Current D.C. Code D.C Code § 22-851(d) prohibits committing specified crimes against a "family member" of a District official or employee, as defined in D.C. Code § 22-851(a),[562] on account of the official or employee's performance of official duties.[563] In contrast, subsection (G) of the RCC definition of "protected person" is limited to a "District official," as that term is

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Code §§ 22-3751, 22-3751.01, and 22-3752. For example, assault with significant bodily injury, assault with intent to kill, assault with intent to commit first degree or second degree child sexual abuse, and burglary are included in the penalty enhancement for crimes against minors, but not the penalty enhancement for the transit operators, and Metrorail station managers. Although the scope of crimes for the penalty enhancement against minors is far broader than the penalty enhancement for crimes committed against transit operators, and Metrorail station managers, there are a few crimes in the penalty enhancement for crimes committed against transit operators, and Metrorail station managers that are not include in the penalty enhancement for minors, such as fourth degree sexual abuse and misdemeanor sexual abuse.

[558] D.C. Code § 22-851(b) ("A person who corruptly or, by threat or force, or by any threatening letter or communication, intimidates, impedes, interferes with, or retaliates against, or attempts to intimidate, impede, interfere with, or retaliate against any official or employee, while the official or employee is engaged in the performance of his or her duties or on account of the performance of those duties, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both."). Conduct within the scope of subsection (b) of D.C Code § 22-851 may also be affected by the revised [obstruction of justice offenses in RCC § 22E-XXXX, forthcoming].

[559] D.C. Code § 22-851(c) ("A person who stalks, threatens, assaults, kidnaps, or injures any official or employee or vandalizes, damages, destroys, or takes the property of an official or employee, while the official or employee is engaged in the performance of his or her duties or on account of the performance of those duties, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 3 years, or both, in addition to any other penalties authorized by law.").

[560] D.C. Code § 22-851(a) ("For the purposes of this section, the term: (2) '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.").

[561] D.C. Code § 22-851(a)(2).

[562] D.C. Code § 22-851(a) ("For the purposes of this section, the term: (1) 'Family member" means an individual to whom the official or employee of the District of Columbia is related by blood, legal custody, marriage, domestic partnership, having a child in common, the sharing of a mutual residence, or the maintenance of a romantic relationship not necessarily including a sexual relationship.').

[563] D.C. Code § 22-851(d) ("A person who stalks, threatens, assaults, kidnaps, or injures a family member or vandalizes, damages, destroys, or takes the property of a family member on account of the performance of the official or employee's duties, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 3 years, or both, in addition to any other penalties authorized by law.").

defined in RCC § 22E-701,[564] and does not include family members of District officials. The RCC definition of "District official" narrows the penalty enhancement to individuals that have special obligations in District government.[565] This change improves the consistency and proportionality of the revised offenses against persons.

Seventh, the RCC definition of "protected person" eliminates the current penalty enhancement for a "citizen patrol member." Current District law has a penalty enhancement for committing specified crimes against a member of a citizen patrol in the course of his or her duties or because of his or her participation in a citizen patrol.[566] In contrast, the RCC definition of "protected person" does not include citizen patrol members and, by extension, does not enhance penalties for this category of complainants in the RCC offenses against persons. This change improves the consistency and proportionality of the revised offenses against persons.

Other changes to the statutory language of the provisions in current Title 22 for crimes against minors,[567] elderly persons,[568] vulnerable adults,[569] law enforcement officers,[570] public safety employees,[571] taxicab drivers,[572] transit operators and Metrorail station managers,[573] and District officials or employees[574] are merely clarificatory. For instance, because the element that the complainant is a "protected person" is part of the gradations in several RCC offenses against persons, rather than a stand-alone penalty enhancement, there is no need to specify that the complainant must satisfy the requirements of the definition "at the time of the offense" as some current sentencing enhancements do.[575]

As applied to certain RCC offenses against persons, the RCC definition of "protected person" may substantively change current District law. For example, the RCC assault and robbery offenses eliminate the affirmative defenses in the current penalty enhancements for committing crimes against the elderly or minors. Under current District law, it is an affirmative defense to the senior citizen penalty enhancement that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed."[576] Similarly, under the current

[564] RCC § 22E-701 defines "District official" as having the same meaning as the term "public official" in D.C. Code § 1-1161.01(47). D.C. Code § 1-1161.01(47) is limited to individuals that have special ethical and campaign finance obligations under the current D.C. Code and is discussed further in the commentary to RCC § 22E-701.
[565] For example, many of the individuals in the definition of "public official" are required to file annual public financial disclosures, D.C. Code § 1-1162.24, and all public officials are subject to possible censure for certain ethical violations. D.C. Code § 1-1162.22(a).
[566] D.C. Code § 22-3602.
[567] D.C. Code § 22-3611.
[568] D.C. Code §§ 22-932(3).
[569] D.C. Code § 22-932(5).
[570] D.C. Code §§ 22-405; 22-2106.
[571] D.C. Code § 22-2106.
[572] D.C. Code § 22-3751.
[573] D.C. Code § 22-3751.01.
[574] D.C. Code § 22-851.
[575] D.C. Code § 22-3601; D.C. Code § 22-3611(c)(1), (c)(2); D.C. Code § 22-3751; D.C. Code § 22-3751.01(a).
[576] D.C. Code § 22-3601(c).

minor victim enhancement, it is an affirmative defense that "the accused reasonably believed that the victim was not a minor [person less than 18 years old] at the time of the offense."[577] Instead of an affirmative defense, the RCC assault and robbery offenses apply a "reckless" culpable mental state to gradations that require that the complaint is a "protected person." "Reckless" is defined in RCC § 22E-206 and here requires that the accused must disregard a substantial risk that the complainant was under 18 or was 65 years of age or older. The "reckless" culpable mental state preserves the substance of the defenses for both the senior citizen enhancement and minor enhancement.[578] However, requiring a "reckless" culpable mental state improves the clarity and consistency of the offenses because the RCC assault and robbery statutes apply a "recklessly" mental state to the other categories of individuals in the definition of "protected person."

The commentaries to relevant RCC offenses against persons discuss in detail the effect of the RCC definition of "protected person" on current District law

"Protection order" means an order issued pursuant to D.C. Code § 16-1005(c).

Explanatory Note. The RCC definition of "protection order" does not include civil injunctions or extrajudicial orders.

The RCC definition of "protection order" is new; the term is not currently defined in Title 22 of the D.C. Code (although an undefined reference to "protection order" appears in the current tampering with a detection device statute[579]). The RCC definition of "protection order" is used in the revised offense of tampering with a detection device.[580]

Relation to Current District Law. The RCC definition of "protection order" is new and does not substantively change District law.

As applied in the revised tampering with a detection device offense, the term "protection order" clarifies, but does not change, current District law. The current statute uses the phrase "protection order" but does not define it. Case law has not addressed its meaning. The revised code specifies that "protection order" refers to the civil protection orders that are issued after formal notice and hearing under Title 16 of the D.C. Code. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

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[577] D.C. Code § 22-3611(b).

[578] The current enhancement for crimes against senior citizens makes it an affirmative defense that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed." D.C. Code § 22-3601(c). In the RCC, an accused that knew or reasonably believed that the complainant was not 65 years or older or could not have known or determined the age of the complainant would not satisfy the culpable mental state of recklessness as to the age of the complaining witness. The accused would not consciously disregard a substantial risk that the complainant was 65 years of age or older. Similarly, the current enhancement for crimes against minors has an affirmative defense that "the accused reasonably believed that the victim was not a minor at the time of the offense." D.C. Code Ann. § 22-3611(b). If an accused reasonably believed that the complaining witness was not a minor, the accused would not satisfy the culpable mental state of recklessness as to the age of the complaining witness because the accused would not consciously disregard a substantial risk that the complainant was under 18 years of age.

[579] D.C. Code § 22-1211(a)(1).

[580] RCC § 22E-3402.

"Public body" has the meaning specified in D.C. Code § 2-574.

Explanatory Note. The RCC definition of "public body" is new; the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "public body" cross-references the definition of "public body" in D.C. Code § 2-574, the District's Open Meetings Act. The RCC definition of "public body" is used in the revised offense of public nuisance.[581]

Relation to Current District Law. The RCC definition of "public body" cross-references the definition of "public body" in D.C. Code § 2-574 and does not substantively change current District law.

As applied to the revised public nuisance offense, the term "public body" clarifies, but does not substantively change, District law. The current disorderly conduct statute makes it unlawful to "engage in loud, threatening, or abusive language, or disruptive conduct in a public building with the intent and effect of impeding or disrupting the orderly conduct of business in that public building." The terms "orderly conduct," "business," and "public building" are not defined. Case law has not addressed their meanings. Legislative history indicates this provision was intended to forbid disruption of the D.C. Council or other public meetings, in a manner comparable to D.C. Code §10-503.15, which prohibits the disruption of Congress.[582] To resolve ambiguities about the scope of this provision, the revised code clarifies that it is the nature of the meeting as one of a public decision-making body that is controlling, and not the ownership or operation of the building. The revised code makes it unlawful to cause an unreasonable interruption of "the orderly conduct of a meeting by a public body" and incorporates the definitions of "public body" and "meeting" from the District's Open Meetings Act. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

"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.

Explanatory Note. The RCC definition of "public conveyance" is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "public conveyance" appear in the current disorderly conduct statute[583]). The RCC definition of "public conveyance" is used in the revised offense of public nuisance.[584]

Relation to Current District Law. The RCC definition of "public conveyance" is new and does not substantively change District law.

As applied in the revised public nuisance statute, the term "public conveyance" clarifies, but does not change, District law. The current disorderly conduct statute (which includes public nuisances) uses the phrase "public conveyance" but does not define it. Case law does not address its meaning. The revised code adds a definition of

[581] RCC § 22E-4202.
[582] *See* Revising the District of Columbia Disorderly Conduct Statutes: A Report and Proposed Legislation Prepared by The Disorderly Conduct Arrest Project Subcommittee of the Council for Court Excellence (October 14, 2010) at Page 11.
[583] D.C. Code § 22-1321(c).
[584] RCC § 22E-4202.

"public conveyance" to be used universally throughout the RCC. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

"Public safety employee" means:

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

(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 paragraph (A) and paragraph (B).

Explanatory Note. The RCC definition of "public safety employee" replaces the current statutory definition of "public safety employee" in D.C. Code § 22-2106(b)(1),[585] applicable to the current murder of a law enforcement officer statute. The RCC definition of "public safety employee" is used in the RCC definition of "protected person"[586] and in the revised offenses of murder,[587] manslaughter,[588] assault,[589] aggravated kidnapping,[590] and aggravated criminal restraint.[591]

Relation to Current District Law. The RCC definition of "public safety employee" makes one clear change to the current statutory definition in D.C. Code § 22-2106(b)(1).[592] The current definition of "public safety employee" is limited to specified firefighters and emergency medical personnel, as well as any federal, state, county, or municipal officers performing comparable functions.[593] In contrast, subsection (B) of the RCC definition expands the definition to include "[a]ny 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." These categories of complainants are included in the definition of "law enforcement officer" for the District's current assault on a police officer (APO) statute,[594] as well as the assault on a public vehicle inspection officer statutes.[595] This change clarifies District law by distinguishing persons who are regularly

[585] D.C. Code § 22-2106(b)(1) ("'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.").
[586] RCC § 22E-701.
[587] RCC § 22E-1101.
[588] RCC § 22E-1102.
[589] RCC § 22E-1202.
[590] RCC § 22E-1401.
[591] RCC § 22E-1403.
[592] D.C. Code § 22-2106(b)(1).
[593] D.C. Code § 22-2106(b)(1).
[594] D.C. Code § 22-405(a) (defining "law enforcement officer" for the APO statute to include "any officer or member of any fire department operating in the District of Columbia" and "any investigator or code inspector employed by the government of the District of Columbia.").
[595] D.C. Code §§ 22-404.02; 22-404.03. Although the criminal offenses in D.C. Code §§ 22-404.02 and 22-404.03 state that the term "public vehicle inspection officer shall have the same meaning as provided in

involved with criminal law enforcement from others who are not, and creating broad, consistent definitions as to who constitutes a law enforcement officer or public safety employee.

As applied to certain RCC offenses against persons, the RCC definition of "public safety employee" may substantively change District law. For example, under current District law, murder is the only offense that enhances penalties specifically for physical harms to paramedics and emergency medical technicians.[596] Through their gradations referencing a "protected person," however, additional RCC offenses against persons, such as robbery and assault, provide new, enhanced penalties where a public safety employee—including paramedics, and emergency medical technicians—is victimized. The expansion of a penalty enhancement for harming such persons improves these offenses' consistency and proportionality of statutes by treating persons in similarly protected positions equally.

The commentaries to relevant RCC offenses against persons discuss in detail the effect of the RCC definition of "public safety employee" on current District law.

"Purposely" has the meaning specified in RCC § 22E-206.

Explanatory Note. The definition of "purposely" is addressed in the Commentary accompanying RCC § 22E-206.

"Recklessly" has the meaning specified in RCC § 22E-206.

Explanatory Note. The definition of "recklessly" is addressed in the Commentary accompanying RCC § 22E-206.

"Result element" has the meaning specified in RCC § 22E-201.

Explanatory Note. The definition of "result element" is addressed in the Commentary accompanying RCC § 22E-201.

"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.

Explanatory Note. Building grounds refers to the area of land occupied by the correctional facility and its yard and outbuildings, with a clearly identified perimeter.

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§ 50-303(19)," in fact the term "public vehicle inspection officer" no longer exists in Title 50 of the D.C. Code. The definition of "public vehicle inspection officer" was repealed with the passage of the Vehicle-For-Hire Innovation Amendment Act of 2014 ("VFHIAA") (Mar. 10, 2015, D.C. Law 20-197, § 2(a), 61 DCR 12430), although the VFHIAA included a substantially similar, new definition for a "vehicle inspection officer." D.C. Code §50-301.03(30B) ("'Vehicle inspection officer' means a District employee trained in the laws, rules, and regulations governing public and private vehicle-for-hire service to ensure the proper provision of service and to support safety through street enforcement efforts, including traffic stops of public and private vehicles-for-hire, pursuant to protocol prescribed under this act and by regulation.") The VFHIAA legislative history does not, however, appear to include reference to the assault on public vehicle inspection officers offenses in D.C. Code §§ 22-404.02 and 22-404.03 or discuss how those offenses might be affected by the elimination of "public vehicle inspection officers."

[596] Note however, that assault-type behavior against all District employees in the course of their duties (including paramedics and emergency medical technicians) are subject to higher level penalties under the District's protection of district public officials statute, D.C. Code § 22-851.

The word "secure" makes clear that a placement at home or in a community-based residential facility is excluded.[597] The definition does not include facilities such as behavioral health hospitals that are principally concerned with providing medical care. The definition does not include buildings used by private businesses to detain suspected criminals, such as a booking room in a retail store.

The RCC definition of "secure juvenile detention facility" is new; the term is not currently defined in Title 22 of the D.C. Code (although similar language is used in the current escape from institution or officer,[598] escape from juvenile facilities,[599] and unlawful possession of contraband[600] offenses). The term "building" that is used in the definition of "secure juvenile detention facility" is defined elsewhere in RCC § 22E-701. The RCC definition of "secure juvenile detention facility" is used in the revised escape from a correctional facility or officer[601] and correction facility contraband [602]offenses.

Relation to Current District Law. The RCC definition of "secure juvenile detention facility" is new and does not substantively change District law.

As applied in the revised escape from a correctional facility or officer offense, the term "secure juvenile detention facility" may substantively change District law. D.C. Code § 22-2601 uses the phrase "penal or correctional institution or facility" but does not define it. DCCA case law has held that, in addition to the Central Detention Facility ("D.C. Jail"), this phrase also includes the District's halfway houses,[603] however, case law is silent as to whether any juvenile detention facilities qualify.[604] D.C. Code § 10-509.01a uses the word "institution" and cross-references D.C. Code § 10-509.01, which is limited to locations outside the District of Columbia that operate as a "sanitorium, hospital, training school, correctional institution, reformatory, workhouse, or jail." In contrast, the revised code separately defines "correctional facility," "halfway house," and "secure juvenile detention facility" to be used universally throughout the RCC. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

As applied in the revised correctional facility contraband offense, the term "secure juvenile detention facility" may substantively change District law. D.C. Code § 22-2603.01 defines "secure juvenile residential facility" to mean "a locked residential facility providing custody, supervision, and care for one or more juveniles that is owned, operated, or under the control of the Department of Youth Rehabilitation Services, excluding residential treatment facilities and accredited hospitals." It defines "grounds" to mean "the area of land occupied by the penal institution or secure juvenile residential facility and its yard and outbuildings, with a clearly identified perimeter." In contrast, the revised code separately defines "correctional facility," "halfway house," and "secure

[597] Community-based residential facilities include group homes, therapeutic foster care, extended family homes, and independent living programs.
[598] D.C. Code § 22-2601.
[599] D.C. Code § 10-509.01a.
[600] D.C. Code § 22-2603.02.
[601] RCC § 22E-3401.
[602] RCC § 22E-3403.
[603] *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).
[604] Juvenile detention facilities are generally regarded as service providers and are not, strictly speaking, "penal" or correctional in nature.

juvenile detention facility" to be used universally throughout the RCC. Each definition includes buildings (also defined in RCC § 22E-701) and building grounds. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

"Self-induced intoxication" has the meaning specified in RCC § 22E-209.

Explanatory Note. The definition of "self-induced intoxication" is addressed in the Commentary accompanying RCC § 22E-209.

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

(D) A substantial risk of death;

(E) Protracted and obvious disfigurement; or

(F) Protracted loss or impairment of the function of a bodily member or organ.

Explanatory Note. "Serious bodily injury" is the highest of the three levels of bodily injury defined in the RCC. The definition incorporates the definitions of both lower levels: "bodily injury" and "significant bodily injury," also defined in RCC § 22E-701. The injury must involve a substantial risk of death or result in protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member or organ.

The RCC definition of "serious bodily injury" replaces the current statutory definition of "serious bodily injury" in D.C. Code § 22-3001(7),[605] applicable to provisions in Chapter 30, Sexual Abuse, and undefined references to "serious bodily injury" in the current aggravated assault,[606] criminal abuse or neglect of a vulnerable adult,[607] and unauthorized use of motor vehicle[608] statutes. There are undefined references to the term[609] and a different definition of the term[610] in other Title 22 statutes.

[605] D.C. Code § 22-3001(7) ("'Serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.").

[606] D.C. Code § 22-404.01 ("A person commits the offense of aggravated assault if: (1) By any means, that person knowingly or purposely causes serious bodily injury to another person…."); D.C. Code § 22-404.03 ("A person commits the offense of aggravated assault on a public vehicle inspection officer if that person…causes serious bodily injury to the public vehicle inspection officer; or…engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury.").

[607] D.C. Code § 22-936 ("A person who commits the offense of criminal abuse or criminal neglect of a vulnerable adult or elderly person which causes serious bodily injury….").

[608] D.C. Code § 22-3215(d)(2)(ii) ("If serious bodily injury results, imprisoned for not less than 5 years, consecutive to the penalty imposed for the crime of violence.").

[609] D.C. Code §§ 22-811(b)(4) (penalty provision for the contributing to the delinquency of a minor statute requiring that the minor or any other person sustain "serious bodily injury."); 22-3152(12)(A), (C), (D), (E), (defining "weapon of mass destruction" for the terrorism statutes to include "[a]ny destructive device that is designed, intended, or otherwise used to cause death or serious bodily injury . . .", "[a]ny weapon that is designed, intended, or otherwise used to cause death or serious bodily injury through the release, dissemination, or impact of a toxic or poisonous chemical," "[a]ny weapon that is designed, intended, or otherwise used to cause death or serious bodily injury through the release, dissemination, or impact of a biological agent or toxin," and "[a]ny weapon that is designed, intended, or otherwise used to cause death or serious bodily injury through the release, dissemination, or impact of radiation or radioactivity, or that contains nuclear material."); 22-3154(a), (b) (manufacture or possession of a weapon of mass destruction

The RCC definition of "serious bodily injury" is used in the revised offenses of robbery,[611] assault,[612] sexual assault,[613] criminal abuse of a minor,[614] criminal neglect of a minor,[615] criminal abuse of a vulnerable adult or elderly person,[616] and criminal neglect of a vulnerable adult or elderly person.[617]

Relation to Current District Law. The RCC definition of "serious bodily injury" makes three clear changes to the current statutory definition of "serious bodily injury" in D.C. Code § 22-3001(7),[618] applicable to provisions in Chapter 30, Sexual Abuse.

First, the revised definition of "serious bodily injury" does not include "unconsciousness." The District's current aggravated assault statute requires "serious bodily injury," but does not define the term,[619] and the DCCA has generally applied the sex offense definition of "serious bodily injury."[620] In the context of aggravated assault, the DCCA has specifically declined to hold that "unconsciousness" is categorically of the same severity as the other harms in the definition of "serious bodily injury."[621] In contrast, the RCC definition of "serious bodily injury" does not include "unconsciousness." Instead, in the RCC offenses against persons, a temporary loss of consciousness constitutes at least "significant bodily injury," also defined in RCC § 22E-701. More lengthy losses of consciousness still may constitute serious bodily injury if the unconsciousness causes "a protracted loss or impairment of the function of a bodily

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statute requiring that the weapon of mass destruction be "capable of causing . . . serious bodily injuries to multiple persons."); 22-3155(a), (b) (use, dissemination, or detonation of a weapon of mass destruction statute requiring that the weapon of mass destruction be "capable of causing . . . serious bodily injuries to multiple persons."). [To date, the RCC has not recommended revisions to these statutes.]

[610] D.C. Code §§ 22-1001(c) (defining "serious bodily injury" for the animal cruelty statute as "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, mutilation, or protracted loss or impairment of the function of a bodily member or organ. Serious bodily injury includes, but is not limited to, broken bones, burns, internal injuries, severe malnutrition, severe lacerations or abrasions, and injuries resulting from untreated medical conditions."). [To date, the RCC has not recommended revisions to this statute.]

[611] RCC § 22E-1201.

[612] RCC § 22E-1202.

[613] RCC § 22E-1301.

[614] RCC § 22E-1501.

[615] RCC § 22E-1502.

[616] RCC § 22E-1503.

[617] RCC § 22E-1504.

[618] D.C. Code § 22-3001(7).

[619] D.C. Code § 22-404.01.

[620] *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute.).

[621] *In re D.P.*, 122 A.3d 903, 908 n. 10 (D.C. 2015) ("In light of our conclusion that [appellant] lacked the requisite mens rea for aggravated assault, we do not determine whether the complainant's brief loss of unconsciousness—from which she fully recovered without medical treatment and which did not amount to significant bodily injury . . . amounted to serious bodily injury."); *Vaughn v. United States*, 93 A.3d 1237, 1269 n. 39 (D.C. 2014) ("We question whether the government presented evidence that [the complainant] suffered serious bodily injury at all. The government presented evidence that [the complainant] briefly lost consciousness following the attack, that the head injuries he incurred did not cause substantial pain, and that, although he sought medical care, he fully recovered from these injuries without medical intervention. This appears to fall well below the "high threshold of injury" . . . we have set to prove aggravated assault.") (internal citations omitted).

member or organ," but unconsciousness is no longer categorically treated as a serious bodily injury. This revision improves the clarity and proportionality of the revised definition.

Second, the revised definition of "serious bodily injury" no longer includes "extreme physical pain." The DCCA has stated that the term "extreme physical pain" "is regrettably imprecise and subjective, and we cannot but be uncomfortable having to grade another human being's pain."[622] This revision improves the clarity and proportionality of the revised definition.

Third, the revised definition of "serious bodily injury" no longer includes "protracted loss or impairment of the function" of a "mental faculty." It is unclear whether "mental *faculty*" (emphasis added) refers to the physical condition of the brain or more generally to psychological distress. The DCCA has not interpreted this part of the current definition of "serious bodily injury." To the extent that "mental faculty" refers to the brain, "mental faculty" is redundant with "organ" in the current definition of "serious bodily injury." To the extent that "mental faculty" refers generally to emotional or psychological distress, it may be hard to qualify, similar to "unconsciousness" and "extreme physical pain" in the current definition. This revision improves the clarity and the proportionality of the revised definition.

Other than these changes, the revised definition does not change existing District law on the meaning of "serious bodily injury" as defined in the current sexual abuse statutes and applied to the current aggravated assault statute. The revised definition is meant to preserve case law interpreting the parts of the current D.C. Code definition, including "disfigurement," that were carried over to the RCC definition. The threshold for such an injury remains high.[623] The syntax of the revised definition clarifies that, as under current District case law interpreting the definition for the sexual abuse statutes,[624] the "substantial risk" applies only to the risk of death.

However, as applied to certain RCC offenses against persons, the revised definition of "serious bodily injury" may change current District law. For example, the revised sexual assault statute (RCC § 22E-1301) has a penalty enhancement if the actor recklessly caused "serious bodily injury to the complainant during the sexual conduct. The current sexual abuse statutes have a similar penalty enhancement for causing "serious bodily injury,"[625] as that term is defined by the current sex offense statutes. Due to the revised definition of "serious bodily injury," the penalty enhancement in the RCC

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[622] *Swinton v. United States*, 902 A.2d 772, 777 (D.C. 2006).

[623] *Swinton v. United States*, 902 A.2d 772, 775 (D.C. 2006) ("Our decisions since *Nixon* have emphasized 'the high threshold of injury, that "the legislature intended in fashioning a crime that increases twenty-fold the maximum prison term for simple assault." *Jenkins v. United States*, 877 A.2d 1062, 1069 (D.C.2005) (internal quotation marks and citations omitted). The cases in which we have found sufficient evidence of 'serious bodily injury' to support convictions for aggravated assault thus have involved grievous stab wounds, severe burnings, or broken bones, lacerations and actual or threatened loss of consciousness. The injuries in these cases usually were life-threatening or disabling. The victims typically required urgent and continuing medical treatment (and, often, surgery), carried visible and long-lasting (if not permanent) scars, and suffered other consequential damage, such as significant impairment of their faculties. In short, these cases have been horrific." (internal citations omitted)).

[624] *Scott v. United States*, 954 A.2d 1037, 1046 (D.C. 2008) ("[W]e readily conclude that the 'substantial risk' . . . is only a substantial risk of death, not a substantial risk of extreme pain, disfigurement, or any of the other conditions listed.").

[625] D.C. Code § 22-3020(a)(3).

sexual assault offense no longer applies to injury that results in unconsciousness, extreme physical pain, or protracted loss or impairment of a "mental faculty," unless the other requirements of the revised definition are met. The revised penalty enhancement ensures the enhancement is reserved for the most serious injuries.

The commentaries to relevant RCC offenses against persons discuss in detail the effect of the RCC definition of "serious bodily injury" on current District law

"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.

Explanatory Note. The RCC definition of "serious mental injury" differs from the definition of "mental injury" in the District's current civil statutes for proceedings on child delinquency, neglect, or need of supervision[626] by adding the requirement that the harm be "substantial" and "prolonged."

The RCC definition of "serious mental injury" is new, the term is not currently statutorily defined in Title 22 of the D.C. Code. The RCC definition of "serious mental injury" is used in the revised offenses of criminal abuse of a minor,[627] criminal neglect of a minor,[628] criminal abuse of a vulnerable adult or elderly person,[629] and criminal neglect of a vulnerable adult or elderly person.[630]

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

As applied to the RCC offenses for criminal abuse and criminal neglect of minors, vulnerable adults, and elderly persons, the term "serious mental injury" may change current District law. These RCC offenses prohibit either recklessly causing serious mental injury to the complainant[631] or recklessly creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience serious mental injury,[632] but the current equivalent offenses in Title 22 either do not include such harm or risk of harm, or it is unclear whether the equivalent offenses in Title 22 do. For example, the current District child cruelty statute is silent as to whether the offense covers purely psychological harms,[633] but DCCA case law is clear that the offense extends at least to serious psychological harm.[634] However, the court has not articulated a precise definition

[626] D.C. Code § 16-2301(31) ("The term 'mental injury' means harm to a child's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition.").
[627] RCC § 22E-1501.
[628] RCC § 22E-1502.
[629] RCC § 22E-1503.
[630] RCC § 22E-1504.
[631] Criminal abuse of a minor (RCC § 22E-1501); criminal abuse of a vulnerable adult or elderly person (RCC § 22E-1503).
[632] Criminal neglect of a minor (RCC § 22E-1502); criminal neglect of a vulnerable adult or elderly person (RCC § 22E-1504).
[633] D.C. Code § 22-1101.
[634] 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

of the requisite psychological harm, making it unclear whether the revised definition of "serious mental injury" changes current District law. Similarly, the current abuse of a vulnerable adult or elderly person statute is graded, in part, based on whether "severe mental distress" resulted,[635] but the statute does not define the term and there is no DCCA case law. Applying the RCC definition of "serious mental injury" to these offenses improves the clarity, completeness, and consistency of the revised offenses.

The commentaries to relevant RCC offenses against persons discuss in detail the effect of the RCC definition of "serious mental injury" on current District law.

"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.

Explanatory Note. The RCC definition of "services" replaces the current definition of "services" in D.C. Code § 22-3201(5),[636] applicable to provisions in Chapter 32, Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and provisions. The RCC definition of "services" is used in the RCC definition of "property,"[637] as well as the revised offenses of forgery[638] and financial exploitation of a vulnerable adult civil provisions.[639]

Relation to Current District Law. The RCC definition of "services" is identical to the statutory definition under current law.[640]

"Sexual act" means:

"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).

[635] D.C. Code §§ 22-933, 22-936(b) (making it a felony with a maximum term of imprisonment of 10 years if "serious bodily injury or severe mental distress" results).

[636] D.C. Code 22-3201(5) ("'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.").

[637] RCC § 22E-701.

[638] RCC § 22E-2204.

[639] RCC § 22E-2209.

[640] D.C. Code § 22-3201(5).

(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; or

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

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

The RCC definition of "sexual act" replaces the current statutory definition of "sexual act" in D.C. Code § 22-3001(8),[641] applicable to provisions in Chapter 30, Sexual Abuse. The RCC definition of "sexual act" is used in the RCC definitions of "commercial sex act"[642] and "sexual contact,"[643] and many RCC sex offenses.[644]

Relation to Current District Law. The revised definition of "sexual act" makes one possible substantive change to the statutory definition of "sexual act" in D.C. Code § 22-3001(8).[645] Subsection (A) of the current definition of "sexual act" requires the penetration of the anus or vulva "of another" by a penis.[646] Subsection (A) of the revised definition of "sexual act," in contrast, requires the penetration of the anus or vulva of "any person." The "of another" requirement in the current definition creates ambiguities in the current sexual abuse offenses regarding liability for the actor engaging in a "sexual act" with the complainant and liability for the involvement of a third party.[647] This revision improves the clarity and consistency of the revised sexual abuse statutes.

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

First, subsection (B) and subsection (C) of the revised definition clarify that the contact or penetration can be with or of "any person." Subsection (B) of the current definition does not specify "any person" or "another person," requiring only "[c]ontact

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

[642] D.C. Code § 22E-701.

[643] D.C. Code § 22E-701.

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

[645] D.C. Code § 22-3001(8).

[646] D.C. Code § 22-3001(8)(A).

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

between the mouth and the penis, the mouth and the vulva, or the mouth and the anus."[648] Similarly, subsection (C) of the current definition does not specify "any person" or "another person," requiring only "penetration . . . of the anus or vulva."[649] This omission creates ambiguities in the current sexual abuse offenses regarding liability for the actor engaging in "sexual contact" with the complainant and liability for the involvement of a third party.[650] Specifying that the contact can be between the specified body parts of "any person" (subsection (B)) and that the penetration can be of "any person" (subsection (C)) clarifies the definition.

Second, the revised definition of "sexual act" no longer states that "the emission of semen is not required," as is the case in subsection (D) of the current definition of "sexual act."[651] Nothing in the remaining subsections of the current definition[652] or in the revised definition of "sexual act" suggests that emission of semen is required. The language is surplusage and potentially confusing. Consequently, the revised definition of "sexual act" omits this language to improve the clarity of the definition.

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

Fourth, subsection (C) of the revised definition of "sexual act" requires the desire to "sexually arouse" or "sexually gratify" any person. Subsection (C) of the current definition of "sexual act" requires, in relevant part, intent to "arouse or gratify the sexual desire of any person."[653] Subsection (C) of the revised definition clarifies that both the desire to "arouse" and the desire to "gratify" must be sexual in nature. Specifying "sexually arouse" and "sexually gratify" improves the clarity of the revised definition.

"Sexual contact" means:

(A) Sexual act; or

(B) 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 the desire to sexually degrade, sexually arouse, or sexually gratify any person.

Explanatory Note. The "desire to sexually degrade, sexually arouse, or sexually gratify any person" requirement in subsection (B) of the revised definition excludes

[648] D.C. Code § 22-3001(8)(B).
[649] D.C. Code § 22-3001(8)(C).
[650] For example, when subsection (B) of the current definition of "sexual act" is inserted into the current second degree child sexual abuse statute (D.C. Code § 22-3009), the plain language reading is "engages in contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus with that child" and "causes that child to engage in contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus." It is unclear whether the specified body parts must belong to the complainant, the actor, or a third party.
[651] D.C. Code § 22-3001(8)(D).
[652] D.C. Code § 22-3001(8)(A) – (C) ("'Sexual act' means: (A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").
[653] D.C. Code § 22-3001(8)(C).

touching done for legitimate medical, hygenic, or law-enforcement reasons. Including "sexual act" in the definition of "sexual contact" establishes that RCC sex offenses that require a "sexual contact" are lesser included offenses of otherwise identical RCC sex offenses that differ only in that they require a "sexual act"—for example first degree sexual assault and third degree sexual assault.

The RCC definition of "sexual contact" replaces the current statutory definition of "sexual contact" in D.C. Code § 22-3001(9),[654] applicable to provisions in Chapter 30, Sexual Abuse. The RCC definition of "sexual contact" is used in the definition of "commercial sex act"[655] and many RCC sex offenses.[656]

Relation to Current District Law. The RCC definition of "sexual contact" makes three clear changes to the statutory definition of "sexual contact" in D.C. Code § 22-3001(9).[657]

First, the revised definition of "sexual contact" no longer requires an intent to "abuse, humiliate, [or] harass" any person. The current definition of "sexual contact" requires an intent to "abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[658] "Abuse, humiliate [or] harass" is broad language that does not appear to be modified by "the sexual desire of any person" in the current definition. There is no DCCA case law interpreting the current intent requirement. In contrast, the revised definition of "sexual contact" requires the desire "to sexually degrade, sexually arouse, or sexually gratify any person" and deletes "abuse, humiliate, [or] harass." Deleting "abuse, humiliate [or] harass avoids including in the RCC sex offenses conduct that is not sexual in nature.[659] Instead, the RCC provides liability for this conduct in the revised assault statute (RCC § 22E-1201) or offensive physical contact statute (RCC § 22E-1205). This change improves the consistency and proportionality of the revised offenses.

Second, the revised definition of "sexual contact" requires the desire to "sexually degrade, sexually arouse, or sexually gratify any person." The current definition of "sexual contact" requires, in part, an intent to "degrade, or arouse or gratify the sexual desire of any person."[660] "Degrade" does not appear to be modified by "the sexual desire of any person" in the current definition. There is no DCCA case law interpreting this requirement. In contrast, the RCC definition of "sexual contact" requires the desire "to sexually degrade, sexually arouse, or sexually gratify any person." Specifying that the desire must be to "sexually" degrade ensures that only touching conduct that is sexual in nature is covered by the RCC sex offenses. The RCC provides liability for nonsexual

[654] D.C. Code § 22-3001(9) ("'Sexual contact' means the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").
[655] D.C. Code § 22E-701.
[656] RCC §§ 22E-1301 (sexual assault); 22E-1302 (sexual abuse of a minor); 22E-1303 (sexual exploitation of an adult); 22E-1305 (enticing a minor into sexual conduct); 22E-1306 (arranging for sexual conduct with a minor); 22E-1307 (nonconsensual sexual conduct).
[657] D.C. Code § 22-3001(9).
[658] D.C. Code § 22-3001(8)(c).
[659] For example, throwing a snowball that hits a person's clothed breast or buttocks with intent to "abuse, humiliate [or] harass" that person, or a relative spanking a child with intent to "abuse, humiliate [or] harass" may satisfy the definition of a "sexual contact."
[660] D.C. Code § 22-3001(8)(c).

touching conduct in the revised assault statute (RCC § 22E-1201) or offensive physical contact statute (RCC § 22E-1205). This change improves the consistency and proportionality of the revised offenses.

Third, the revised definition of "sexual contact" includes a "sexual act," as that term is defined in RCC § 22E-701. It is unclear in current District law whether "sexual contact" necessarily includes a "sexual act" because the current definition of "sexual contact" requires the intent to abuse, humiliate, etc., and subsection (A) and subsection (B) of the current definition of "sexual act" do not.[661] In contrast, the revised definition of "sexual contact" statutorily specifies that "sexual contact" includes a "sexual act." This change establishes that RCC sex offenses that require a "sexual contact" are lesser included offenses of otherwise identical RCC sex offenses that differ only in that they require a "sexual act"—for example first degree sexual assault and third degree sexual assault. This change improves the clarity, consistency, and proportionality of the revised sex offenses and removes a possible gap in current District law.

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

"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.

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

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

Explanatory Note. "Significant bodily injury" is the intermediate level of three levels of physical injury defined in the RCC. The definition incorporates the definition of "bodily injury," also defined in RCC § 22E-701. The injury must require hospitalization or immediate medical treatment beyond what a layperson can personally administer and the hospitalization or immediate medical treatment must be necessary to either prevent long-term physical damage or to abate severe pain. Regardless whether the requirements in the first sentence of the definition are proven, the injuries specified in the last sentence of the definition constitute at least "significant bodily injury," such as a fracture of a bone or a concussion.

The RCC definition of "significant bodily injury" replaces the current statutory definition of "significant bodily injury" in D.C. Code § 22-404(b),[662] applicable to the felony assault with significant bodily injury offense, and an undefined reference to "significant bodily injury" in the assault on a police officer[663] statute. The term is also defined in other Title 22 statutes.[664] The RCC definition is used in the RCC definition of "serious bodily injury"[665] and the revised offenses of robbery,[666] assault,[667] criminal abuse of a minor,[668] criminal neglect of a minor,[669] criminal abuse of a vulnerable adult or elderly person,[670] and criminal neglect of a vulnerable adult or elderly person.[671]

Relation to Current District Law. The RCC definition of "significant bodily injury" makes three clear changes to the statutory definition of "significant bodily injury" in D.C. Code § 22-404(b).[672]

First, the revised definition of "significant bodily injury" requires "immediate medical treatment beyond what a layperson can personally administer." The current definition of "significant bodily injury" merely requires "immediate medical attention"[673] for this prong of the definition. However, District case law has construed medical "attention" in the current statutory definition to mean medical "treatment,"[674] and has

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[662] D.C. Code 22-404(b) ("For the purposes of this paragraph, the term "significant bodily injury" means an injury that requires hospitalization or immediate medical attention.").

[663] D.C. Code 22-405(c) ("A person who violates subsection (b) of this section and causes significant bodily injury to the law enforcement officer, or commits a violent act that creates a grave risk of causing significant bodily injury to the officer, shall be guilty of a felony and, upon conviction, shall be imprisoned not more than 10 years or fined not more than the amount set forth in § 22-3571.01, or both.").

[664] D.C. Code § 22-861(a)(2) (injuring a police animal statute defining "significant bodily injury" as an injury that requires hospitalization or immediate medical attention."). [To date, the RCC has not recommended revisions to this statute.]

[665] RCC § 22E-701.

[666] RCC § 22E-1201.

[667] RCC § 22E-1202.

[668] RCC § 22E-1501.

[669] RCC § 22E-1502.

[670] RCC § 22E-1503.

[671] RCC § 22E-1504.

[672] D.C. Code § 22-404(b).

[673] D.C. Code § 22-404(b) ("For the purposes of this paragraph, the term 'significant bodily injury' means an injury that requires hospitalization or immediate medical attention.").

[674] *See, e.g.*, *Quintanilla v. United States*, 62 A.3d 1261, 1264-65 (D.C. 2013) ("medical attention means the treatment that is necessary to preserve the health and wellbeing of the individual, *e.g.*, to prevent long-term physical damage, possible disability, disfigurement, or severe pain . . . the attention required—treatment—is not satisfied by mere diagnosis.") (internal quotation marks omitted); *In re D.P.*, 122 A.3d

held that the treatment must be "to prevent long-term physical damage or to abate severe pain,"[675] and be "beyond what a layperson can personally administer."[676] By codifying these requirements, the revised definition adopts the position of the DCCA that determining whether an injury is sufficient to constitute a "significant bodily injury" is an objective[677] inquiry as to the nature of the injury. Assessment of the nature of the injury can be a difficult factual issue for a jury or fact finder,[678] and in some cases expert medical testimony may be required to prove a significant bodily injury.[679] Whether a person wants to receive medical care[680] and whether medical care occurs[681] are not dispositive as to whether an injury is "significant bodily injury" under either current law or the RCC. This change improves the clarity, completeness, and consistency of the revised definition.

Second, "hospitalization" in the revised definition of "significant bodily injury" must be necessary to "prevent long-term physical damage or to abate severe pain." The current definition of "significant bodily injury" does not have any additional requirements for hospitalization beyond "requires hospitalization."[682] DCCA case law

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903, 911 (D.C. 2015) ("As interpreted by this court, immediate medical attention refers to treatment; in other words, the attention required . . . is not satisfied by mere diagnosis." (internal quotation marks omitted).

[675] *See, e.g.*, *Belt v. United States*, 149 A.3d 1048, 1055 (D.C. 2016) ("In other words, there are two independent bases for a fact finder to conclude that a victim has suffered a significant bodily injury: (1) where the injury requires medical treatment to prevent "long-term physical damage" or "potentially permanent injuries"; or (2) where the injury requires medical treatment to abate the victim's "severe" pain."); *Wilson v. United States*, 140 A.3d 1212, 1218 (D.C. 2016) ("However bad the injuries, may seem, the government's combined evidence fails to show that immediate medical attention was required to prevent longterm [sic] physical damage and other potentially permanent injuries or abate pain that is severe instead of lesser, short-term hurts." (internal quotation marks omitted).

[676] *See, e.g.*, *Quintanilla v. United States*, 62 A.3d 1261, 1265 (D.C. 2013) ("And we may infer, accordingly, that everyday remedies such as ice packs, bandages, and self-administered over-the-counter medications, are not sufficiently medical to qualify under the statute, whether administered by a medical professional or with self-help. Treatment of a higher order, requiring true medical expertise, is required.") (internal quotation marks omitted); *Teneyck v. United States*, 112 A.3d 906, 910 (D.C. 2015) ("The focus here is not, however, whether [the complaining witness] needed to remove the glass to prevent long-term damage, but whether a medical professional was required to remove the glass because [the complaining witness] could not have safely removed it himself—for example, with tweezers or another self-administered remedy.").

[677] *Belt v. United States*, 149 A.3d 1048, 1055 (D.C. 2016) ("The term "immediate medical attention" and the issue of whether the victim required hospitalization are objective inquiries.").

[678] *Belt v. United States*, 149 A.3d 1048, 1056 (D.C. 2016).

[679] *See Jackson v. United States*, 996 A.2d 796, 798 (D.C. 2010) (noting that in some cases, such as where the subject of proper medical treatment is not within the realm of common knowledge and everyday experience a medical opinion may be necessary to demonstrate criminal neglect).

[680] *See, e.g.*, *In re R.S.*, 6 A.3d 854, 859 (D.C. 2010) ("[N]or is a decision by the injured party not to seek immediate medical attention determinative as to whether the injury in fact called for such attention.").

[681] *See, e.g.*, *Teneyck v. United States*, 112 A.3d 906, 910 (D.C. 2015) ("Again, the standard is an objective one, and the fact that medical treatment occurred does not mean that medical treatment was required."); *Wilson v. United States*, 140 A.3d 1212, 1219 (D.C. 2016) ("Even assuming [the complaining witness] did receive some form of treatment in the hospital, therefore, the fact that medical treatment occurred does not mean that medical treatment was required." (internal quotation marks omitted) (citing *Teneyck v. United States*, 112 A.3d 906, 910 (D.C. 2015)).

[682] D.C. Code § 22-404(b) ("For the purposes of this paragraph, the term 'significant bodily injury' means an injury that requires hospitalization or immediate medical attention.").

has speculated that the reference to "hospitalization" in the current definition may be intended to cover "latent" injuries that are not immediately apparent.[683] DCCA case law has also said that the requirements for an injury that requires "hospitalization" may be different from an injury that requires "immediate medical attention,"[684] the other prong of the current definition of "significant bodily injury." This case law suggests that hospitalization for merely diagnostic purposes, and not treatment, may be sufficient to prove a significant bodily injury.[685] However, in each of the DCCA cases where hospitalization for diagnostic testing constituted "significant bodily injury," the complaining witness sustained an injury.[686] Consequently, neither the current definition nor existing case law provides a clear standard to be used to determine when "hospitalization" satisfies the current definition of "significant bodily injury." In contrast, the RCC definition of "significant bodily injury" specifies the standard for an injury that requires hospitalization at any point in time is whether the hospitalization is required to "prevent long-term physical damage or to abate severe pain." This is the same standard the DCCA has applied to injuries requiring "immediate medical attention" in the current definition of "significant bodily injury" and precludes finding a "significant

[683] *In re R.S.*, 6 A.3d 854, 859 n.3 (D.C. 2010) ("It is not easy to envision a situation in which an injury might require hospitalization and yet not also require immediate medical attention. Perhaps the hospitalization definition, which is presented as an alternative, is to cover a situation where an injury is only latent and manifests itself a considerable time after the fact; *e.g.*, an unrecognized internal injury or concussion.").

[684] *See, e.g.*, *Quintanilla v. United States*, 62 A.3d 1261, 1264 n.17 ("One can conceive of injuries (for example, a head injury that may or may not have resulted in a concussion) where immediate medical 'attention' in the form of monitoring or even testing is required, but where no 'treatment' is ultimately necessary to preserve or improve the victim's health. On the other hand, situations can surely arise when immediate then prolonged monitoring, coupled with testing, will eventuate in treatment. The question as to where the line is drawn between monitoring or testing and treatment in these fluid situations, however, is likely to become moot, as such scrutiny will normally involve hospitalization, the alternative basis for finding 'significant' bodily injury."); *Wilson v. United States*, 140 A.3d 1212, 1219 (D.C. 2016) ("Then in *Quintanilla*, the court left open the possibility that an injury could require hospitalization in fluid situations that involve immediate then prolonged monitoring, coupled with testing, regardless of whether such monitoring or testing eventuate[s] in treatment.") (citations and quotation marks omitted).

[685] *Blair v. United States*, 114 A.3d 960, 979 (D.C. 2015) ("We distinguished hospitalization, which we called the alternative basis for finding significant bodily injury, observing that it may be entailed in fluid situations, involving immediate than prolonged monitoring, coupled with testing, that may (or may not) 'eventuate in treatment.'") (citations and quotation marks omitted).

[686] *Blair v. United States*, 114 A.3d 960, 980 (D.C. 2015) ("While not every blow to the head in the course of an assault necessarily constitutes significant bodily injury, we conclude that where, as here, the defendant repeatedly struck the victim's head, requiring testing or monitoring to diagnose possible internal head injuries, and also caused injuries all over the victim's body, the assault is sufficiently egregious to constitute significant bodily injury. Because the testimony and photographic evidence in this case showed that appellant 'kept banging [the complainant's] head against the ground' with the result that she felt disoriented; that the hospital emergency room physician ordered a CAT scan and X-ray of her head and neck to determine whether she sustained internal injuries; and that C.H. sustained multiple abrasions and bruising all over her body, including trauma around her eye, we hold that the evidence was sufficient to allow a reasonable jury to conclude beyond a reasonable doubt that [the complainant's] injuries were significant and thus to support appellant's conviction of felony assault.") (internal citations omitted); *Brown v. United States*, 146 A.3d 110, 114-16 (D.C. 2016) (finding the evidence sufficient for significant bodily injury when the complainant went to the hospital five days after the assault due to lingering head pain and other symptoms, was given a CAT scan, was diagnosed with a concussion, and was instructed about what to do in order to avert worsened or prolonged symptoms).

bodily injury" where there is hospitalization for merely diagnostic purposes. This change improves the clarity, completeness, and consistency of the revised definition.

Third, the RCC definition of "significant bodily injury" provides a bright-line list of specific types of injuries that per se (inherently) constitute at least a "significant bodily injury." The current definition of "significant bodily injury" doesn't have such a list and DCCA case law does not provide specific injuries that constitute "significant bodily injury." In contrast, the RCC definition of "significant bodily injury" provides a bright-line list of per se injuries. Whether or not the listed injuries could also meet the standards described in the first sentence of the RCC definition of "significant bodily injury" or also provide a basis for liability under the standard for the RCC definition of "serious bodily injury,"[687] proof of the listed injuries suffices to establish at least "significant bodily injury." Specifically listing per se significant injuries clarifies the current state of law, fills possible gaps in District law,[688] and may improve the consistency of adjudication.

The listed injuries in part reflect current District case law, which has generally held that concussions[689] and lacerations requiring stitches[690] are sufficient proof of significant bodily injury. The other injuries listed in the definition may frequently be the subject of criminal prosecutions but their status as significant bodily injuries has not been clearly (or at all) established in District case law. No District case law addresses severity of burns, but second degree burns are typically recognized as requiring medical treatment.[691] Loss of consciousness is currently a part of the statutory definition of "serious bodily injury" for sexual abuse offenses,[692] however DCCA case law has questioned, without resolving, whether loss of consciousness constitutes a "serious bodily

[687] For example, a laceration that is one inch in length and one quarter inch in depth would be a per se significant bodily injury, but may also be a serious bodily injury if it results in protracted and obvious disfigurement.

[688] Current District case law appears to exclude from the definition of significant bodily injury latent injuries that, although requiring medical treatment, do not require admittance to a hospital. *Quintanilla v. United States*, 62 A.3d 1261, 1264 n.17 (D.C. 2013) ("[T]here is no provision in the statute for latent injuries that do not require hospitalization, even if they do ultimately require medical attention. It follows that, for injuries not requiring immediate medical attention, the injury will not be significant unless it does eventually require hospitalization."); *Teneyck v. United States*, 112 A.3d 906, 909 n.4 ("'[H]ospitalization' under the statute requires more than being admitted for outpatient care."); However, latent injuries (such as a concussion) that are per se significant bodily injuries listed in the second sentence of the RCC definition would be covered, even without proof of admittance to a hospital.

[689] *See Brown v. United States*, 146 A.3d 110, 114-15 (finding the evidence sufficient for "significant bodily injury" even though the complaining witness did not go to the hospital until five days after the attack when the complaining witness sustained repeated blows to his head and leg and the complaining witness was diagnosed with a concussion).

[690] *See, e.g., Rollerson v. United States*, 127 A.3d 1220, 1232 (D.C. 2015) (Upholding finding of significant bodily injury based on medical treatment that included nine stiches for "gashes to her face" going down to the "white meat."); *In re R.S.*, 6 A.3d 854, 859 (D.C. 2010)(Upholding finding of significant bodily injury based on medical treatment that included four to six inches); *Flores v. United States*, 37 A.3d 866, 867 (D.C.2011)(Upholding finding of significant bodily injury based on medical treatment that included "eight to ten stitches and a tetanus shot.").

[691] *See, e.g.,* https://www.cdc.gov/masstrauma/factsheets/public/burns.pdf (last visited December 1, 2017)(stating that, in contrast to first degree burns which may be treatable by a layperson, medical treatment from a trained professional is required.

[692] D.C. Code § 22-3001(7) ("'Serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.").

injury" for purposes of assault.[693] The inclusion of a traumatic brain injury[694] requires proof of such an injury, and mere evidence of blows to the head or diagnostic medical activity will not suffice.[695] The inclusion of a contusion (bruise) or other bodily injury to the neck or head caused by strangulation or suffocation as defined in RCC § 22E-701 reflects the heightened seriousness of such injuries, particularly in light of research indicating such injuries are often linked to more serious patterns of violence.[696]

In addition to the above-discussed clear substantive changes to the current statutory definition of "significant bodily injury" in D.C. Code § 22-404(b),[697] the revised definition makes one possible substantive change. The revised definition of "significant bodily injury" requires that the injury be a "bodily injury," defined in RCC § 22E-701 as physical pain, illness, or any impairment of physical condition." The current definition of "significant bodily injury" requires an "injury." There is no DCCA case law interpreting "injury" in the current definition. The RCC definition incorporates the defined term of "bodily injury" into the revised definition to clarify that a "significant bodily injury" always constitutes a bodily injury."

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[693] *In re D.P.*, 122 A.3d 903, 908 n. 10 (D.C. 2015) ("In light of our conclusion that [appellant] lacked the requisite mens rea for aggravated assault, we do not determine whether the complainant's brief loss of unconsciousness—from which she fully recovered without medical treatment and which did not amount to significant bodily injury . . . amounted to serious bodily injury."); *Vaughn v. United States*, 93 A.3d 1237, 1269 n. 39 (D.C. 2014) ("We question whether the government presented evidence that [the complainant] suffered serious bodily injury at all. The government presented evidence that [the complainant] briefly lost consciousness following the attack, that the head injuries he incurred did not cause substantial pain, and that, although he sought medical care, he fully recovered from these injuries without medical intervention. This appears to fall well below the "high threshold of injury" . . . we have set to prove aggravated assault.") (internal citations omitted).

[694] For example, a concussion. *See* https://www.cdc.gov/headsup/basics/concussion_whatis.html (last visited Dec. 1, 2017).

[695] In one case, the DCCA upheld a conviction for felony assault based on injuries that chiefly, though not solely, consisted of head trauma which was subjected to diagnostic testing but apparently was not specifically diagnosed as a concussion. *See Blair v. United States*, 114 A.3d 960, 980 (D.C. 2015) ("While not every blow to the head in the course of an assault necessarily constitutes significant bodily injury, we conclude that where, as here, the defendant repeatedly struck the victim's head, requiring testing or monitoring to diagnose possible internal head injuries, and also caused injuries all over the victim's body, the assault is sufficiently egregious to constitute significant bodily injury.") (internal citations omitted). The RCC definition of significant bodily injury calls the *Blair* ruling into question to the extent that there may not have been sufficient evidence that the injury caused by the defendant was a traumatic brain injury or that the injury otherwise required, to prevent long-term physical damage or to abate severe pain, hospitalization or immediate medical treatment beyond what a layperson can personally administer. The DCCA avoided reliance on the need for a medical diagnosis in a subsequent case involving head trauma. *Brown v. United States*, 146 A.3d 110, 116 (D.C. 2016) ("At the hospital, [the complaining witness] did not receive mere diagnosis, but was instructed [by the doctor] about what he needed to do to avert worsened or prolonged head pain or other symptoms. Thus [the complaining witness's] injury was one that, to preserve his well-being, necessitated that he be taken to the hospital shortly after the injury was inflicted."). To the extent the *Brown* court relied upon the doctor's diagnosis of a traumatic brain injury of the need for medical advice to avoid longer term damage, the decision is consistent with the RCC definition of "significant bodily injury."

[696] *See, e.g.*, Nancy Glass et al., Non-Fatal Strangulation Is an Important Risk Factor for Homicide of Women, Journal of Emergency Medicine, 35.3 (2008) (available online at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2573025/) (last visited December 1, 2017).

[697] D.C. Code § 22-404(b).

As applied to certain RCC offenses against persons, the revised definition of "significant bodily injury" may change current District law. For example, the RCC offenses for criminal abuse and criminal neglect of minors, vulnerable adults, and elderly persons prohibit either recklessly causing significant bodily injury to the complainant[698] or recklessly creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience significant bodily injury.[699] However, the current equivalent offenses in Title 22 either do not include such harm or risk of harm, or it is unclear whether the equivalent offenses in Title 22 do. For example, the current first degree child cruelty statute prohibits, in part, "tortures,"[700] "beats,"[701] and "maltreats,"[702] and second degree child cruelty prohibits, in part, "maltreats."[703] The current statute does not define these terms and there is no DCCA case law determining the required amount of physical harm.[704] Instead of this ambiguity, the revised criminal abuse of a minor statute specifies the minimal degree of physical harm required for each grade of the offense, including a gradation for "significant bodily injury." Similarly, the current abuse of a vulnerable adult or elderly person statute grades, in part, based on whether "serious bodily injury"[705] or "permanent bodily harm"[706] resulted. The statute does not define any of these terms and there is no DCCA case law interpreting "serious bodily injury" or "permanent bodily harm" for this offense. The RCC offense codifies a gradation for causing "significant bodily injury," improving the clarity and completeness of the offense.

The commentaries to relevant RCC offenses against persons discuss in detail the effect of the RCC definition of "significant bodily injury" on current District law.

"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.

Explanatory Note. The RCC defines "significant emotional distress" to mean substantial, ongoing mental suffering. Significant emotional distress does not include suffering minor inconveniences. The word "ongoing" makes clear that significant emotional distress must be continuous or continual in nature. Significant emotional distress is trepidation that outlasts the interaction. The distress must be high, reaching a level that would possibly lead to seeking professional treatment.[707] The degree of mental

[698] Criminal abuse of a minor (RCC § 22E-1501); criminal abuse of a vulnerable adult or elderly person (RCC § 22E-1503).
[699] Criminal neglect of a minor (RCC § 22E-1502); criminal neglect of a vulnerable adult or elderly person (RCC § 22E-1504).
[700] D.C. Code § 22-1101(a).
[701] D.C. Code § 22-1101(a).
[702] D.C. Code § 22-1101(a).
[703] D.C. Code § 22-1101(b)(1).
[704] The DCCA has extensively discussed "maltreats" in terms of incorporating serious psychological or emotional harm, but not the required physical harm. *Alfaro v. United States*, 859 A.2d 149, 157-60 (D.C. 2004).
[705] D.C. Code § 22-936(b).
[706] D.C. Code § 22-936(c).
[707] The government is not required to prove that the person actually sought or needed professional treatment or counseling.

anguish must be something markedly greater than the level of uneasiness, nervousness, unhappiness or the like which commonly experienced in day to day living.

The RCC definition of "significant emotional distress" replaces the definition of "emotional distress" in D.C. Code § 22-3132(4).[708] The RCC definition of "significant emotional distress" is used in the revised offense of stalking.[709]

Relation to Current District Law. The RCC definition of "significant emotional distress" clarifies, but does not change, District law. The current statute uses the phrases "emotional distress" and "seriously alarmed, disturbed, or frightened" but does not define them. Case law has explained that both phrases should be understood as mental harms that rise significantly above that which is commonly experienced in day to day living.[710] Emotional distress is "high," "markedly greater than the level of uneasiness, nervousness, unhappiness or the like," and "reaching a level that would possibly lead to seeking professional treatment."[711] The revised code adds a definition of "significant emotional distress" to more clearly state this case law. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

"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.

Explanatory Note. "Sound recordings" is currently defined in D.C. Code § 22-3214.01(a)(3)[712] for the current deceptive labeling statute. The RCC definition of "sound recording" replaces the current definition of "sound recording" in D.C. Code § 22-3214.01(a)(3) and the definition of "phonorecords" in the current commercial piracy statute[713] and is used in the revised offenses of unlawful creation or possession of a recording[714] and unlawful labeling of a recording.[715]

Relation to Current District Law. The RCC definition of "sound recording" is substantively identical to the definition of "sound recording"[716] in the current deceptive labeling statute.

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[708] D.C. Code § 22-3132(4). ("'Emotional distress' means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling;").
[709] RCC § 22E-1206.
[710] *Coleman v. United States*, 16-CM-345, 2019 WL 1066002 (D.C. Mar. 7, 2019).
[711] *Id*.
[712] D.C. Code § 22-3214.01(a)(3) ("'Sound recordings' means material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.").
[713] D.C. Code Ann. § 22-3214(a)(3) ("'Phonorecords means material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.
[714] RCC § 22E-2105.
[715] RCC § 22E-2207.
[716] D.C. Code § 22-3214.01(a)(3) ("'Sound recording' means "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or

"Speech" means oral or written language, symbols, or gestures.

Explanatory Note. Oral language means spoken words or sounds. Written language means inscribed words or letters. Symbols include images, icons, and props. Gestures means physical movements that communicate an idea. "Speech" is narrower than "communication."

The RCC definition of "speech" is new; the term is not currently defined in Title 22 of the D.C. Code (although similar language is used in the current disorderly conduct statute[717]). The RCC definition of "speech" is used in the revised offense of disorderly conduct.[718]

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

The current *disorderly conduct* statute does not use the word "speech," but does distinguish between "language," "gestures," and "conduct." Case law has not addressed the meanings of these terms. The revised code adds a definition of "speech" to be used universally throughout the RCC. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

"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.

Explanatory Note. "Strangulation or suffocation" is not statutorily defined in Title 22 of the current D.C. Code. The RCC definition is used in the RCC definition of "significant bodily injury."[719]

Relation to Current District Law. The RCC definition of "strangulation or suffocation" is new to District law.

"Strict liability" has the meaning specified in RCC § 22E-205.

Explanatory Note. The definition of "strict liability" is addressed in the Commentary accompanying RCC § 22E-205.

"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; and

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later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.").

[717] D.C. Code § 22-1321.

[718] RCC § 22E-4201.

[719] RCC § 22E-701.

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

(D) A person who is 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).

Explanatory Note. The RCC definition of "transportation worker" is new, the term is not currently defined in Title 22 of the D.C. Code (although there is a penalty enhancement[720] with similarly defined terms for certain crimes committed against a "Metrorail station manager" or a "transit operator," as well as a penalty enhancement[721] for certain crimes committed against a taxicab driver. The RCC definition of "transportation worker" replaces the penalty enhancement and defined terms[722] for certain crimes committed against a "Metrorail station manager" or a "transit operator," as well as the penalty enhancement[723] for certain crimes committed against a taxicab driver. The RCC definition of "transportation worker" is used in the RCC definition of a "protected person."[724]

Relation to Current District Law. The RCC definition of "transportation worker" makes four clear changes to the statutory language of the defined terms[725] in the current penalty enhancement for certain crimes committed against a "Metrorail station manager" or a "transit operator," as well as the penalty enhancement[726] for certain crimes committed against a taxicab driver.

First, subsection (A) of the RCC definition of "transportation worker" is substantively identical to the definitions of "mass transit vehicle"[727] and "transit

[720] D.C. Code § 22-3751.01 ("(a) Any person who commits an offense enumerated in § 22-3752 against a transit operator, who, at the time of the offense, is authorized to operate and is operating a mass transit vehicle in the District of Columbia, or against Metrorail station manager while on duty in the District of Columbia, may be punished by a fine of up to one and ½ times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to one and ½ times the maximum term of imprisonment otherwise authorized by the offense, or both."); 22-3751.01(b)(1), (b)(2), (b)(3) (defining "mass transit vehicle" as "any 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," "Metrorail station manager" as "any Washington Metropolitan Area Transit Authority employee who is assigned to supervise a Metrorail station from a kiosk at that station," and "transit operator" as a person who is licensed to operate a mass transit vehicle.").

[721] D.C. Code § 22-3751 ("Any person who commits an offense listed in § 22-3752 against a taxicab driver who, at the time of the offense, has a current license to operate a taxicab in the District of Columbia or any United States jurisdiction and is operating a taxicab in the District of Columbia may be punished by a fine of up to one and 1/2 times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to one and 1/2 times the maximum term of imprisonment otherwise authorized for the offense, or both.").

[722] D.C. Code § 22-3751.01.

[723] D.C. Code § 22-3751.

[724] RCC § 22E-701.

[725] D.C. Code § 22-3751.01.

[726] D.C. Code § 22-3751.

[727] D.C. Code § 22-3751.01(b)(1) (defining "mass transit vehicle" as "any 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.").

operator"[728] in the current penalty enhancement[729] for these complainants and subsection (C) is substantively identical to the penalty enhancement[730] for crimes committed against a taxicab driver.[731] However, unlike the current penalty enhancements, subsection (A) does not require that the transit operator be "authorized" to operate the mass transit vehicle "at the time of the offense," and subsection (C) does not require that the taxicab driver be licensed and operating a taxicab "at the time of the offense." Instead, the definition of "protected person" in RCC § 22E-701 includes a transportation worker "in the course of his or her official duties" and the protected person gradations are codified directly into RCC offenses against persons. These are clarificatory changes that are consistent with other categories of complainants in the RCC definition of "protected person" that require the complainant to be "in the course of official duties."

Second, subsection (B) of the RCC definition of "transportation worker" is substantively identical to the definition of a "Metrorail station manager"[732] in the current penalty enhancement[733] for crimes committed against this category of complainant. However, subsection (B) does not require, as does current D.C. Code § 22-3751.01, that the Metrorail station manager be "on duty." Instead the definition of "protected person" in RCC § 22E-701 includes a transportation worker "in the course of official duties." This is a clarificatory change that is consistent with other categories of complainants in the RCC definition of "protected person" that require the complainant to be "in the course of official duties."

Third, subsection (D) of the definition of "transportation worker" codifies the requirements for a private vehicle-for-hire operator in contract with a private vehicle-for-hire company, as defined by D.C. Code § 50-301.03(16B).[734] The current penalty enhancement for certain crimes committed against a "Metrorail station manager" or a "transit operator," as well as the penalty enhancement[735] for certain crimes committed against a taxicab driver, do not include drivers of private vehicle-for-hire. Including this category of complainant in the RCC definition of "transportation worker" fills a gap in current District law, particularly given the ubiquity of private vehicle-for-hire services.

As applied to certain RCC offenses against persons, the RCC definition of "transportation worker" may substantively change current District law. For example, the RCC's robbery and assault statutes provide more severe penalties for harms inflicted on protected persons, including transportation workers. While a penalty enhancement for robbery and assault already applies under current District law to commercial vehicle operators,[736] specified WMATA employees,[737] and taxicab drivers,[738] such penalty

[728] D.C. Code § 22-3751.01(b)(3) (defining "transit operator" as a person who is licensed to operate a mass transit vehicle.").
[729] D.C. Code § 22-3751.01.
[730] D.C. Code § 22-3751.
[731] D.C. Code § 22-3751.
[732] D.C. Code § 22-3751.01 (b)(2) (defining "Metrorail station manager" as "any Washington Metropolitan Area Transit Authority employee who is assigned to supervise a Metrorail station from a kiosk at that station," and "transit operator" as a person who is licensed to operate a mass transit vehicle.").
[733] D.C. Code § 22-3751.01.
[734] D.C. Code § 50-301.03(16B) ("'Private vehicle-for-hire company' means an organization, including a corporation, partnership, or sole proprietorship, operating in the District that uses digital dispatch to connect passengers to a network of private vehicle-for-hire operators.").
[735] D.C. Code § 22-3751.
[736] D.C. Code § 22-3751.

enhancements do not apply to private vehicle-for-hire operators. Consequently, subsection (D) effectively changes District law as applied to the RCC robbery and assault statutes, through their reference to "protected persons" and "transportation workers." Inclusion of these drivers in the same category as other transportation workers improves the proportionality of the revised offenses against persons and removes a gap in current District law. The commentaries to relevant RCC offenses against persons discuss in detail the effect of the RCC definition of "transportation worker" on current District law.

"Value"

(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].

Explanatory Note. Subsection (A) of the RCC definition of "value" states that the "value" of property is its fair market value, a defined term per RCC § 22E-701, which 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. "Owner" is a defined term per RCC § 22E-701 meaning a person holding an interest in property with which the actor is not privileged to interfere without consent. Moreover, the "value" is based on the fair market value at the time and place of the offense.

Subsection (B) provides alternative methods of determining "value" for written instruments and other property when the fair market value cannot be ascertained. These are rare situations when there is no evidence as to fair market value.[739]

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[737] D.C. Code § 22-3751.

[738] D.C. Code § 22-3751.

[739] *See State v. Ohms*, 309 Mont. 263, 267 (2002) (interpreting the definition of "value," which required that replacement value be considered only when the market value "cannot be satisfactorily ascertained," as meaning "if the State is unable to present evidence of the stolen item's market value, it must establish that the market value of the stolen item cannot be ascertained before it resorts to the alternative of establishing value by proof of replacement value alone."); *State v. Foster*, 762 S.W.2d 51, 53 (Mo. Ct. App. 1988) (stating that "cost of replacement was not an authorized manner of proof" because "the state offered no evidence of the value of the items taken at the time and place of the crime" and "there is no basis for

Subsection (B)(i) specifies that, for property other than written instruments, a defined term per RCC § 22E-701, when fair market value cannot be ascertained, "value" is the cost of replacement of the property within a reasonable time after the offense.[740]

Subsections (B)(ii) and (b)(iii) clarify the methods of valuation for written instruments, a defined term in RCC 22E-701, when fair market value cannot be ascertained.[741] Subsection (B)(ii) applies to written instruments that are "evidence of debt," such as checks, a defined term in RCC § 22E-701, drafts, or promissory notes. The "value" of such a written instrument is the amount due or collectible thereon, that figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied.[742] Subsection (B)(iii) applies to written instruments other than evidence of debt "that create[s], release[s], discharge[s], or otherwise affect[s] any other valuable legal right, privilege, or obligation."[743] The "value" of such written instruments is "the greatest amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the written instrument."

Subsection (C) first provides that, notwithstanding subsections (A) and (B), the "value" of a "payment card," a defined term in RCC § 22E-701, meaning 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, is set at $[X]. Second, the "value" of a check that has not been endorsed, i.e. a blank check unsigned on the front by the

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finding that the items could not have been appraised, or that evidence of their value at the time of the crime could not be satisfactorily ascertained" when the definition of "value" was "the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime."); *Washington v. State*, 2013 Ark. App. 148, 3 (not reported in S.W.3d) ("Replacement value equals 'value' under the theft-of-property statute only if the market value cannot be ascertained. . . . [h]ere, there was evidence of market value…").

[740] The facts of *State v. Ohms*, 309 Mont. 263 (2002) provide an example. The property at issue was a stolen masonry saw and the felony threshold for value was $1,000. *Ohms*, 309 Mont. at 264. At trial, the owner testified that he had purchased the used saw approximately nine years earlier for $400. *Id.* at 266. He also testified that after the purchase he had the motor rebuilt for $600. *Id.* An expert testified that an entirely new unit would be priced at $3,924. The definition of "value" in Montana allows evidence of replacement value only if market value "cannot be satisfactorily ascertained." *Id.* The court held that the state could not use replacement value because the state did not first establish that the market value of the property could not be ascertained. *Id.* at 267.

Washington v. State, 2013 Ark. App. 148, 3 (not reported in S.W.3d) ("Replacement value equals 'value' under the theft-of-property statute only if the market value cannot be ascertained… [h]ere, there was evidence of market value . . . .").

[741] Examples of written instruments whose fair market value can be reasonably ascertained include some public and corporate bonds and securities.

[742] For example, if a check is made out to an individual in the amount of $1,000 the value of that check normally is $1,000, the face amount of indebtedness. However, in one jurisdiction, the court used such an "ordinarily" caveat in a similar definition of "value" to determine that the value of a forged check was not the face amount of indebtedness. *See State v. Skorpen*, 57 Wash.App. 144, 149 (1990) ("The State argues that the value of the check 'shall be deemed the amount due or collectible thereon or thereby, that figure ordinarily being the face amount . . .' . In order to avoid rendering part of this phrase superfluous, it must be construed so as to recognize the possibility of situations in which the amount due or collectible on a written instrument is not its face amount.").

[743] For example, relying on such language, a case in New York held that two automobile registrations were "of value" because, in part, "the complainant herein has had his privilege to drive his vehicle suspended by the theft of its registration certificates. These certificates give rise at least to prosecution for theft of the piece of paper upon which proof of compliance with New York vehicle laws is indicated."). *People v. Saunders*, 82 Misc. 2d 542, 371 N.Y.S.2d 352 (Crim. Ct. 1975).

drawer, is set at $[X]. These fixed valuations only apply to the payment cards and blank checks themselves, not property that is obtained by use of the payment card or check.[744]

"Value" is currently defined in D.C. Code § 22-3001(7),[745] applicable to provisions in Chapter 32, Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and provisions. The RCC definition of "value" is used in the revised offenses of theft,[746] fraud,[747] payment card fraud,[748] check fraud,[749] forgery,[750] identity theft,[751] financial exploitation of a vulnerable adult,[752] possession of stolen property,[753] trafficking of stolen property,[754] and extortion.[755]

Relation to Current District Law. The RCC definition of "value" makes one clear change to the statutory definition of "value" in in D.C. Code § 22-3001(7).[756]

The RCC definition of "value" provides a set value for a payment card of $[X][757] and an unendorsed check at $[X], per subsection (C). Under the current statutory definition of "value," the "value" of a payment card is the amount of property "that has been or can be obtained through its use, or the amount promised or paid by the credit card, [or] check."[758] There is no case law on the meaning of this phrase.[759] In contrast,

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[744] For example, theft of a purse containing three payment cards and a checkbook yields a set valuation of $[X] that can be used for determining the gradation of theft—without requiring proof of available credit for each card or amount of funds available for the check at the time of the offense. If the thief should then use a stolen payment card or check to obtain cash, goods, or property from a storeowner, the value of the property obtained from the storeowner would constitute a separate loss, with value being easily determined by the fair market value of the property received.

[745] D.C. Code § 22-3201(7) ("'Value' with respect to a credit card, check, or other written instrument means the amount of money, credit, debt, or other tangible or intangible property or services that has been or can be obtained through its use, or the amount promised or paid by the credit card, check, or other written instrument.").

[746] RCC § 22E-2101.

[747] RCC § 22E-2201.

[748] RCC § 22E-2202.

[749] RCC § 22E-2203.

[750] RCC § 22E-2204.

[751] RCC § 22E-2205.

[752] RCC § 22E-2208.

[753] RCC § 22E-2401.

[754] RCC § 22E-2402.

[755] RCC § 22E-2301.

[756] D.C. Code § 22-3201(7).

[757] [A recommendation on the precise value is forthcoming, in conjunction with the CCRC review of penalties.]

[758] D.C. Code 22-3201(7) ("'Value' with respect to a credit card, check, or other written instrument means the amount of money, credit, debt, or other tangible or intangible property or services that has been or can be obtained through its use, or the amount promised or paid by the credit card, check, or other written instrument.").

[759] There is limited case law on the value of a credit card under the District's pre-1982 Theft Act laws. In *In re V.L.M.*, a receiving stolen property case, the DCCA stated that a "currently usable credit card, was of obvious monetary value to its owner, and indeed, to anyone else who might attempt to use it to obtain gasoline on credit." *In re V.L.M.*, 340 A.2d 818, 820 (D.C. 1975). Beyond this statement, there is no indication in *In re V.L.M.* how the DCCA valued the credit card. The trial court found that the credit card had no value in excess of $100, but the trial court's reasoning, and whether the DCCA approved of this method of valuation, is unclear. To the extent that *In re V.L.M.* supports a method of valuation for credit cards different from the standard in subsection (b)(3) of the revised definition of "value," the revised definition of "value" is a change in law.)

the RCC definition of "value" provides a set value for a payment card or an unendorsed check. A fixed amount provides a fairer and more efficient means of calculating the value of an unused payment card or blank check, items commonly involved in property crimes. The revised definition dispenses with proof of the amount of credit or funds available to a given card or bank account at the time of the property crime. Doing so also avoids disparate valuation of people's credit cards and checks based on their available credit or size of their bank account.[760] The provision instead strikes a balance between the greater, but unrealized, harm that the owner of the card or check could suffer if the stolen card or check was used, with the relatively minor, actual, inconvenience to the owner of losing the card or check. It also punishes more harshly a defendant who takes multiple cards or checks, as opposed to a defendant that takes only one card or check. This change improves the proportionality of the revised definition.

The RCC definition of "value" is generally consistent with the limited District case law interpreting the term "value" outside of the statutory definition in § 22-3001(7). Subsection (A) of the revised definition provides that, generally, the fair market value of property shall determine its "value." This codifies District case law for theft and theft-related offenses that establishes that "value" means "fair market value,"[761] as well as District case law recognizing that "fair market value" must be determined at the time[762] and place[763] of the offense. In addition, this part of the revised definition of "value" reflects current District practice.[764] Subsection (B) of the revised definition provides a number of alternate means of determining the value of written instruments and other property in the rare case when fair market value cannot be ascertained. The limited DCCA case law on "value" does not provide a clear rule for instances when fair market value cannot be ascertained, although several cases refer generally to the "value" of an object as its "useful, functional purpose."[765] The provisions in subsection (B) appear to be consistent with the application of this "useful, functional purpose" standard, and are

[760] For example, theft of a purse with two payment cards connected to accounts of $300 each would, if aggregated, provide a basis for theft of $600 under current law—graded as third degree theft in the RCC or a 180 day misdemeanor under current law. A purse with the same number of cards but in the name of a wealthier person who has credit limits of $15,000 each would, if aggregated, provide a basis for theft of $30,000—graded as first degree theft in the RCC or a 10 year felony under current law.

[761] *See, e.g., Foreman v. United States*, 988 A.2d 505, 507 (D.C. 2010);

[762] *See, e.g., Jeffcoat v. United States*, 551 A.2d 1301, 1303 (D.C. 1988) ("The value of property is determined at the time the crime through which it is acquired occurs.");.

[763] *See Long v. United States*, 156 A.3d 698 (D.C. 2017) (stating in a receiving stolen property case that "[p]roperty value . . . is its market value at the time and place stolen, if there is a market for it.") (quoting *Hebron v. United States*, 837 A.2d 910, 913 n.3 (D.C. 2003) (quoting LaFave, Criminal Law, § 8.4(b) (3d ed. 2000))).

[764] D.C. Crim. Jur. Instr. § 3.105 (jury instruction for "value" stating, in part, that "[v]alue means fair market value at the time when and the place where the property was allegedly" obtained).

[765] *See Jeffcoat v. United States*, 551 A.2d 1301, 1303 (D.C. 1988) ("[T]he value of an item is to be determined by its 'useful functional purpose.' " (quoting Jenkins v. United States, 374 A.2d 581, 586 n.9 (D.C. 1977))). Note, however, that several cases referring to the "useful functional purpose" standard of value appear to be primarily concerned with establishing that the object has some minimal value for a lowest grade of liability. See, e.g., *Jenkins v. United States*, 374 A.2d 581, 586 n. 9 (D.C.1977) (broken window has some value); *Paige v. United States*, 183 A.2d 759 (D.C.Mun.App.1962) (vent fastener for auto window had some value); *Wills v. United States*, 147 A.3d 761, 775 n. 12 (D.C. 2016) (keys had some value). The revised definition of value in RCC 22E-2001 does not affect such cases' determination that the objects at issue had some value.

not intended to change the application of such a flexible standard for establishing whether an item has some minimal value.[766] The revised definition of "value" fills a gap in the existing statutory definition about valuation when fair market value cannot be readily ascertained.

It should be noted that the revised definition of "value" does not affect long-standing District case law on the evidentiary requirements for proving "value." Some of this case law predates the Theft and White Collar Crimes Act of 1982, which significantly revised the District's theft and theft-related offenses.[767] To the extent that this case law is still good law, the revised definition of "value" does not change it—except as to payment cards. Nor does the revised definition of "value" change any first degree theft cases on "value" decided after the 1982 Theft Act[768]—except as to payment cards.

"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.

Explanatory Note. The RCC definition of "vulnerable adult" specifies the requirements for proving a person is a "vulnerable adult" in the revised offenses against persons. Under this definition, the mental or physical limitation must substantially impair that person's ability to independently provide for his or her daily needs or safeguard his or her person, property, or legal interests. Minor impairments, e.g. imperfect vision that can be remedied with prescription glasses, will not suffice.

The term "vulnerable adult" is currently statutorily defined in D.C. Code § 22-932(5)[769] for offenses and provisions concerning abuse and neglect of vulnerable adults. The RCC definition of "vulnerable adult" is used in the definition of a "protected

[766] Compare RCC 22E-2001 (24)(B)(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;") with *Jeffcoat* at 1303 (regarding appellant's wrongful taking of a check filled out for $150 but not cashed, "When appellant received the check from Thompson, its useful functional purpose was to enable him to acquire $150 in cash.").

[767] In *Eldridge v. United States*, the DCCA noted that first degree theft under the 1982 Theft Act is the "rough equivalent" to the former statutory offense of grand larceny and adopted "*in toto*" for first degree theft "the proof requirements on the issue of value" established in pre-1982 case law for grand larceny. *Eldridge v. United States*, 492 A.2d 879, 881-82. *Eldridge* lists the following cases and citations as representative of this body of case law, although the list is not exclusive: *Malloy v. United States*, 483 A.2d 678, 680-81 (D.C. 1984); *Moore v. United States*, 388 A.2d 889 (D.C. 1978); *Williams v. United States*, 376 A.2d 442 (D.C. 1977); *Wilson v. United States*, 358 A.2d 324 (D.C. 1976); *Boone v. United States*, 296 A.2d 449 (D.C. 1972); *United States v. Thweatt*, 140 U.S. App. D.C. 120, 433 F.2d 1226 (1970).

[768] *See, e.g.*, *Zellers v. United States*, 682 A.2d 1118 (D.C. 1996); *Hebron v. United States*, 837 A.2d 910 (D.C. 2003); *Chappelle v. United States*, 736 A.2d 212 (D.C. 1999); *Terrell v. United States*, 721 A.2d 957 (D.C. 1988); *Foreman v. United States*, 988 A.2d 505 (D.C. 2010).

[769] D.C. Code § 22-932(5) ("'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.").

person,"[770] as well as the revised offenses of abuse of a vulnerable adult or elderly person,[771] neglect of a vulnerable adult or elderly person,[772] and sexual assault.[773]

Relation to Current District Law. The RCC definition of "vulnerable adult" is identical to the current definition of "vulnerable adult" in D.C. Code § 22-932.

The RCC "vulnerable adult" definition does not itself change current District law, but may result in changes of law as applied to particular offenses. For example, the RCC robbery and assault gradations are based in part on whether the victim was a "protected person,"[774] and a "vulnerable adult" is defined as one kind of "protected person."[775] Consequently, the RCC provides enhanced penalties for assaults and robberies of vulnerable adults whereas, under current law, committing robbery or assault against a vulnerable adult does not change the grade of either offense, or otherwise authorize more severe penalties. Inclusion of vulnerable adults in the same category as seniors, minors, and others improves the proportionality of the revised offenses against persons and removes a gap in current District law.

"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.

Explanatory Note. "Written instrument" is currently defined in D.C. Code § 22-3241(a)(3)[776] for the forgery offense. The RCC definition of "written instrument"

[770] RCC § 22E-701.
[771] RCC § 22E-1503.
[772] RCC § 22E-1504.
[773] RCC § 22E-1301.
[774] RCC §§ 22E-1201, 1202.
[775] RCC § 22E-701.
[776] D.C. Code § 22-3241(a)(3) ("'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) Stamp, legal tender, or other obligation of any domestic or foreign governmental entity; (C) Stock certificate, money order, money order blank, traveler's check, evidence of indebtedness, certificate of interest or participation in any profitsharing agreement, transferable share, investment contract, voting trust certificate, certification of interest in any tangible or intangible property, and any certificate or receipt for

replaces the current definition of "written instrument" in D.C. Code § 22-3241(a)(3). The RCC definition is used in the revised definition of "value,"[777] as well as the revised offense of forgery.[778]

Relation to Current District Law. The revised definition of "written instrument" is consistent with current District law. The revised definition differs slightly by explicitly including "a will, contract, deed, or any other document purporting to have legal or evidentiary significance." However, including these documents in the definition of "written instrument" does not change current law, as the list of documents in the definition of "written instrument" in the current D.C. Code is also non-exhaustive.

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or warrant or right to subscribe to or purchase any of the foregoing items; (D) Commercial paper or document, or any other commercial instrument containing written or printed matter or the equivalent; or (E) 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.").

[777] RCC § 22E-701.

[778] RCC § 22E-2204.

COMMENTARY
SUBTITLE II. OFFENSES AGAINST PERSONS

RCC § 22E-1101. Murder.

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

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

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

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

[2] D.C. Code § 22-851.

[3] D.C. Code § 22-4502.

[4] D.C. Code § 22-3601.

[5] D.C. Code § 22-3602.

[6] D.C. Code § 22-3611.

[7] D.C. Code §§ 22-3751; 22-3752.

[8] D.C. Code §§ 22-3751.01; 22-3752.

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

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

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

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

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

[11] D.C. Code § 22-851.

[12] D.C. Code § 22-4502.

[13] D.C. Code § 22-3601.

[14] D.C. Code § 22-3602.

[15] D.C. Code § 22-3611.

[16] D.C. Code §§ 22-3751; 22-3752.

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

[18] D.C. Code § 22-2102.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[28] See Commentary to RCC § 22E-206.

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

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

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

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

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

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

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

Subsection (c) specifies rules for imputing a conscious disregard of the risk required to prove that the person acted with extreme indifference to human life. Under the principles of liability governing intoxication under RCC § 22E-209, when an offense requires recklessness as to a result or circumstance, that culpable mental state may be imputed even if the person lacked actual awareness of a substantial risk due to his or her self-induced intoxication.[39] However, as discussed above, extreme indifference to human life in paragraph (b)(1) of the RCC murder statute requires that the person consciously disregarded an *extreme* risk of death or serious bodily injury, a greater degree of risk than is required for recklessness alone. While RCC § 22E-209 does not authorize fact finders to impute awareness of an extreme risk, this subsection specifies that a person shall be deemed to have been aware of an extreme risk required to prove that the person acted with extreme indifference to human life when the person was unaware of that risk due to self-induced intoxication, but would have been aware of the risk had the person been sober. The terms "intoxication" and "self-induced intoxication" have the meanings specified in RCC § 22E-209.[40]

Even when a person's conscious disregard of an extreme risk of death or serious bodily injury is imputed under this subsection, in some instances the person may still not have acted with extreme indifference to human life. It is possible, though unlikely, that a person's self-induced intoxication is non-culpable, and weighs against finding that the person acted with extreme indifference to human life.[41] In these cases, although the

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

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

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

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

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

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

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

awareness of risk may be imputed, the person could still be acquitted of second degree murder. However, finding that the person did not act with extreme indifference to human life does not preclude finding that the person acted recklessly as required for involuntary manslaughter[42], provided that his or her conduct was clearly blameworthy.

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

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

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

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

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

[42] RCC § 22E-1102.

its disregard is clearly blameworthy. The term "protected person" is defined in RCC § 22E-701.[43]

Subparagraph (d)(3)(B) specifies that causing the death of another "with the purpose" of harming the decedent because of his or her status as a law enforcement officer, public safety employee, or district official is an aggravating circumstance. This aggravating circumstance requires that the accused acted with "purpose," a term defined at RCC § 22E-206, which means that the actor must consciously desire to harm that person because of his or her status as a law enforcement officer, public safety employee, or District official.[44] Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes.[45] "Law enforcement officer," "public safety employee," and "District official" are all defined terms in RCC § 22E-701. Per RCC § 22E-205, the object of the phrase "with the purpose" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Here, it is not necessary to prove that the complainant who was harmed was a law enforcement officer, public safety employee, or District official, only that the actor believed to a practical certainty that the complainant that he or she would harm a person of such a status.

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

Subparagraph (d)(3)(D) specifies that murder committed for hire is an aggravating circumstance. This aggravating circumstance is satisfied if the actor received anything of pecuniary value from another person in exchange for causing the death. This subsection also specifies that the culpable mental state required for this aggravating circumstance is "knowingly," a term defined under RCC § 22E-206 to mean that the actor must have been practically certain that he or she would receive anything of value in exchange for causing the death of another.

Subparagraph (d)(3)(E) specifies that the infliction of extreme physical pain or mental suffering for a prolonged period of time immediately prior to the decedent's death

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

(A) Under 18 years of age old, when, in fact, the actor is 18 years of age or older and at least 4 years older than the complainant;
(B) 65 years old or older, when, in fact, the actor is at least 10 years younger than the complainant;
(C) A vulnerable adult;
(D)A law enforcement officer, while in the course of official duties;
(E) A public safety employee while in the course of official duties;
(F) A transportation worker, while in the course of official duties; or
(G)A District official, while in the course of official duties.

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

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

is an aggravating circumstance.[46] This subsection also specifies that the culpable mental state required for this aggravating circumstance is "knowingly," a term defined under RCC § 22E-206 to mean that the actor must have been practically certain that his or her conduct would cause extreme physical pain or mental suffering for a prolonged period of time prior to the decedent's death.

Subparagraph (d)(3)(F) specifies that mutilating or desecrating the decedent's body is an aggravating circumstance.[47] This subsection also specifies that the culpable mental state required for this aggravating circumstance is "knowingly," a term defined under RCC § 22E-206 to mean that the actor must be practically certain that he or she mutilated or desecrated the body after death.

Subparagraph (d)(3)(G) specifies that substantial planning is an aggravating circumstance. Substantial planning requires more than mere premeditation and deliberation. The term "substantial planning" is intended to have the same meaning as under current law.[48] Although substantial planning does not require an intricate plot, the accused must have formed the intent to kill a substantial amount of time before committing the murder.[49] This subparagraph uses the term "in fact," which specifies that no culpable mental state applies to this aggravating circumstance.

Subsection (e) provides for a bifurcated proceeding when a person is charged with penalty enhancements under subparagraphs (c)(3)(E) or (c)(3)(F). In the first stage of the proceeding, the fact finder shall only consider evidence relevant to determining whether the accused committed either first or second degree murder. Evidence that is relevant to determining whether aggravating factors under subparagraphs (c)(3)(E) or (c)(3)(F) are not admissible at this stage, unless it is relevant to determining whether the accused committed either first or second degree murder. In the second stage of the proceeding, the fact finder may consider evidence relevant to determining whether aggravating factors under subparagraphs (c)(3)(E) or (c)(3)(F). This bifurcated procedure limits the admissibility of unfairly prejudicial evidence during the first stage

Paragraph (f)(1) provides that in addition to any other defenses otherwise applicable to the accused's conduct, the presence of mitigating circumstances is a defense to prosecution for first degree or second degree murder. This paragraph provides a non-exhaustive definition of mitigating circumstances.[50]

Subparagraph (f)(1)(A) first defines mitigating circumstances as acting under the influence of extreme emotional disturbance for which there was a reasonable cause. "Extreme emotional disturbance" refers to emotions such as "rage," "fear or any violent

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

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

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

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

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

and intense emotion sufficient to dethrone reason."[51] Subparagraph (e)(1)(A) further specifies that the reasonableness of the cause of the disturbance shall be determined from the viewpoint of a reasonable person in the actor's situation under the circumstances as the actor believed them to be. The "actor's situation" includes some of the actor's personal traits, such as physical disabilities[52], or temporary emotional states,[53] which should be taken into account in determining reasonableness. However, the actor's idiosyncratic values or moral judgments are irrelevant.[54] Subparagraph (e)(1)(A) also specifies that reasonableness shall be determined from the accused's situation "as the actor believed them to be." This language clarifies that the actor's *factual* beliefs, even if inaccurate, must be taken into account in determining whether the cause of the extreme emotional disturbance was reasonable.[55] The fact finder must determine in each case whether the provoking circumstance was a reasonable cause of the extreme emotional disturbance, such that "the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen."[56]

Subparagraph (f)(1)(B) defines mitigating circumstances to include acting under an unreasonable belief that the use of deadly force was necessary to prevent death or serious bodily injury under the circumstances. This form of mitigation may arise in the context of imperfect self-defense or the defense of others.[57] A person is justified in using deadly force if he reasonably believes he, or another person, is in imminent danger of serious bodily harm or death, and that the use of deadly force was necessary to prevent the infliction of that harm.[58] Use of deadly force with such a reasonable belief is a complete defense to liability.[59] If the actor genuinely believes these circumstances exist, but that belief in either circumstance is unreasonable¸ subparagraph (e)(1)(B) clarifies that the actor is not guilty of murder, but is guilty of voluntary manslaughter.[60]

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

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

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

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

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

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

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

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

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

[60] If an actor uses lethal force reasonably believing that the decedent was threatening an imminent use of deadly force, but the belief that use of lethal force was necessary to repel the attack is unreasonable because the actor could have ran away, an imperfect self-defense claim would be available to mitigate the offense from murder to manslaughter. In addition, belief that the use of lethal force was necessary may be unreasonable if the actor used excessive force. For example, if the actor genuinely believed that the

Subparagraph (f)(1)(C) further defines mitigating circumstances to broadly include any other legally-recognized partial defense to murder. For example, an unreasonable belief in any circumstance that would provide a legal justification for the use of lethal force, apart from self-defense or defense of others, may constitute a mitigating circumstance.[61]

Paragraph (f)(2) specifies the burden of proof for the mitigation defense. If any evidence of mitigating circumstances is presented at trial by either the government or the accused, the government bears the burden of proving the absence of mitigating circumstances beyond a reasonable doubt. This paragraph is intended to codify current District law, which specifies the government's burden of proof.[62]

Paragraph (f)(3) specifies the effect of the mitigation defense in a murder prosecution. If evidence of mitigation has been presented at trial and the government fails to meet its burden of proving that mitigating circumstance were absent, but proves all other elements of murder, then the accused is not guilty of murder but is guilty of voluntary manslaughter.[63]

Subsection (g) provides that a person cannot be held liable as an accomplice to felony murder, as defined in paragraph (b)(2).[64] This subsection does not limit application of any other form of homicide liability.[65]

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

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

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decedent was threatening an imminent use of deadly force, but *non-lethal* force would have been sufficient to repel the attack, an imperfect self-defense claim would be available to mitigate the offense from murder to manslaughter. *See, Dorsey v. United States*, 935 A.2d 288, 293 (D.C. 2007).

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

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

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

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

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

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

First, under the revised murder statute, felony murder is graded as second degree murder. Under the current first degree murder statute, a person may be convicted if he or she unintentionally causes the death of another while committing or attempting to commit a specified felony.[66] Such an unintentional felony murder is currently punished more severely than an intentional, but non-premeditated killing (which currently constitutes second degree murder), subjecting the defendant to a life sentence if the government can prove that at least one aggravating circumstance was present.[67] Moreover, one of the possible aggravating circumstances that enhances penalties for first degree felony murder is that the killing occurred while the accused was committing or attempting to commit "kidnapping,"[68] "robbery, arson, rape, or a sexual offense,"[69] and the DCCA has held that the predicate felony for felony murder can also serve as an aggravating circumstance.[70] Consequently, under current law, an unintentional murder that occurs during a robbery, arson, sexual offense, or kidnapping is subject to a more severe maximum sentence than even a premeditated, intentional killing (which currently constitutes first degree murder absent aggravating circumstances). By contrast, under the RCC, unintentionally causing the death of another while committing an enumerated felony constitutes second degree murder. This change improves the proportionality of penalties under the RCC by treating killings committed with a lower culpable mental state less severely.

Second, the revised murder statute eliminates as a distinct form of first degree murder purposely causing the death of another while "perpetrating or attempting to perpetrate an offense punishable by imprisonment in the penitentiary."[71] The DCCA has held that an "offense punishable by imprisonment in the penitentiary refers to any felony.[72] Under the RCC, the grading with respect to general felony conduct is simplified, such that purposely causing the death of another person with premeditation and deliberation is first degree murder, while purposeful killing without premeditation or deliberation will still be covered by the second degree murder offense. This change improves the clarity and proportionality of the revised criminal code.

Third, the revised first degree murder statute eliminates as a distinct form of murder D.C. Code § 22-2102, which requires that the accused "maliciously places an

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

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

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

[69] D.C. Code § 22-2104.01 (b)(8).

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

[71] D.C. Code § 22-2101.

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

obstruction upon a railroad or street railroad . . . and thereby occasions the death of another."[73] In contrast, the RCC treats killings caused by obstructing railroads the same as any other killings, with charges dependent on the accused's culpable mental state, and the presence of aggravating or mitigating circumstances. The fact that a killing occurs by means of obstructing a railroad no longer, by itself, renders the killing first degree murder. This change improves the proportionality of the revised homicide statutes by ensuring that the accused's culpable mental state remains the primary grading factor, instead of the specific means of placing obstructions upon a railroad or street railroad.

Fourth, the revised second degree murder statute changes the specified felonies that may serve as a predicate offense for "felony murder" in five ways.[74] The current felony murder predicates include: (1) all conduct constituting "robbery," currently an ungraded offense; (2) first degree child cruelty; (3) any "felony involving a controlled substance;"[75] (4) mayhem; and (5) "any housebreaking while armed with or using a dangerous weapon," although it is unclear which specific crimes constitute such "housebreaking."[76] By contrast, the RCC clarifies, and in several respects reduces, the conduct that is a predicate for felony murder. First, the revised statute states that first degree, second degree, third degree, and fourth degree robbery are predicates for felony murder, but does not include the RCC's fifth degree robbery as a predicate offense, or pickpocketing-type conduct that is treated as theft from a person[77] in the RCC. Eliminating such conduct as predicates for felony murder improves the statute's proportionality because such conduct does not involve infliction of significant bodily injury or the use of a weapon, and lacks the inherent dangerousness of first degree, second degree, third degree, and fourth degree robbery.[78] Second, the revised second degree murder offense does not include the current D.C. Code first degree child cruelty, and instead includes the RCC's first and second degree child abuse, but not third degree

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

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

[75] D.C. Code §22-2101.

[76] Under current law, burglary is divided into two grades, both of which appear to be included in the felony murder statutory reference to "housebreaking." The original 1901 Code codified the offense now known as burglary, but called it "housebreaking." The original "housebreaking" offense only had one grade, and criminalized entry of *any building* with intent to commit a crime therein. In 1940, Congress amended the first degree murder statute and included an enumerated list of felonies, which included housebreaking, for felony murder. See H.R. Rep. Doc. No. 76-1821, at 1 (1940) (Conf. Rep). In 1967, Congress relabeled "housebreaking" as "second degree burglary," and created first degree burglary, which required that the burglar entered an occupied dwelling. However, the DCCA has held that only the current first degree burglary offense may serve as a predicate to non-purposeful felony murder. *Robinson v. United States*, 100 A.3d 95, 109 (D.C. 2014).

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

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

child abuse. While the RCC child abuse statutes are comparable to first degree child cruelty in the D.C. Code, the RCC changes current law as at least some conduct that constitutes the RCC's third degree child abuse offense would satisfy the elements of the current first degree child cruelty statute.[79] Omitting third degree child abuse as a predicate for felony murder improves the proportionality of the statute, as the RCC third degree child abuse and the current first degree child cruelty statute cover conduct that is not sufficiently dangerous or harmful to warrant felony murder liability.[80] Third, the revised second degree murder offense does not include felonies involving a controlled substance as predicates for felony murder. Omitting controlled substance offenses from the enumerated offenses improves the proportionality of the felony murder rule, as controlled substance offenses do not present the same inherent, direct risk of physical harm to others as compared to the other enumerated felonies.[81] Fourth, the revised second degree murder offense no longer includes "mayhem" as a predicate for felony murder. Mayhem is a common law offense that is replaced under the RCC by the revised first degree and second degree assault offenses.[82] The revised statute does not include these offenses as enumerated predicate offenses as unnecessary. In most cases, a person who causes the death of another while committing or attempting to commit first or second degree assault can be convicted of second degree murder under a depraved heart theory.[83] Omitting these offenses from the enumerated predicate offenses improves the

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

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

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

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

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

clarity of the code. Lastly, the revised second degree murder offense replaces the phrase "any housebreaking while possessing a dangerous weapon" with "first degree burglary while possessing a dangerous weapon on his or her person." Under current law, only first degree burglary while armed may serve as a predicate offense,[84] and the current first degree burglary offense requires that the accused entered an occupied dwelling. This largely corresponds to the RCC's first degree burglary offense, with only minor changes to current law.[85]

Fifth, the revised second degree murder offense requires that, for felony murder, the accused must have caused the death of another while acting "in furtherance" of the predicate felony. The current statute does not specify that the accused cause the death of another "in furtherance" of the underlying felony, and the DCCA has held that "[t]here is no requirement in the law . . . that the government prove the killing was done in furtherance of the felony in order to convict the actual killer of felony murder."[86] However, while there is no "in furtherance" requirement under current law,[87] the DCCA has held that "[m]ere temporal and locational coincidence"[88] between the underlying felony and the death are not enough. There must have been an "actual legal relation between the killing and the crime . . . [such] that the killing can be said to have occurred *as a part of the perpetration of the crime*."[89] By contrast, the revised statute, through use of the "in furtherance" phrase, requires that the accused's conduct that caused the death of another in some way facilitated the commission or attempted commission of the offense, including avoiding apprehension or detection of the offense or attempted offense.[90] Practically, this change in law may have little impact, as most cases in which

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caused a serious bodily injury, or recklessly caused the death of another under circumstances manifesting extreme indifference to human life, either of which culpable mental states would satisfy the requirement for second degree murder per paragraph (b)(2).

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

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

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

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

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

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

[90] Courts in other states have disagreed about the meaning of "in furtherance" language that is common in felony murder statutes. Some courts have held that "in furtherance" requires that the act that caused the death must have advanced or facilitated commission of the underlying crime. *E.g.*, *State v. Arias*, 641 P.2d 1285, 1287 (Ariz. 1982); *Auman v. People*, 109 P.3d 647, 656 (Colo. 2005) (the death must occur either "in the course of" or "in furtherance of" immediate flight, so that a defendant commits felony murder only if a

the accused causes the death of another as "part of perpetration of the crime," he or she would also have been acting in furtherance of the crime. However, this change improves the proportionality of the offense insofar as a person whose risk-creating behavior is not in furtherance of the felony is not as culpable as a person who otherwise negligently kills someone in the course of committing a specified felony.[91]

Sixth, applying the general culpability principles for self-induced intoxication in RCC § 22E-209 allows a defendant to claim that due to intoxication, he or she did not form the awareness of risk required to act "recklessly, with extreme indifference to human life." However, subsection (c) allows a fact finder to impute awareness of the risk required to prove that the defendant acted with extreme indifference to human life, when the lack of awareness was due to self-induced intoxication. Although self-induced intoxication is generally culpable, and weighs in favor of finding that the person acted with extreme indifference to human life, it is possible, however unlikely, that self-induced intoxication reduces the blameworthiness, and negates finding that the person acted with extreme indifference to human life.[92]

The current murder statutes are silent as to the effect of voluntary intoxication, but the DCCA has held that, although evidence of self-induced intoxication may negate a finding that the defendant acted with premeditation as required for first degree murder, it "may not reduce murder to voluntary manslaughter, nor permit an acquittal of [second degree] murder."[93] The DCCA further clarified that evidence of voluntary intoxication "is not admissible to disprove [the element of] malice' integral to the crime of murder."[94] By contrast, although subsection (c) allows for imputation of the awareness of risk, in some rare cases, a defendant's self-induced intoxication may still negate finding that he or she acted with extreme indifference to human life, as required for second degree murder. This change improves the proportionality of the revised offense.

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

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

[92] *Infra*, at 41.

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

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

In addition, to the extent that the voluntary intoxication provision changes current law with respect to any of the predicate offenses for felony murder, the provision also changes current law as to felony murder.[95] If voluntary intoxication negates the requisite culpable mental state required for a predicate offense, there can be no felony murder liability based on that offense.[96] These changes improve the clarity, completeness, and proportionality of the revised offense.

Seventh, the penalty enhancements under subsection (d) omit as an aggravating circumstance that the murder was committed in the course of kidnapping or abduction, or attempt to kidnap or abduct. The current first degree murder statute is subject to a penalty enhancement where it is proven that the murder was committed in the course of a kidnapping, abduction, or attempted kidnapping or abduction.[97] By contrast, the penalty enhancement under subsection (d) omits this aggravating circumstance as unnecessary. In any case in which a person recklessly, with extreme indifference to human life, kills another while committing or attempting to commit kidnapping, the person may be convicted and separately sentenced for kidnapping or attempted kidnapping, which substantially increases the maximum allowable punishment beyond a murder not committed in the course of a kidnapping or attempted kidnapping. Eliminating this aggravating circumstance reduces unnecessary overlap between offenses[98], and improves the clarity and proportionality of the revised statute by preventing both an enhanced penalty for the murder and a separate conviction and sentence for the kidnapping offense.

Eighth, the penalty enhancements under subsection (d) omit as an aggravating circumstance that the murder was committed while committing or attempting to commit a robbery, arson, rape, or sexual offense. The current first degree murder statute is subject to a penalty enhancement where it is proven that the murder was committed "while committing or attempting to commit a robbery, arson, rape, or sexual offense."[99] The terms "rape" and "sexual offense" are undefined by the current statute, and there is no case law on point.[100] By contrast, the penalty enhancement under subsection (d) omits this aggravating circumstance as unnecessary. Even with the omission of this

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

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

[97] D.C. Code § 22-2104.1(b)(1).

[98] It is unclear whether under current District law, a defendant may be sentenced under the kidnapping aggravating circumstance and be separately convicted and sentenced for the kidnapping itself. It is possible that when kidnapping is used as an aggravating circumstance to enhance the maximum penalty for murder, the conviction for kidnaping merges with the murder conviction. If so, there is no overlap issue. No case law exists on point.

[99] D.C. Code § 22-2104.01(b)(8).

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

aggravating circumstance, the accused may still be separately convicted and sentenced for the robbery, arson, rape, or other sexual offense, which substantially increases the maximum allowable punishment beyond a murder not committed in the course of robbery, arson, rape, or another sexual offense. Eliminating this aggravating circumstance reduces unnecessary overlap between offenses,[101] and improves the clarity and proportionality of the revised statute by preventing both an enhanced penalty for the murder and a separate conviction and sentence for the other felony offense.

Ninth, the penalty enhancements under subsection (d) omit as an aggravating circumstance that there was more than one first degree murder arising out of one incident. The current first degree murder statute is subject to a penalty enhancement when there was more than one offense of murder in the first degree arising out of one "incident."[102] The term "incident" is not defined by the statute, and there is no case law on point. By contrast, the penalty enhancement under subsection (d) omits this aggravating circumstance as unnecessary. In any case in which the accused commits more than one murder, that person may be convicted and sentenced for multiple counts of murder, which allows for punishment proportionate to the conduct.[103] Eliminating this aggravating circumstance reduces unnecessary overlap between offenses,[104] and improves the clarity and proportionality of the revised statute by preventing both enhanced penalty for each murder and a separate conviction and sentence for the additional murders.

Tenth, the penalty enhancements under subsection (d) omit as an aggravating circumstance that the murder was a drive-by or random shooting. The current first degree murder statute is subject to a penalty enhancement when the murder "involved a drive-by or random shooting."[105] There is no District case law on the meaning of "random." By contrast, the penalty enhancement under subsection (d) omits this aggravating circumstance because the circumstance is vague and drive-by or random shootings are not sufficiently distinguishable from other murders to justify a more severe sentence. It is unclear both what connection would suffice to establish that a murder "involved" a drive-by or random shooting, and what the meaning of "random" is in this

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

[102] D.C. Code § 22-2104.1(b)(6).

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

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

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

context[106]. In addition, murders committing by random or drive-by shootings do not categorically inflict greater suffering on the victim, nor are they significantly more culpable than murders committed by other means.[107] Eliminating this aggravating circumstance improves the clarity and proportionality of the revised statute by preventing enhanced penalties for murders that are not categorically more heinous or culpable than other types of murder.

Eleventh, the penalty enhancements under subsection (d) omit as an aggravating circumstance that the murder was committed because of the victim's race, color, religion, national origin, sexual orientation, or gender identity or expression. The current first degree murder statute is subject to a penalty enhancement when the murder was "committed because of the victim's race, color, religion, national origin, sexual orientation, or gender identity or expression[.]"[108] A separate bias-related crime penalty enhancement in current D.C. Code § 22-3703 increases the maximum punishment for any murder by one and a half times when the murder "demonstrates an accused's prejudice based on the actual or perceived race, color, religion, national origin, …sexual orientation, gender identity or expression…."[109] By contrast, the penalty enhancements under subsection (d) omit this aggravating circumstance as unnecessary because bias motivated murders will be subject to a general penalty enhancement under RCC § 22E-607. Omitting this aggravating circumstance reduces unnecessary overlap between statutes[110] and improves the proportionality of the offense by precluding bias motivations from enhancing penalties twice, both as an aggravating circumstance and under the separate bias enhancement.

Twelfth, the penalty enhancements under subsection (d) omit as an aggravating circumstance that the offense was committed because the victim was or had been a witness in any criminal investigation or judicial proceeding or was capable of providing or had provided assistance in any criminal investigation or judicial proceeding. The current first and second degree murder statutes are subject to a penalty enhancement when the murder ".was committed because the victim was or had been a witness in any criminal investigation or judicial proceeding or was capable of providing or had provided

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

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

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

[109] D.C. Code §§ 22-3701, 22-3703.

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

assistance in any criminal investigation or judicial proceeding."[111] By contrast, the penalty enhancements under subsection (d) omit this aggravating circumstance as unnecessary because murders committed for these purposes are subject to separate criminal liability under the obstructing justice statute.[112]

Thirteenth, the penalty enhancements under subsection (d) omit as an aggravating circumstance that the accused had previously been convicted of murder, manslaughter, or other enumerated violent offenses. The current first degree murder statute is subject to a penalty enhancement when the accused had previously been convicted of certain violent offenses.[113] Separate repeat offender penalty enhancements in current D.C. Code §§ 22-1804 and 22-1804a potentially increases the maximum punishment for any murder committed by a person with one or two prior convictions for certain offenses (including those currently as aggravating circumstances for first degree murder.)[114] By contrast, the penalty enhancement under subsection (d) omits this aggravating circumstance as unnecessary. The general penalty enhancement for recidivist conduct under RCC § 22E-606 provides for enhanced penalties. Omitting this aggravating circumstance reduces unnecessary overlap between criminal statutes[115] and improves the proportionality of the offense by precluding prior convictions from enhancing penalties twice, both as an aggravating circumstance and under the separate recidivist enhancement.

Fourteenth, the penalty enhancements under subsection (d) include as an aggravating circumstance that the murder was committed for the purpose of harming the victim because of the victim's status as a law enforcement officer or public safety employee, or District official. Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes.[116] Under current law, an accused who knowingly causes the death of a law enforcement officer or public safety employee, with knowledge or reason to know that the victim was an on-duty law enforcement officer or public safety employee, or "on account of performance"[117] of the officer's or employee's official duties is guilty of a separate murder of a law enforcement officer offense. A separate penalty enhancement in current D.C. Code § 22-3602 increases the maximum punishment for any murder by one and a half times when the murder is of "a member of a citizen patrol ("member") while that member is participating in a citizen patrol, or because of the member's participation

[111] D.C. Code § 24-403.01 (b-2)(2)(B).
[112] See RCC § 22E-XXXX [pending revision of the obstructing justice statute].
[113] D.C. Code § 22-2104.01(b)(12) (these offenses are: "murder, (B) manslaughter, (C) any attempt, solicitation, or conspiracy to commit murder, (D) assault with intent to kill, (E) assault with intent to murder, or (F) at least twice, for any offense or offenses, described in § 22-4501(f) [now § 22-1331(4)] whether committed in the District of Columbia or any other state, or the United States.").
[114] D.C. Code §§ 22-1804 and 22-1804a.
[115] It is unclear whether under current District law, a defendant may be sentenced under both the general recidivist enhancement, and this aggravating circumstance based on the same prior conviction. It is possible that only one statute may apply to a particular murder, and if so there is no overlap issue. No case law exists on point.
[116] For example, if a person fires several shots above a District official's head with the purpose of frightening the official, and accidentally hits and kills the official, the aggravating factor under (c)(3)(B) may apply, even if the person did not have the purpose of causing bodily injury.
[117] D.C. Code § 22-2106.

in a citizen patrol."[118] A separate offense criminalizes harming District officials or employees and their family members.[119] By contrast, penalty enhancements under subsection (d) include as an aggravating circumstance that the murder was committed with the purpose of harming the victim because of the victim's status as a law enforcement officer, public safety employee, or District official. Inclusion of this this aggravating circumstance replaces the murder of a law enforcement officer offense that exists under current law.[120] Use of the RCC's "law enforcement officer" definition also changes current law by including certain types of officers that are not included under the current murder of a law enforcement officer statute.[121] This aggravating circumstance covers only a subset of District employees—District officials—and does not include citizen patrol members, consistent with other provisions in the RCC.[122] Including this aggravating circumstance, and eliminating the separate murder of a law enforcement officer, reduces unnecessary overlap between criminal statutes and improves the clarity and consistency of the revised code.

Fifteenth, the penalty enhancements under subsection (d) include as an aggravating circumstance that the accused was reckless as to the victim's status as a "protected person," a term defined under RCC § 22E-701, which includes "a law enforcement officer, while in the course of official duties", "public safety employee, while in the course of official duties," "transportation worker, while in the course of official duties," or a "District official, while in the course of official duties." Under current law, the aggravating circumstances that authorize a life sentence for murder do not include the victim's status as an on duty law enforcement officer, public safety employee, transportation worker, District official or employee, or citizen patrol member. However, separate statutes authorize enhanced penalties based on the victim's status as a specified transportation worker,[123] or status as a citizen patrol member.[124] Separate statutes also criminalize murder of a law enforcement officer engaged in official duties,[125] and harming District officials or employees and their family members as separate offenses.[126] By contrast, the penalty enhancements under subsection (d) include as an aggravating circumstance that the victim was a "protected person."[127] This term is

[118] D.C. Code § 22-3602(b).
[119] D.C. Code §22-851.
[120] D.C. Code § 22-2106.
[121] The RCC's "law enforcement officer" definition includes; "any…reserve officer, or designated civilian employee of the Metropolitan Police Department;" "any licensed special police officer"; and "any officer or employee…of the Social Services Division of the Superior Court…charged with intake, assessment, or community supervision." These types of officers are not included in the definition of "law enforcement officer" in the current murder of a law enforcement officer statute.
[122] For more information on the RCC definition of "District official," see commentary to RCC § 22E-701.
[123] D.C. Code § 22-3751 (enhancement for specified crimes committed against taxicab drivers); D.C. Code § 22- 3751.01 (enhancement for specified crimes committed against transit operator or Metrorail station manager).
[124] D.C. Code § 22-3602 (enhancement for specified crimes committed against citizen patrol members).
[125] The current murder of a law enforcement officer offense criminalizes causing the death of an on-duty law enforcement officer or public safety employee "with knowledge or reason to know the victim is a law enforcement officer or public safety employee." D.C Code § 22-2106.
[126] D.C. Code §22-851.
[127] For more information on the RCC definition of "protected person," see commentary to RCC § 22E-701.

defined to include persons vulnerable due to youth or old age, a specified transportation worker, or a law enforcement officer engaged in official duties, and replaces the current D.C. Code's separate penalty enhancements, and the murder of a law enforcement officer offense. Under the revised term, a victim's status as a member of a "citizen patrol" no longer is sufficient for an enhanced murder penalty. Including recklessness as to victim being a protected person as an aggravating circumstance, and eliminating the separate penalty enhancements, and the separate murder of a law enforcement officer improves the clarity and consistency of the revised code.

Sixteenth, the penalty enhancements under subsection (d), through use of the term "protected person," change the range of victims' ages that qualify as an aggravating circumstance. Under current law, three separate statutory provisions authorize heightened penalties for murder based on the age of the victim. Both first and second degree murder are punishable by a lifetime sentence if the victim was less than 12 years old or more than 60 years old.[128] Separate statutes allow for penalty enhancements of one and one half times the maximum authorized punishment for murder if the victim was 65 years of age or older[129], or less than 18 years of age if the perpetrator was at least 18 years of age and at least two years older than the victim.[130] By contrast, the penalty enhancements under subsection (d), through use of the term "protected person," include as aggravating circumstances that the victim was less than 18 years old—if the actor is at least 18 years old and at least 4 years older than the complainant—or the victim was 65 years or older—when the actor is at least 10 years younger than the complainant.[131] This aggravating circumstance replaces both the age based aggravating circumstances under current law, and the separate statutory penalty enhancements based on the victim's age, insofar as they apply to murder. This change in law improves the consistency of the current and revised code.[132]

Seventeenth, the revised murder statute does not provide enhanced penalties for committing murder while armed with a dangerous weapon. Under current law, murder is subject to heightened penalties if the accused committed the offense "while armed" or "having readily available" a dangerous weapon.[133] In contrast, under the revised statute, committing murder while armed does not increase the severity of penalties. As a practical matter, nearly all murders involve a dangerous weapon, and raising the gradation of murder in all instances using a dangerous weapon would increase liability significantly compared to the current murder statute. Moreover, as a practical matter, it is unclear whether the current code's separate weapon enhancement significantly affect sentences for murder. This change improves the proportionality of the revised code, as

[128] D.C. Code § 24-403.01 (b-2)(2)(G).
[129] D.C. Code §22-3601.
[130] D.C. Code § 22-3611.
[131] RCC § 22E-701.
[132] This aggravating circumstance may also change current law in another way. It is unclear whether under current law, a felony murder predicated on first degree child cruelty is subject to penalty enhancement due to the victim's status as a minor. Under the revised second degree murder offense, first degree child abuse and second degree child abuse are predicate offenses for felony murder. Under the RCC, a second degree felony murder predicated on child abuse is, in addition, subject to a penalty enhancement based on the victim's status as a minor.
[133] D.C. Code § 22-4502.

murder while armed does not inflict greater harm than unarmed murder, and therefore does not warrant heightened penalty.

Eighteenth, the penalty enhancements under subsection (d) do not require separate written notice and a separate hearing as is required under D.C. Code § 22-2104.01(a), or a separate written notice prior as is required under § 22-403.01(b-2)(A). Under current law, § 22-2104(a) requires that the government notify the accused in writing at least 30 days prior to trial if intends to seek a sentence of life imprisonment without release.[134] When the government alleges that aggravating circumstances enumerated under § 22-2104.01 were present, a separate sentencing proceeding must be held "as soon as practicable after the trial has been completed to determine whether to impose a sentence of more than 60 years[.]"[135] Following the hearing, if the sentencing court wishes to impose a sentence greater than 60 years, a finding in writing must state whether, beyond a reasonable doubt, one or more aggravating circumstances exist.[136] In addition, if the government intends to rely on the aggravating circumstances listed under § 24-403.01(b-2) it must file an indictment or information at least thirty days prior to trial or a guilty plea that states in "writing one or more aggravating circumstances to be relied upon."[137] D.C. Code §24-403.01(b-2) does not specify whether a separate sentencing hearing must be held. By contrast, the revised murder statute eliminates the special requirements under D.C. Code § 22-2104.01(a), (c) and § 24-403.01(b-2)(A) that relate to sentences for murder.[138] Under the revised murder statute, proof of at least one aggravating circumstance is still an element which must be alleged in the indictment[139] and proven beyond a reasonable doubt at trial.[140] The factfinder is not required to separately produce a written finding that at least one aggravating circumstance was proven beyond a reasonable doubt, however, nor is the hearing described in current law required.[141] However, eliminating the statutory notice and hearing requirements applicable to the current District murder statutes does not change applicable Sixth Amendment law which, since the District adopted its statutory notice requirements, has expanded to require proof beyond a reasonable doubt of facts that subject a person to a higher statutory penalty.[142] This change improves the clarity of the criminal code.

The revised murder statute does not specifically address the effect of an appellate determination that the burden of proof was not met with respect to an aggravating circumstance that was the basis for the conviction. Current D.C. Code § 22-2104.01(d)

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[134] D.C. Code § 22-2104.
[135] D.C. Code § 22-2104.01.
[136] D.C. Code § 22-2104.01(c).
[137] D.C. Code § 22-403.01 (b-2)(1)(A).
[138] D.C. Code § 24.403.01 includes sentencing procedures for other offenses. The statutory language of § 24.403.01 will only change insofar as it is relevant to sentencing for murder.
[139] D.C. Super. Ct. R. Crim. P. 7.
[140] *In re Winship*, 397 U.S. 358 (1970).
[141] However, as set forth in subsection (e), a separate proceeding will be used to determine if aggravating factors under subparagraphs (c)(3)(E) or (c)(3)(F) were present.
[142] *See Ring v. Arizona*, 536 U.S. 584, 609 (2002) (holding that the Sixth Amendment requires a jury to find at least one aggravating circumstance that authorizes imposition of the death penalty); *Long v. United States*, 83 A.3d 369, 379 (D.C. 2013), *as amended* (Jan. 23, 2014) (holding that it was plain error for a judge to make factual findings to determine a defendant's eligibility for an enhanced sentence of life without the parole).

provides that if a trial court is reversed on appeal due to "an error only in the separate sentencing procedure, any new proceeding before the trial court shall only pertain to the issue of sentencing."[143] However, this provision is unnecessary as the revised murder statute does not require any separate sentencing proceeding. If a conviction for murder with a sentencing enhancement is reversed on appeal on grounds that only relate to one of the aggravating circumstances, the appellate court may order entry of judgment as to first degree or second degree murder.[144]

Nineteenth, the revised murder statute bars accomplice liability for felony murder.[145] Under current District case law, "[a]ccomplices also are liable for felony murder if the killing . . . [is] a natural and probable consequence of acts done in the perpetration of the felony."[146] In contrast, under the revised murder statute, a person may not be convicted as an accomplice to felony murder as defined in paragraph (b)(2). This change improves the proportionality of the revised offense by matching the actor's liability to his or her true degree of culpability.

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[143] D.C. Code § 22-2104.01 (d).

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

[145] At least one state bars application of felony murder when the defendant did not commit the lethal act. E.g., Cal. Penal Code § 189 (e) ("A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven: (1) The person was the actual killer. (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2."). Other states provide affirmative defenses in cases where the defendant did not commit the lethal act. E.g. Wash. Rev. Code Ann. § 9A.32.030 ("Except that in any prosecution under [for felony murder] in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant: (i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and (ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and (iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and (iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.").

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

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

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

First, the revised murder statute recognizes that acting under an "extreme emotional disturbance for which there is a reasonable cause" constitutes a mitigating circumstance, and serves as a partial defense to murder. Although current District murder statutes make no mention of mitigating circumstances, the DCCA has held that a person commits voluntary manslaughter when he or she causes the death of another with a mental state that would constitute murder, except for the presence of mitigating circumstances.[147] The DCCA has not clearly defined what constitutes a "mitigating circumstance," but has held that mitigating circumstances include a accused "act[ing] in the heat of passion caused by adequate provocation."[148] Under common law, cases interpreting what constituted adequate provocation came to recognize "fixed categories of conduct"[149] that "the law recognized as sufficiently provocative to mitigate"[150] murder to the lesser offense of manslaughter.[151]

In contrast, the RCC's murder statute states that acting under "extreme emotional disturbance" is a mitigating circumstance, thereby adopting the modern approach to provocation, which is more flexible in determining which circumstances are sufficient to mitigate murder to manslaughter.[152] This modern approach "does not provide specific categories of acceptable or unacceptable provocatory conduct."[153] Instead of being limited to the "fixed categories" that have been previously recognized by courts, the modern approach more generally inquires whether the "provocation is that which would cause . . . a reasonable man . . . to become so aroused as to kill another"[154] such that "the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen."[155] Consistent with this modern approach, under subsection (f) of the

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

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

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

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

[151] *See*, Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter As Partial Justification and Partial Excuse*, 52 Wm. & Mary L. Rev. 1027, 1036 (2011) ("The law came to recognize four distinct-and exhaustive-categories of provocative conduct considered "sufficiently grave to warrant the reduction from murder to manslaughter of a hot-blooded intentional killing." The categories were: (1) a grossly insultive assault; (2) witnessing an attack upon a friend or relative; (3) seeing an Englishman unlawfully deprived of his liberty; and (4) witnessing one's wife in the act of adultery."); Lafave, Wayne. 2 Subst. Crim. L. § 15.2 (3d ed.) ("There has been a tendency for the law to jell concerning what conduct does or does not constitute a reasonable provocation for purposes of voluntary manslaughter.").

[152] Commentary to MPC § 210.3 at 49.

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

[154] *Id.* at 542.

[155] Commentary to MPC § 210.3 at 63.

revised murder statute, it is possible to mitigate homicides from murder to manslaughter even under circumstances that have not been traditionally recognized at common law.[156]

One notable change from the common law of provocation is that an "extreme emotional disturbance" need not have been caused wholly or in part by the decedent in order to be adequate.[157] For example, consider a case in which the accused discovers that his neighbor has killed the accused's spouse, and in a fit of rage, the accused kills a third person who attempted to protect the neighbor. Under the traditional common law approach, since the third party was not responsible for provoking the accused, mitigation would be unavailable. Under the "extreme emotional disturbance" rule however, it is at least possible that the homicide could be mitigated downwards to manslaughter. Despite its differences, the modern approach in many ways is similar to the common law approach. Under both approaches, the accused must have acted with an emotional state that would cause a person to become so "aroused as to kill another"[158] 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."[159] Further, under both approaches, the reasonableness of the accused's reaction to the provoking circumstance is determined from the accused's view of the facts.[160]

It is unclear whether adopting the modern "extreme emotional disturbance" approach changes current District law.[161] Although the DCCA has long used the traditional "adequate provocation" formulation[162], 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[.]"[163] 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."[164] Ultimately the DCCA

[156] For example, at common law, and under current DCCA case law, mere words alone are inadequate provocation. *See Brown*, 584 A.2d at 540 (D.C. 1990); D.C. Crim. Jur. Instr. § 4-202; Lafave, Wayne. 2 Subst. Crim. L. § 15.2 (3d ed.). However, under the "extreme emotional disturbance" formulation, it is at least possible that mere words, if sufficiently provocative, could constitute a reasonable cause for an extreme emotional disturbance.
[157] Commentary to MPC § 210.3 at 49.
[158] *High v. United States*, 972 A.2d 829, 833-34 (D.C. 2009).
[159] *Brown*, 584 A.2d at 543 n. 17.
[160] *See, High*, 972 A.2d at 834 (stating that instruction on voluntary manslaughter mitigation would be appropriate if "a reasonable man would have been induced to lose self-control . . . because he *believed* that his friend engaged in sexual relations with his adult step-sister" with on regard to whether this belief was factually accurate).
[161] *See, Comber*, 584 A.2d at 41 ("The mitigation principle is predicated on the legal system's recognition of the 'weaknesses' or 'infirmity' of human nature, R. Perkins & R. Boyce, supra, at 84; Bradford, supra, 344 A.2d at 214 (citation omitted), as well as a belief that those who kill under "extreme mental or emotional disturbance for which there is reasonable explanation or excuse" are less 'morally blameworth[y]' than those who kill in the absence of such influences. Model Penal Code, supra, § 210.3 comment 5").
[162] *E.g., High*, 972 A.2d at 833.
[163] *Brown v. United States*, 584 A.2d at 542.
[164] *Brown v. United States*, 584 A.2d at 542.

has not fully reconciled its "recognition (or non-recognition) of the Model Penal Code"[165] approach to provocation, and so it is unclear how adopting the modern approach changes current law.[166]

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

Second, the revised murder statute recognizes that "acting with an unreasonable belief that the use of deadly force was necessary to prevent a *person* from unlawfully causing death or serious bodily injury" constitutes a mitigating circumstance. Under this language, the actor need not have believed that the *decedent* would unlawfully cause death or serious bodily injury.[167] There is no DCCA case law on point as to whether mitigation applies if the actor believed that the use of lethal force was necessary to prevent someone other than the decedent from causing death or serious bodily injury.[168] The revised statute clarifies that mitigation applies in these circumstances.

Third, the revised murder offense may change current District law by explicitly including any other legally-recognized partial defenses, apart from imperfect self-defense, or defense of others, as a mitigating circumstance.[169] While the District's murder statutes are silent as to the relevance or definition of mitigating circumstances, DCCA case law has recognized that mitigating circumstances may be found in situations besides imperfect self-defense or defense of others.[170] However, the DCCA has not specified when the use of deadly force is justified in other circumstances,[171] and whether mitigation would be available for mistakes as to those justifications. By contrast, the RCC specifically recognizes that any other legally-recognized partial defense which substantially diminishes either the accused's culpability or the wrongfulness of the

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

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

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

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

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

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

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

accused's conduct constitute mitigating circumstances. For example, if lethal force may be justified under certain circumstances, even absent the fear of death or serious bodily harm, then an unreasonable belief that those circumstances existed could constitute a mitigating circumstance.[172] The RCC's recognition of mitigation in situations besides imperfect self-defense or defense of others clarifies the revised murder statutes while leaving to courts the precise contours of such mitigating circumstances. Explicitly recognizing these partial defenses as mitigating circumstances improves the proportionality of the offense, by allowing courts to recognize mitigation when appropriate to reflect the accused's reduced culpability.

Fourth, in the revised second degree murder offense, felony murder requires that the accused negligently caused the death of another. While the current statute is clear that intent to cause death is not required, DCCA case law has not clearly stated whether strict liability as to death is sufficient. Some case law suggests no culpable mental state is necessary,[173] while at least one *en banc* decision suggests that a mental state of negligence is required.[174] The RCC second degree murder statute clarifies this ambiguity by requiring negligence as to causing death of another. To the extent that requiring negligence may change current District case law, this change would improve the proportionality of the statute by ensuring a person who was not even negligent as to the death of another could not be punished for murder.[175] A person who was not even negligent as to death does not share the relatively high culpability that justifies murder liability for unintentionally causing the death of another while committing a specified felony.

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

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

[174] The *en banc* court in *Wilson-Bey* stated that the felony murder doctrine applies "in the case of a *reasonably foreseeable* killing, without a showing that the defendant intended to kill the decedent, if the homicide was committed in the course of one of several enumerated felonies." *Wilson-Bey v. United States*, 903 A.2d 818, 838 (D.C. 2006). Other statements in the *Wilson-Bey* decision strongly suggest that "reasonably foreseeable" is the practical equivalent of criminal negligence. The opinion quotes the Model Penal Code, "To say that the accomplice is liable if the offense . . . is 'reasonably foreseeable' or the 'probable consequence' of another crime is to make him liable for negligence, even though more is required in order to convict the principal actor. This is both incongruous and unjust."

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

Fifth, under the revised second degree murder offense, felony murder liability does not exist if the person killed was an accomplice to the predicate felony.[176] Current statutory language and DCCA case law do not clarify whether a person can be convicted of felony murder when the decedent was an accomplice to the predicate felony.[177] The RCC second degree murder statute resolves this ambiguity under current law, and, to the extent it may change law, improves the proportionality of the offense. Under the revised offense, felony murder would provide greater punishment only for victims of the predicate offense or other innocent bystanders who are killed during the commission or attempted commission of an enumerated felony. When the decedent was an accomplice to the underlying offense, he or she assumed the risk in taking part in an inherently dangerous felony, and the negligent death of such a person does not warrant as severe a punishment.

Sixth, the revised second degree murder offense requires that the lethal act be committed by the accused.[178] Current statutory language and DCCA case law do not clarify whether a person can be convicted of felony murder when someone other than the accused committed the lethal act. The revised second degree murder offense resolves this ambiguity under current law and improves the proportionality of the offense insofar as it is disproportionately severe to punish a person for murder when another person commits the lethal act (assuming no accessory or conspiracy liability).[179]

Seventh, the revised second degree murder offense does not criminalize unintentionally causing the death of another while committing or attempting to commit a felony that is not specified in the statute. Although the current first degree murder statute's felony murder provisions do not specifically provide for such liability, the DCCA has stated that it is unclear if second degree murder liability applies to a non-purposeful killing that occurs during the commission of a non-enumerated felony.[180] The revised second degree murder statute resolves this ambiguity by clarifying that unintentionally causing the death of another person while committing or attempting to commit any unspecified felony is not criminalized as murder under the RCC.[181] To the extent that it may change current law, eliminating second degree murder liability for non-

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

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

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

[179] This limitation of the felony murder rule does not preclude murder liability anytime a non-participant's voluntary act contributes to the death of another. *See Bonhart v. United States*, 691 A.2d 160 (D.C. 1997) (affirming felony murder conviction when defendant committed arson, and victim ran back into burning building to rescue his property).

[180] In *Comber v. United States*, the DCCA noted that "[w]hat remains unclear in the District of Columbia is the status of one who commits a non-purposeful killing in the course of a [felony not enumerated in the first degree murder statute]."[180]

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

purposeful felony murder predicated on any felony offense also improves the proportionality of the RCC. Punishing as murder unintentionally causing death of another while committing or attempting to commit any felony, regardless of the inherent dangerousness of the felony would be disproportionately severe.[182]

Eighth, the enhanced penalty provisions recognize as aggravating circumstances that that the accused knowingly subjected the decedent to extreme physical pain or mental suffering prior to the victim's death, or mutilated or desecrated the decedent's body. Under current law, first degree murder is subject to enhanced penalties if the murder "was especially heinous, atrocious, or cruel."[183] The phrase "especially heinous, atrocious, or cruel" (EHAC) is not statutorily defined and case law is unclear as to its meaning.[184] The DCCA has held that a murder may be EHAC if it involves inflicting substantial physical pain or mental anguish prior to death,[185] but substantial physical or mental suffering may not be necessary. The Court has recognized that EHAC does "not focus exclusively upon the sensations of the victim before death."[186] For example, the DCCA has recognized that a murder involving mutilation of body parts, regardless of whether this inflicted additional suffering on the victim, can render a murder EHAC.[187] The DCCA also has stated that a murder may be EHAC if the killing is unprovoked,[188] if the accused did not deny his role in the killing,[189] if the murder involved a violation of trust,[190] if the accused's motive for the murder was to avoid returning to prison,[191] or if the murder was committed "for the fun of it."[192] However, although the DCCA has recognized these circumstances as relevant to determining whether a murder is EHAC, the DCCA has never held that these circumstances alone render a murder EHAC. In

[182] This is especially true given the modern expansion of criminal code. The felony murder rule originates in English common law, and developed at a time when English law only recognized a small number of inherently dangerous felonies. Lafave, Wayne. § 14.5.Felony murder, 2 Subst. Crim. L. § 14.5 (3d ed.).
[183] D.C. Code § 22-403.01 (b-2)(2)(D).
[184] *See* Rosen, Richard, A. *The "Especially Heinous" Aggravating Circumstance in Capital Cases-the Standardless Standard*, 64 N.C. L. Rev. 941 (1986).
[185] *Parker v. United States*, 692 A.2d 913 (D.C. 1996) (murder was especially heinous, atrocious, or cruel when defendant stalked victim and victim was aware of the possibility of harm, and the victim experienced prolonged and excruciating pain, including mental suffering); *Henderson v. United States*, 678 A.2d 20, 23 (D.C. 1996) (victim suffered severe injuries, and "death came neither swiftly nor painlessly" and therefore "the death in this case was a form of torture which was especially heinous, atrocious, or cruel."); *Keels v. United States*, 785 A.2d 672, 681 (D.C. 2001) (murder was especially, heinous, or cruel based on evidence that victim "did not die instantly, that she had suffered numerous wounds, and that an object had been inserted into her vagina").
[186] *Rider v. United States*, 687 A.2d 1348, 1355 (D.C. 1996).
[187] *Id*, at 1355 (affirming finding that murder was EHAC when defendant slashed victim's testicles and ankles despite evidence indicating that at the time victim was unconscious and unable to feel pain).
[188] *Parker*, 692 A.2d at 917 n.6.
[189] *Id.*
[190] *Henderson v. United States*, 678 A.2d 20, 24 (D.C. 1996).
[191] *Id. at* 24.
[192] *Long v. United States*, 83 A.3d 369, 381 (D.C. 2013), as amended (Jan. 23, 2014) (noting that the legislative history of D.C. Code § 22-2104.01 indicates that murders committed "just for the fun of it" may be deemed especially heinous, atrocious, or cruel). Committee Report on the "First Degree Murder Amendment Act of 1992", Bill 9-118, at 2.

these cases, the murder also involved infliction of substantial physical or mental suffering, or both.[193]

The RCC enhanced penalty provision more clearly identifies murders involving extreme and prolonged physical or mental suffering prior to death, or mutilation or desecration of the body, as subject to heightened penalties. Other circumstances referenced in DCCA descriptions of EHAC that do not involve substantial physical or mental suffering, or mutilation or desecration of the body do not increase penalties for murder unless they satisfy another enumerated aggravating circumstance. Specifying that inflicting extreme physical pain or mental suffering, or mutilating or desecrating the body are aggravating circumstances improves the clarity of the code, and, to the extent it may change current law, helps to ensure proportionate penalties. The current EHAC formulation is vague, and creates the possibility of arbitrariness in sentencing. As the DCCA has noted, all murders "are to some degree heinous, atrocious, and cruel"[194] and the difficulty in distinguishing those murders that are especially heinous, atrocious, or cruel can lead to arbitrary and disproportionate results.[195] By omitting the vague EHAC formulation, the enhanced penalty provision improves penalty proportionality by more clearly defining the class of murders that warrant heightened punishment.

Ninth, through reference to the term "protected person," the RCC enhanced penalty provision applies recklessness as to whether the decedent is a law enforcement officer or public safety employee engaged in the course of his or her official duties. The current murder of a law enforcement statute[196] criminalizes intentionally causing the death of another "with knowledge or reason to know that the victim is a law enforcement officer or public safety employee" while that officer or employee is "engaged in . . . performance of such officer's or employee's official duties[.]"[197] Although the DCCA has clearly held that actual knowledge that the victim was a law enforcement officer or public safety employee is not required[198], the DCCA has not further specified the mental state as to whether the officer or employee was engaged in performance of official duties. RCC subparagraph (c)(3)(A) of the revised murder statute resolves this ambiguity and requires that the accused caused the death of another with recklessness as to whether the decedent was a law enforcement officer or public safety employee in the course of his or her official duties. Specifying a recklessness mental state improves the clarity of the criminal code by resolving this ambiguity under current District law, and is consistent

[193] *Parker*, 692 A.2d 913 (D.C. 1996) (victim experienced prolonged and excruciating pain, including mental suffering, and was stalked prior to the killing making her aware of the possibility of violence); *Henderson*, 678 A.2d 20 (D.C. 1996) (victim was alive when defendant stabbed her, severed her windpipe, and then strangled her, and her death was "a form of torture").

[194] *Long v. United States*, 83 A.3d 369, 381 (D.C. 2013), as amended (Jan. 23, 2014); see also *State v. Salazar*, 844 P.2d 566, 585–86 (Ariz. 1992) ("If there is some 'real science' to separating 'especially' heinous, cruel, or depraved killers from 'ordinary' heinous, cruel, or depraved killers, it escapes me. It also has escaped the court.").

[195] *See Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (noting that the words "outrageously or wantonly vile, horrible and inhuman" in the Georgia criminal code do not create "any inherent restraint on the arbitrary and capricious infliction of the death sentence.").

[196] D.C. Code § 22-2106.

[197] D.C. Code § 22-2106 (emphasis added).

[198] *Dean v. United States*, 938 A.2d 751, 762 (D.C. 2007).

with the culpable mental state requirement for other offenses in the RCC based on the decedent being a protected person.[199]

Tenth, through the definition of "protected person" the revised statute recognizes as an aggravating circumstance that the accused was reckless as to the victim being a "vulnerable adult." Under current law, it is an aggravating circumstance to first degree murder (but not second degree) that the victim is a "especially vulnerable due to age or a mental or physical infirmity."[200] Similarly, it is an aggravating circumstance to second degree murder (but not first degree) that the victim is "vulnerable because of mental or physical infirmity."[201] No current statute, nor DCCA case law, however, clarifies what types of mental or physical infirmities are required to be proven per this language. The relevant statutes are silent and there is no case law on what, if any, culpable mental state is required as to these circumstances under current District law. However, in the RCC murder statutes the penalty enhancements under subsection (c) include as an aggravating circumstance to both first and second degree murder that the victim a "vulnerable adult."[202] This change improves the consistency and proportionality of the RCC, by reflecting the special status these individuals have elsewhere in current District law,[203] and by making enhancement for murder consistent with enhancements for RCC offenses.[204]

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

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

Second, the revised statute eliminates any statutory reference to the accused being "of sound memory and discretion." Current District statutory language states that "[w]hoever, being of sound memory and discretion" kills another with the requisite mens rea is "guilty of murder in the first degree."[205] Yet, under current law, it is not an element of first degree murder that the accused was "of sound memory and discretion."[206]

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[199] *E.g.*, RCC § 22E-1202.
[200] D.C. Code § 22-2104.01
[201] D.C. Code § 24-403.01 (b-2)(2)(G).
[202] RCC § 22E-701 ("'Vulnerable adult' means a person who is 18 years of age or older and has one or more physical or mental limitations that substantially impair the person's ability to independently provide for their daily needs or safeguard their person, property, or legal interests.").
[203] 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.
[204] See, e.g., RCC § 22E-1202.
[205] D.C. Code § 22-2101.
[206] *Hill v. United States*, 22 App. D.C. 395, 409-10 (D.C. Cir. 1903); *Shanahan v. United States*, 354 A.2d 524, 526 (D.C. 1976) (in prosecuting first degree murder, government was not required to affirmatively prove that defendant was of sound memory and discretion).
The formulation of murder requiring that the defendant be of "sound memory and discretion" dates at least as far back as 17th century England. Michael H. Hoffheimer, *Murder and Manslaughter in Mississippi:*

Rather, the words "of sound memory and discretion" only refers to the basic requirement of legal sanity.[207] Under the RCC this statutory language is superfluous. The accused's sanity remains a general defense to all crimes, not just first degree murder. This change improves the clarity of the revised murder statute.

Third, the revised second degree murder offense explicitly codifies causing the death of another recklessly with extreme indifference to human life (commonly called "depraved heart murder") in paragraph (b)(1). The current second degree murder statute only defines the offense as killing another person "with malice aforethought."[208] However, the DCCA has recognized that "malice aforethought" is a common law term of art that encompasses multiple distinct mental states, including depraved heart malice.[209] The revised statute abandons this archaic legal term of art and instead specifies that causing the death of another recklessly with extreme indifference to human life constitutes second degree murder. This language is not intended to change any current DCCA case law with respect to "depraved heart murder."

Fourth, the revised second degree murder offense does not specifically criminalize acting with intent to cause serious bodily harm, and thereby causing the death of another. Under current District case law, a person commits second degree murder if he causes the death of another without intent to cause death, but with intent to cause "serious bodily harm."[210] However, under the revised second degree murder offense, causing death by engaging in conduct with intent to commit serious bodily injury is still criminalized as second degree murder because it constitutes depraved heart murder under paragraph (b)(1). The current second degree murder statute's reference to acting with intent to cause serious bodily harm and thereby killing a person is superfluous to the revised second degree murder offense and its elimination clarifies the statute.

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

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

[208] D.C. Code § 22-2103.

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

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

RCC § 22E-1102. Manslaughter.

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

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

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

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

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

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

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

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

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

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

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

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

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

[16] See Commentary to RCC § 22E-206.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[32] RCC § 22E-1102.

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

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

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

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

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

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

(A) Under 18 years of age old, and when, in fact, the defendant actor is at least 18 years of age or older old and at least 2 4 years older than the other person complainant;
(B) 65 years old or older, when, in fact, the actor is at least 10 years younger than the complainant;
(C) A vulnerable adult;
(D)A law enforcement officer, while in the course of official duties;
(E) A public safety employee while in the course of official duties;
(F) A transportation worker, while in the course of official duties; or
(G)A District official, while in the course of official duties.

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

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

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

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

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

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

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

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

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

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

[44] *Infra*, at 241.

[45] *Davidson v. United States*, 137 A.3d 973, 975 (D.C. 2016).

[46] 22-3611 (enhancement for specified crimes committed against minors).

[47] D.C. Code §§ 22-3601 (enhancement for specified crimes committed against senior citizens);

[48] D.C. Code § 22-3751 (enhancement for specified crimes committed against taxicab drivers); D.C. Code § 22- 3751.01 (enhancement for specified crimes committed against transit operator or Metrorail station manager).

[49] D.C. Code § 22-3602 (enhancement for specified crimes committed against citizen patrol members).

[50] D.C. Code §22-851. Specifically, the offense criminalizes intimidating, impeding, interfering with, retaliating against, stalking, assaulting, kidnapping, injuring a District official or employee or family member of an official or employee, or damages or vandalizes the property of a District official or employee or family member of an official or employee.

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

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

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

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

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

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

(C) A vulnerable adult;

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

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

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

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

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

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

[54] D.C. Code § 22-4502.

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

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

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

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

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

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

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

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

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

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

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

[66] D.C. Code §22-2101.

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

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

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

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

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

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

RCC § 22E-1103. Negligent Homicide.

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

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

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

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

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

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

[1] See Commentary to RCC § 22E-206.

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

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

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

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

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

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

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

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

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

[8] Commentary to RCC § 22E-206.

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

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

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

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

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

RCC § 22E-1201. Robbery.

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

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

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

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

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

Paragraph (e)(3) requires that the defendant act "with intent to" deprive the owner of property.[17] "Deprive" is a defined term meaning that the other person is unlikely to recover the property, or that it will be withheld permanently or long enough to lose a substantial portion of its value or benefit. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would "deprive" the other person of the property. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such a deprivation actually occurred, only that the defendant believed to a practical certainty that a deprivation would result.

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

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

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

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

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

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

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

Paragraph (e)(4) also specifies a "knowingly" culpable mental state, requiring that the accused be aware to a practical certainty that he or she took or exercised control over property, by one of the means listed in subparagraphs (e)(4)(A)-(C). This requires both that the defendant was aware to a practical certainty that he or she was causing bodily injury or other act specified in (e)(4)(A)-(C); and that the defendant was aware that the use of these means in some way causally aided or facilitated taking or exercising control over the property.[23] Temporally, it is not required that when the defendant caused bodily

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

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

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

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

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

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

injury, made threats, or used overpowering physical force, he or she had already formed an intent to take or exercise control over property.[24]

Subsection (d) defines four alternative ways of committing fourth degree robbery. Fourth degree robbery requires that the defendant commit the elements of fifth degree robbery, and in the course of doing so, also satisfies the elements under sub-subparagraphs (d)(2)(A)(i)-(iii), or (d)(2)(B).[25] Under sub-subparagraph (d)(2)(A)(i), a person commits fourth degree robbery when, in the course of committing fifth degree robbery, he or she recklessly causes significant bodily injury to someone physically present, other than an accomplice. "Significant bodily injury" is a term defined under RCC § 22E-701, as an injury that "to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer."[26] The defendant still must have satisfied all the elements of fourth degree robbery,[27] including *knowingly* using physical force, causing bodily injury, or making threats. However, it is sufficient if the defendant was merely *reckless* as to causing *significant* bodily injury.[28] Under (d)(2)(A)(ii), a person commits fourth degree robbery when in the course of committing fifth degree robbery, he or she recklessly displays what is, in fact, a dangerous weapon or imitation dangerous weapon. The terms "dangerous weapon" and "imitation dangerous weapon" are defined under RCC § 22E-701. Under sub-subparagraph (d)(2)(A)(iii) a person commits fourth degree robbery if in the course of committing fifth degree robbery, he or she recklessly causes bodily injury to a protected person. The term "protected person" is defined under RCC § 22E-701. Under subparagraph (d)(2)(B), a person commits fourth degree robbery when the property that he or she takes or exercises control over is a motor vehicle. Subparagraph (d)(2)(B) uses the term "in fact" to specify that there is no culpable mental state as to whether the property was a motor vehicle.

Subsection (c) defines three alternate versions of third degree robbery. Third degree robbery requires that the person commit the elements of fifth degree robbery, and

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

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

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

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

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

in the course of doing so satisfies at least one of the elements under subparagraphs (c)(2)(A)-(B). Under sub-subparagraph (c)(2)(A)(i), a person commits third degree robbery if he or she recklessly causes significant bodily injury to a protected person, other than an accomplice. The term "significant bodily injury" is defined in RCC § 22E-701 as "a bodily injury that, to prevent longterm physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer." Under this subsection the person must be reckless as to the complainant being a protected person. Under sub-subparagraph (c)(2)(A)(ii), a person commits third degree robbery if he or she recklessly causes bodily injury by displaying or using what, in fact, is a dangerous weapon. This sub-subparagraph requires that the person actually cause bodily injury by displaying or using a dangerous weapon.[29] The term "use" is intended to include making physical contact with the weapon and conduct other than oral or written language, symbols, or gestures, that indicates the presence of a weapon.[30] Under subparagraph (c)(2)(B), a person commits third degree robbery when the property of another that he or she takes or exercises control over is a motor vehicle, and the person displays or uses a dangerous weapon or imitation weapon. Subparagraph (c)(2)(B) uses the term "in fact" to specify that there is no culpable mental state requirement as to whether the property was a motor vehicle, or as to whether the object used to commit the robbery was a dangerous weapon or imitation dangerous weapon.

Subsection (b) defines two alternate versions of second degree robbery. Second degree robbery requires that the person commit the elements of fifth degree robbery, and in the course of doing so, satisfies at least one of the elements under subparagraph (b)(2)(A) or (b)(2)(B). Under subparagraph (b)(2)(A), a person commits second degree robbery if he or she recklessly causes serious bodily injury to someone present, other than an accomplice.[31] The term "serious bodily injury" is defined in RCC § 22-701 as an injury "that involves: a substantial risk of death; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member or organ." As with fifth degree robbery, although the defendant must knowingly use physical force, cause bodily injury, or make threats, recklessness as to causing serious bodily injury suffices. Under subparagraph (b)(2)(B), a person commits second degree robbery if he or she recklessly causes significant bodily injury by displaying or using a dangerous weapon, in the course of committing fifth degree robbery. This subparagraph requires that the defendant actually used the dangerous weapon to cause the significant bodily injury.[32] The term

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

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

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

[32] It is insufficient if the defendant causes significant bodily injury by some other means, while merely possessing, but not displaying or using, a dangerous weapon. However, this element may be satisfied if the

"use" is intended to include making physical contact with the weapon and conduct other than oral or written language, symbols, or gestures, that indicates the presence of a weapon.[33] The phrase "in fact" specifies that there is no culpable mental state requirement as to whether the weapon used to cause the significant bodily injury was a "dangerous weapon."

Subsection (a) defines two alternate versions of first degree robbery. First degree robbery requires that the defendant commit the elements of fifth degree robbery, and, in the course of doing so, satisfies the elements under (a)(2)(A) or (B). Under subparagraph (a)(2)(A) a person commits first degree robbery if he or she recklessly causes serious bodily injury to any person physically present, other than an accomplice, by means of a dangerous weapon. This subparagraph requires that the defendant actually used the dangerous weapon to cause the serious bodily injury.[34] The term "use" is intended to include making physical contact with the weapon and conduct other than oral or written language, symbols, or gestures, that indicates the presence of a weapon.[35] The phrase "in fact" specifies that there is no culpable mental state as to whether the weapon used to cause the serious bodily injury was a "dangerous weapon." Under subparagraph (a)(2)(B), a person commits first degree robbery if he or she recklessly causes serious bodily injury to a "protected person" other than an accomplice. A reckless mental state applies as to whether the person who suffered the serious bodily injury was a "protected person." Although the defendant must have knowingly used overpowering physical force, caused bodily injury, or made specified threats, a recklessness mental state suffices as to causing serious bodily injury.

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

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

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

First, the revised robbery offense does not criminalize non-violent pickpocketing or taking or exercising control over property without the use of bodily injury, overpowering physical force, or the commission of a criminal menace. The current robbery and carjacking statutes criminalize all pickpocketing and other takings of property from the person or from the immediate physical control of another by sudden or stealthy seizure, or snatching, even when the complainant did not know the property was

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person displays a weapon in order to frighten or incapacitate the other person, and then uses other means to cause the bodily injury. See footnote to commentary on subsection (c) of robbery.

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

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

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

taken (and so was not menaced, let alone injured).[36] By contrast, under the RCC, such non-violent pickpocketing, seizures, and snatchings of property from the person are criminalized as theft[37] instead of robbery. Taking an object from the person or from the immediate physical control of another person without his or her knowledge,[38] or with only minor touching that does not cause bodily injury or involve overpowering physical force merits less severe punishment than takings that involve physical harm or criminal menacing. This change improves the proportionality of the robbery statute.

Second, the revised robbery statute divides the offense into five grades of robbery based chiefly on the extent of the violence involved in taking or exercising control over property. The current robbery statute consists of a single grade that does not distinguish between crimes in which the defendant went entirely unnoticed by the complainant (e.g., pickpocketing) and those where the defendant inflicted serious bodily injury. By contrast, the revised statute is graded chiefly by the extent of violence in the robbery. The revised robbery statute largely follows existing District law in conceptualizing

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

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

[37] *See* D.C. Code § 22E-2101.

[38] The DCCA has defined "immediate actual possession" under the robbery statute "refers to the area within which the victim can reasonably be expected to exercise some physical control over the property." *Sutton v. United States*, 988 A.2d 478, 485 (D.C. 2010). *See also*, *Beaner v. United States*, 845 A.2d 525, 532-33 (D.C. 2004) (holding that the term "immediate actual possession," as used in the carjacking statute was borrowed from the robbery statute, includes a car that was several feet from the owner when it was taken).

robbery as a composite offense involving a theft from a person and an assault. All grades of the revised robbery statute require that the defendant took or exercised control over property from the person or from the immediate physical control of another by causing bodily injury, threatening to immediately kill, kidnap, inflict bodily injury, or commit a sexual act, or using overpowering physical force. The chief variations in the lower four grades of the revised statutes correspond to the main distinctions in intrusion under the current and revised assault statute—threats/overpowering physical force/bodily injury (lowest level harm), significant bodily injury (intermediate level harm), display or use of a dangerous weapon (intermediate level harm); and serious bodily injury (most severe harm). The taking of a motor vehicle, accounting for the current carjacking offense, is also integrated into the revised robbery gradations. The revised robbery offense's new grading scheme creates consistency with the revised assault offenses, and improves the proportionality of punishment by matching more severe penalties to those robberies that inflict greater harms.

Third, the revised robbery statute's grading scheme integrates penalty enhancements for using a dangerous weapon, and replaces the enhanced penalties authorized under current D.C. Code § 22-4502, when committing robbery "while armed" or "having readily available" a dangerous weapon. The replacement of D.C. Code § 22-4502 by the weapon provisions in the revised robbery offense involves several changes. First, existing District case law on D.C. Code § 22-4502 holds that the penalty enhancements are authorized if the defendant either had "actual physical possession of [a weapon]";[39] or if the weapon was merely in "close proximity or easily accessible during the commission of the underlying [offense],"[40] provided that the defendant also constructively possessed the weapon.[41] There is no further requirement under current law that the defendant actually used the weapon or caused any injury.[42] By contrast, in the RCC robbery offense the defendant must actually cause bodily injury or make threats "by displaying or using" a dangerous weapon. Merely being armed with or having readily available, a dangerous weapon would not be sufficient for the higher grades of robbery.[43] Second, under current law, a person who commits robbery armed with or having readily available an imitation firearm, even if it is not used or displayed in any way, is subject to the enhanced penalties under D.C. Code § 22-4502. By contrast, in the

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

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

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

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

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

revised offense displaying an imitation dangerous weapon is only relevant to fourth degree robbery. Including enhancements for use of a dangerous weapon within the revised robbery statute gradations improves the proportionality of punishment both by matching more severe penalties to those robberies that actually inflict greater harms by use of a weapon, and tailoring the effects of the weapon enhancement instead of relying on a separate statute that generally enhances multiple offenses and levels of robbery with the same penalty.

Fourth, through the revised robbery statute's references to a "protected person," the offense creates new penalty enhancements for harms to several groups of persons, reduces penalty enhancements for some persons, and creates more proportionate penalties for harms to other groups of persons. Current District statutes provide additional liability for robbery committed against certain groups of persons. The District's protection of District public officials statute penalizes various actions, including robberies, against a District official or employee while in the course of their duties or on account of those duties, or actions against a family member of a District official or employee.[44] The District also has penalty enhancements for robbery or carjacking of: minors;[45] senior citizens;[46] taxicab drivers;[47] and transit operators and Metrorail station managers.[48] Robbery and assault with intent to rob a member of a citizen patrol[49] are also subject to enhanced penalties.

In contrast with current law, the RCC robbery statute, through its references to harms to a "protected person," extends a new penalty enhancement to groups recognized elsewhere in the current D.C. Code as meriting special treatment: non-District government law enforcement and public safety employees in the course of their duties;[50] operators of private-vehicles-for hire in the course of their duties;[51] vulnerable adults.[52] Unlike current law, the RCC robbery statute, however, does not provide a penalty enhancement for: persons robbed because of their participation in a citizen patrol (but not while on duty);[53] persons robbed because of their status as District employees who do not qualify as District officials (but not while on duty);[54] and persons robbed because of their

[44] D.C. Code § 22-851. A defendant who commits robbery under the revised statute necessarily commits an assault, and would be subject to the provisions of D.C. Code § 22-851(c) and (d). Where a robbery "intimidates, impedes, interferes" or has other statutorily specified results on a District official or employee, the defendant may be subject to D.C. Code § 22-851(b). In addition, since robbery requires taking property, any person who commits a robbery of a District official, employee, or family member of a District official or employee, may be subject to D.C. Code § 22-851 (c) or (d).
[45] D.C. Code § 22-3611.
[46] D.C. Code § 22-3601.
[47] D.C. Code §§ 22-3751; 22-3752.
[48] D.C. Code §§ 22-3751.01; 22-3752.
[49] D.C. Code § 22-3602.
[50] See commentary to RCC § 22E-701 regarding the definition of a law enforcement officer.
[51] 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.
[52] 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.
[53] D.C. Code § 22-3602(b).
[54] D.C. Code § 22-851.

familial relationship to a District official or employee;[55] persons under the age of 18 (unless the defendant is 18 years of age or older, and at least 4 years older than the complainant);[56] or persons more than 65 years of age when the defendant is less than 10 years younger than the complainant.[57] The RCC robbery statute also applies penalty enhancements across multiple gradations, rather than the one robbery and one carjacking gradation in current law, creating a more proportionate application of all these penalty enhancements.[58] 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.[59]

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

Fifth, the revised robbery offense provides distinct liability for carjacking and carjacking by using or displaying a dangerous weapon in its gradations, and requires a person to act knowingly with respect to taking or exercising control over a motor vehicle. Under current law carjacking is a legally distinct offense and only requires that the person acts "recklessly" with respect to the taking or exercise of control over the motor vehicle. However, there is no clear basis for requiring a lower culpable mental state for carjacking as compared to robbery generally, and it is not clear from legislative history that the Council intended such a difference.[60] By contrast, requiring a knowing culpable mental state is consistent with the current D.C. Court of Appeal's (DCCA) requirement of knowledge as to the lack of effective consent in the District's unauthorized use of a motor

[55] D.C. Code § 22-851.

[56] D.C. Code § 22-3611 authorizes heightened penalties for robbery when the complainant is under the age of 18, and the actor is at least 2 years older than the complainant.

[57] D.C. Code § 22-3601 authorizes heightened penalties for robbery when the complainant is 65 years of age or older, but does not require that the defendant be at least 10 years younger than the complainant.

[58] The District's current penalty enhancements for minors, senior citizens, taxicab drivers, transit operators, and citizen patrol members increase the maximum term of imprisonment by 1 ½ times the amount otherwise authorized. Robbery currently has a 2-15 year imprisonment penalty (3-22.5 years with one enhancement) and carjacking has a 7-21 year imprisonment penalty (10.5-31.5 years with one enhancement).

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

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

vehicle (UUV) statute[61] and in the revised UUV statute. Requiring a knowing culpable mental state also makes the revised robbery offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[62] Including carjacking as a form of robbery also improves the proportionality of punishment by prohibiting convictions for both robbery and carjacking based on a single act or course of conduct.[63] In addition, including carjacking by using or displaying a dangerous weapon as a gradation of robbery also replaces the portion of current D.C. Code § 24-403.01(b-2) that authorizes heightened penalties for committing carjacking while armed.[64] Replacing this portion of the current statute improves the clarity and proportionality of the revised offense.

Sixth, the revised robbery statute punishes attempted robbery the same as most other criminal attempts.[65] Current District law provides a specific penalty for attempted robbery, apart from the general penalty for attempted crimes.[66] There is no clear rationale for such special attempt penalties in robbery as compared to other offenses. In contrast, under the revised robbery statute, the general part's attempt provisions[67] will establish penalties for attempted robbery (including robbery of a motor vehicle) consistent with other offenses. This change improves the consistency of the revised robbery statute with other offenses.

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

First, the revised robbery statute applies a culpable mental state of knowledge to paragraph (e)(1) which requires that the defendant takes or exercises control over property. The current robbery statute does not specify a culpable mental state for these elements and no case law exists directly on point. However, the DCCA has stated that robbery requires a "felonious taking,"[68] suggesting that a culpable mental state similar to that of theft should be applied. As a "knowing" culpable mental state applies to the revised theft statute,[69] an identical culpable mental state is provided for robbery. Applying a knowledge culpable mental state requirement to statutory elements that

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

[62] *See, e.g.*, RCC § 22E-2101.

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

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

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

[66] D.C. Code § 22-2802.

[67] RCC § 22E-301.

[68] *Lattimore v. United States*, 684 A.2d 357, 359 (D.C. 1996).

[69] RCC § 22E-2101.

distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[70] Requiring a knowing culpable mental state also makes the revised robbery statute consistent with offenses like theft, which generally require that the defendant act knowingly with respect to the elements of the offense.[71]

Second, the revised robbery statute requires that the property be "of another." The current statute does not explicitly require that the property taken be "of another." However, as noted above, the DCCA has held that the current robbery statute incorporates the elements of "larceny,"[72] which requires that property be of another.[73] Moreover, DCCA case law and current District practice suggests that carjacking liability similarly requires the property to be of another.[74] Requiring that the property be "of another" would codify this element suggested in District case law, and would bar a robbery conviction in cases in which the defendant took his or her own property.[75] This change clarifies existing law and improves penalty proportionality by limiting the more severe robbery penalties to conduct that involves an illegal taking, exercise of control, or attempted taking or exercise of control over another's property.

Third, the revised robbery statute incorporates statutory provisions that increase penalties based on the complainant's age, the status of the complainant as a vulnerable adult, a law enforcement officer, public safety employee, District official or transportation worker acting in the course of his or her duties, applying a reckless culpable mental state to these circumstances. The current robbery statute does not itself provide for any additional penalties based on the status of the victim. However, multiple separate statutory provisions apply to robbery in existing law, and are captured by the language in the revised robbery statute.[76] The language of these statutes is silent as to the culpable mental state, and there is virtually no case law construing these statutory

[70] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[71] *See, e.g.*, RCC § 22E-2101.
[72] *Lattimore*, 684 A.2d at 359 ("In the District of Columbia, robbery retains its common law elements.").
[73] At common law larceny required an intent to deprive the owner of the property, which is not possible if the property belongs to the person who takes it. Wayne, Lafave. § 20.3.Robbery, 3 Subst. Crim. L. § 20.3 ("Robbery consists of all six elements of larceny—a (1) trespassory (2) taking and (3) carrying away of the (4) personal property (5) of another (6) with intent to steal it—plus two additional requirements: (7) that the property be taken from the person or presence of the other and (8) that the taking be accomplished b means of force or putting in fear.").
[74] Redbook 4.302 ("S/he took [attempted to take] the [insert type of motor vehicle] without right to it;") ("The 'without right to it' language refers to the defendant's lack of a lawful claim to the motor vehicle, such as ownership. *See Allen v. United States*, 697 A.2d 1 (D.C. 1997) (listing as one of the elements of carjacking as the taking "of a person's vehicle," implying the taking of a vehicle owned by someone other than the defendant); *see also Pixley v. United States*, 692 A.2d 438 (D.C. 1997) (making no distinction between robbery and carjacking on the issue of actual ownership; thus, implying that a defendant could not be guilty of carjacking if he was the lawful owner of the motor vehicle).").
[75] Depending on the facts, prosecutions for criminal menace or assault nonetheless may be warranted where a person takes back one's own property by criminal menace, overpowering physical force, or bodily injury.
[76] D.C. Code § 22-3601, Enhanced penalty for crimes against senior citizens; D.C. Code § 22-3611, Enhanced penalty for committing crime of violence against minors; D.C. Code § 22-3751.01, Enhanced penalties for offenses committed against transit operators and Metrorail station managers; and D.C. Code § 22-851, Protection of District public officials.

enhancements.[77] However, while none of the statutes specify a culpable mental state, it is notable that D.C. Code § 22-3601 and D.C. Code § 22-3602 have affirmative defenses that exculpate where the defendant "reasonably believed" the victim was not a senior or minor. Such affirmative defenses suggest that strict liability does not apply, at least to those penalty enhancements, and suggest that some subjective awareness is necessary. Accordingly, the revised robbery statute requires a reckless culpable mental state as to the relevant circumstances of age, occupation, etc. This change clarifies the requisite culpable mental state requirements.

Fourth, the revised robbery statute can be satisfied if the defendant "takes or exercises control over" property. In contrast, the current robbery statute requires that the defendant "takes" property, but does not use the words "exercise control over" property. However, it is not clear that these words substantively alter the scope of the offense. The DCCA has held that robbery incorporates the elements of larceny, and both the revised and current theft statutes include "taking" and "exercising control over" property.[78] Including "exercises control over" in the revised robbery statute would ensure that various means of conduct constituting theft would suffice for robbery even if there was no taking.[79] Including "exercises control over" also is consistent with current law with respect to carjacking. The DCCA has stated that a person may be convicted of carjacking "by burning the vehicle (or, perhaps stripping it) without taking, using, operating or removing it from its location."[80] The revised robbery statute more clearly and consistently tracks the theft-type conduct recognized in current law.

Fifth, the revised robbery statute requires that the defendant knowingly caused bodily injury; threatened to immediately kill, kidnap, inflict bodily injury, or commit a sexual act against the complainant; or used overpowering physical force. If a defendant is only reckless as to these elements, he or she cannot be convicted of robbery, even if he or she recklessly caused force or injury that facilitates taking property. The current District robbery and carjacking statutes are silent as to what, if any culpable mental state applies to such conduct, and District case law has not clarified the issue.[81] The lack of clarity on this issue is perhaps not surprising, given that the current robbery offense only requires that the defendant took property from the from the person or from the immediate physical control of a person, and provides that the force requirement can be satisfied by moving the property to the slightest degree. Under current law, a defendant who injures another, and then intentionally takes property from that person's immediate possession would be guilty of robbery, regardless of whether he caused the injury knowingly or

[77] There is no case law regarding the mental state as to the status of the victim under D.C. Code §§ 22-3601; 22-3611; 22-3751.01; 22-851.
[78] D.C. Code § 22E-2101; D.C. Code §22-3211(a)(1).
[79] For example, if a defendant used threat of force to compel a person to relinquish property and give it to a third person, the defendant could still be convicted of robbery even though he himself did not take the property.
[80] *Allen v. United States*, 697 A.2d 1, 2 (D.C. 1997).
[81] *See*, *Gray*, 155 A.3d at 396 (J. McCleese dissenting) ("Our cases leave me uncertain as to whether a defendant must laws have intentionally deployed force or violence in order to be guilty of robbery").

recklessly.[82] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[83] Requiring a knowing culpable mental state also makes the revised robbery statute consistent with offenses like theft, which generally require that the defendant act knowingly with respect to the elements of the offense.[84]

Sixth, under the revised robbery statute the defendant not only must have taken or exercised control over property, by causing bodily injury, making threats, or using overpowering physical force—the defendant also must know that the bodily injury, threats, or use of physical force in some way facilitated taking or exercising control over the property. The current robbery and carjacking statutes are silent as to what culpability may be required as to whether the use of force, etc. facilitated taking or exercising control over the property. Current District case law holds that a person can commit robbery if he or she "takes advantage of a situation which he created by use of force," and that "it is hard to see how that is done without some *awareness* of the opportunity being exploited."[85] The DCCA does not specify, however, what degree of awareness is required under the current robbery statute. The revised statute requires knowledge, which is consistent with the DCCA's current holding, and reflects longstanding recognition that the conduct constituting a case generally must be known by the defendant.[86]

[82] *But see*, *Gray*, 155 A.3d at 386 ("We are not persuaded by the dissent's argument that *Leak* stands for the proposition that 'any taking' from the 'immediate actual possession' of the victim 'is a robbery—not simple larceny.'").
[83] *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)").
[84] *See, e.g.*, RCC § 22E-2101.
[85] *Gray*, 155 A.3d at 383 (emphasis added).
[86] *See Elonis*, 135 S. Ct. at 2009 ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)"). The causal relationship between the use of overpowering force, bodily injury, or menace and the taking or exercising control over property is at the heart of robbery as a composite offense comprised of assault and theft-type conduct.

RCC § 22E-1202. Assault.

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

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

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

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

Subsections (a)(3), (a)(4), and (b)(1) specify a culpable mental state of "recklessly, with extreme indifference to human life" for causing serious bodily injury. "Serious bodily injury" is a defined term in RCC § 22E-701 that means injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ. A "recklessly" culpable mental state, a term defined at RCC § 22E-206 to her mean that the accused consciously disregarded a substantial risk of causing serious bodily injury to another, and the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard is clearly blameworthy. However, recklessness alone is insufficient for these subsections. In subsections (a)(3), (a)(4), and (b)(1), the accused must also act "with extreme indifference to human life." This language is intended to codify the same standard used in current D.C. Court of Appeals (DCCA) case law defining what is commonly known as "depraved heart murder."[28] In contrast to the "substantial" risks required for ordinary recklessness, the depraved heart murder standard requires that the accused consciously disregarded an "*extreme* risk of causing serious bodily injury."[29] For example, the DCCA has recognized extreme indifference to human life when a person caused the death of another

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

by driving at speeds in excess of 90 miles per hour, and turning onto a crowded onramp in an effort to escape police[30]; firing ten bullets towards an area where people were gathered[31]; and providing a weapon to another person, knowing that person would use it to injure a third person.[32] Although it is not possible to specifically define the degree and nature of risk that is "extreme," the "extreme indifference" language codifies all DCCA case law regarding "depraved heart" murder, which is also applicable to the current aggravated assault statute.

Subsection (a)(3) specifically prohibits recklessly, with extreme indifference to human life, causing serious bodily injury to the complainant by displaying or using an object that, in fact, is a dangerous weapon. Subsection (a)(3) specifies the culpable mental state of "recklessly, with extreme indifference to human life." This culpable mental state is discussed at length above. Per the rule of construction in RCC § 22E-207, the culpable mental state of recklessly, with extreme indifference to human life applies to both causing serious bodily injury and causing such injury by displaying or using an object. "Dangerous weapon" is a defined term in RCC § 22E-701 that includes inherently dangerous weapons, such as firearms, as well as objects used in a manner likely to cause death or serious bodily. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement for a given element, here whether the object displayed or used is a "dangerous weapon."

Subsection (a)(4) specifically prohibits recklessly, with extreme indifference to human life, causing serious bodily injury to specific categories of individuals. In subsection (a)(4)(A), the complainant must be one of the categories in the definition of a "protected person" in RCC § 22E-701, such as being a law enforcement officer in the course of his or her duties. The culpable mental state of "recklessly" applies in subsection (a)(4)(A) to the fact that the complainant is a "protected person." "Recklessly," a term defined at RCC § 22E-206, here means the accused must disregard a substantial risk that the complainant is a "protected person."

Subparagraph (a)(4)(B) specifies as an alternative means of proving liability that actor caused serious bodily injury "with the purpose" of harming the decedent because of his or her status as a law enforcement officer, public safety employee, or district official. This alternative requires that the accused acted with "purpose," a term defined at RCC § 22E-206, which means that the actor must consciously desire to harm that person because of his or her status as a law enforcement officer, public safety employee, or District official.[33] Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes. "Law enforcement officer," "public safety employee," and "District official" are all defined terms in RCC § 22E-701. Per RCC § 22E-205, the object of the phrase "with the purpose" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Here, it is not

[30] *Powell v. United States*, 485 A.2d 596, 598 (D.C. 1984).
[31] *Jennings v. United States*, 993 A.2d 1077, 1081 (D.C. 2010).
[32] *Perez v. United States*, 968 A.2d 39, 102 (D.C. 2009) (note that the defendant was guilty of second degree murder on an accomplice theory).
[33] For example, a defendant who commits aggravated assault an off-duty police officer in retaliation for the officer arresting the defendant's friend would constitute committing aggravated assault with the purpose of harming the decedent due to his status as a law enforcement officer.

necessary to prove that the complainant who was harmed was a law enforcement officer, public safety employee, or District official, only that the actor believed to a practical certainty that the complainant that he or she would harm a person of such a status.

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

Subsection (b)(2) specifies the other type of prohibited conduct for second degree assault—causing significant bodily injury to the complainant by displaying or using an object that, in fact, is a dangerous weapon. "Significant bodily injury" is the intermediate level of bodily injury in the revised assault statute and is defined in RCC § 22E-701 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone. The culpable mental state of "recklessly" applies in subsection (b)(2) and is defined in RCC § 22E-206 to mean here being aware of a substantial risk that one's conduct will cause significant bodily injury by displaying or using an object. Per the rule of construction in RCC § 22E-207, the culpable mental state "recklessly" applies to both causing significant bodily injury and causing such injury by displaying or using an object. "Dangerous weapon" is a defined term in RCC § 22E-701 that includes inherently dangerous weapons, such as firearms, as well as other objects that by their use are likely to cause death or serious bodily injury. "In fact," a defined term per RCC § 22E-207, is used to indicate that there is no culpable mental state requirement for a given element, here whether the item displayed or used is a "dangerous weapon."

Subsections (c)(1)(A) and subsection (c)(1)(B) specify the various types of prohibited conduct for third degree assault. Subsection (c)(1)(A) and subsection (c)(1)(B) prohibit causing significant bodily injury to specific categories of individuals. The protected individuals and requirements in this type of third degree assault are identical to those in subsection (a)(4)(A) and subsection (a)(4)(B) of first degree assault, with two exceptions. First, the required culpable mental state for causing the significant bodily injury in subsection (c)(1) is "recklessly," a defined term in RCC § 22E-206 to mean here being aware of a substantial risk that one's conduct will cause significant bodily injury. Second, the required bodily injury is "significant bodily injury," the intermediate level of bodily injury in the revised assault statute and defined in RCC § 22E-701 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone.

Subsection (c)(2) specifies the other type of prohibited conduct for third degree assault—causing bodily injury to the complainant by displaying or using an object that, in fact, is a dangerous weapon. "Bodily injury" is the lowest level of bodily injury in the revised assault statute and is defined in RCC § 22E-701 to require "physical pain, illness, or any impairment of condition." The culpable mental state of "recklessly" applies in subsection (c)(2) and is defined in RCC § 22E-206 to mean here being aware of a substantial risk that one's conduct will cause bodily injury by displaying or using an

object. Per the rule of construction in RCC § 22E-207, the culpable mental state "recklessly" applies to both causing bodily injury and causing such injury by the display or use of an object. "Dangerous weapon" is a defined term in RCC § 22E-701 that includes inherently dangerous weapons, such as firearms, as well as other objects that by their use are likely to cause death or serious bodily injury. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement for a given element, here whether the item displayed or used is a "dangerous weapon."

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

Subsection (e) specifies the various types of prohibited conduct for fifth degree assault. Subsection (e)(1)(A) and subsection (e)(1)(B) prohibit causing bodily injury to specific categories of individuals. The protected individuals and requirements in this type of fifth degree assault are identical to those in subsection (a)(4)(A) and subsection (a)(4)(B) of first degree assault, with two exceptions. First, the required culpable mental state for causing the bodily injury in subsection (e)(1) is "recklessly," a defined term in RCC § 22E-206 to mean here being aware of a substantial risk that one's conduct will cause bodily injury. Second, this type of fourth degree assault requires "bodily injury." "Bodily injury" is the lowest level of bodily injury in the revised assault statute and is defined in RCC § 22E-701 to mean "physical pain, illness, or any impairment of physical condition."

Subsection (e)(2) specifies the other type of fifth degree assault—causing bodily injury to the complainant by discharging an object that, in fact, is a firearm as defined in D.C. Code § 22-4501(2A). The culpable mental state of "negligently" applies in subsection (e)(2) and is defined in RCC § 22E-206 to here mean that a person should be aware of a substantial risk that one's conduct will cause bodily injury by discharging an object. Per the rule of construction in RCC § 22E-207, the culpable mental state of "negligently" applies to both causing bodily injury and causing such injury by discharging the object. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement for a given element, here whether the object used in the offense is a firearm as defined in DC Code § 22-4501(2A). "Bodily injury" is the lowest level of bodily injury in the revised assault statute and is defined in RCC § 22E-701 to mean "physical pain, illness, or any impairment of physical condition."

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

Subsection (g) prohibits justification or excuse defenses under RCC [§§ 22E-XXX – 22E-XXX] when an individual actively opposes a use of physical force by a law enforcement officer and, in doing so, allegedly assaults the law enforcement officer. No such defense exists where a person is "reckless" as to the complainant's status as a law enforcement officer, and when the officer's use of physical force occurs for a legitimate police purpose during an arrest, stop or detention and the amount of physical force used appeared reasonably necessary. "Reckless," a defined term in RCC § 22E-206, means here that the accused was aware of a substantial risk that the complainant was a "law enforcement officer," as that term is defined in RCC § 22E-701. The limitation applies to all gradations of the revised assault statute, whether or not the gradation provides a penalty enhancement for the status of the complainant.

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

Even when a person's conscious disregard of an extreme risk of death or serious bodily injury is imputed under this subsection, in some instances the person may still not have acted with extreme indifference to human life. It is possible, though unlikely, that a person's self-induced intoxication is non-culpable, and negates finding that the person acted with extreme indifference to human life.[36] In these cases, although the awareness

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

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

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

of risk may be imputed, the person could still be acquitted under paragraphs (a)(3), (a)(4), and (b)(1). However, finding that the person did not act with extreme indifference to human life does not preclude finding that the person acted recklessly as required for other forms of assault, provided that his or her conduct was clearly blameworthy.

[Subsection (i) specifies the requirements for jury demandability in the revised assault offense and is bracketed pending a review of penalties for all RCC offenses.]

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

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

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

First, the revised assault statute does not criminalize (as a completed offense) conduct that falls short of inflicting "bodily injury," as that term is defined in RCC § 22E-701. Under current District law, an assault[37] includes: 1) intent-to-frighten assaults that do not result in physical contact with the complainant's body;[38] 2) non-violent sexual touching[39] that causes no pain or impairment to the complainant's body; and 3) any

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proximity. Nevertheless, X is only liable for second degree assault under the RCC if X's conduct manifested an extreme indifference to human life.

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

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

[38] *See, e.g.*, *Joiner-Die v. United States*, 899 A.2d 762, 765 (D.C. 2006) ("To establish intent-to-frighten assault, the government must prove: (1) that the defendant committed a threatening act that reasonably would create in another person the fear of immediate injury; (2) that, when he/she committed the act, the defendant had the apparent present ability to injure that person; and (3) that the defendant committed the act voluntarily, on purpose, and not by accident or mistake."). The DCCA has made it clear that in intent-to frighten assaults, the accused must have the intent to cause fear in the complaining witness. *See, e.g.*, *Sousa v. United States*, 400 A.2d 1036, 1044 (D.C. 1979) ("Our attention is focused "upon the menacing conduct of the accused and his purposeful design either to engender fear in or do violence to his victim."); *Robinson v. United States*, 506 A.2d 572, 574 (D.C. 1986) ("Intent-to-frighten assault, on the other hand, requires proof that the defendant intended either to cause injury or to create apprehension in the victim by engaging in some threatening conduct; an actual battery need not be attempted.") (citing W. LaFave & A. Scott, Handbook on Criminal Law § 82, at 610–612 (1972)).

[39] "Where the assault involves a nonviolent sexual touching the court has held that there is an assault . . . because 'the sexual nature [of the conduct] suppl[ies] the element of violence or threat of violence.'" *Matter of A.B.*, 556 A.2d 645, 646 (D.C. 1989) (quoting *Goudy v. United States*, 495 A.2d 744, 746 (D.C.1985), *modified*, 505 A.2d 461 (D.C.), *cert. denied*, 479 U.S. 832, 107 S.Ct. 120, 93 L.Ed.2d 66 (1986)). The DCCA has stated that the elements of non-violent sexual touching assault are: 1) That the defendant committed a sexual touching on another person; 2) That when the defendant committed the touching, s/he acted voluntarily, on purpose and not by mistake or accident; and 3) That the other person did not consent to being touched by the defendant in that matter. *Mungo v. United States*, 772 A.2d 240,

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

Second, the RCC no longer criminalizes as separate offenses assault with intent to kill, assault with intent to commit first degree sexual abuse, assault with intent to commit second degree sexual abuse, assault with intent to commit child sexual abuse, assault with intent to commit robbery, assault with intent to commit mayhem, and assault with intent to commit any other felony. Current District law criminalizes this conduct as separate offenses[42] collectively referred to as the "assault with intent to" or "AWI" offenses. In contrast, in the RCC, liability for the conduct criminalized by the current AWI offenses is provided through application of the general attempt statute in RCC § 22E-301 to the completed offenses.[43] The *actus reus*[44] and the required culpable mental state[45] of an

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246 (D.C. 2001) (quoting Criminal Jury Instructions for the District of Columbia, No. 4.06(C) (4th ed.1993)). "Touching another's body in a place that would cause fear, shame, humiliation or mental anguish in a person of reasonable sensibility, if done without consent, constitutes sexual touching." *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001) (citations omitted). "The government need not prove that the victim actually suffered anger, fear, or humiliation." *Mungo*, 772 A.2d at 246 (citations omitted).

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

[41] As is discussed in the commentary to the revised nonconsensual sexual conduct statute (RCC § 22E-1307), second degree nonconsensual sexual conduct generally replaces liability for the non-violent sexual touching form of assault. The offensive physical contact statute (RCC § 22E-1205) provides general liability for offensive touching because the offense does not require an intent to sexually degrade, arouse, or gratify.

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

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

attempt in the RCC provide for liability that is at least as expansive as that afforded by the current AWI offenses. This change improves the clarity of the revised assault statute, eliminates unnecessary overlap between the AWI offenses and general attempt liability for assault-type offenses, and improves the proportionality of the revised statutes by applying a consistent attempt penalty.

Third, the revised assault statute replaces the separate common law offenses of mayhem and malicious disfigurement. The D.C. Code currently specifies penalties for the crimes of mayhem and malicious disfigurement,[46] although the elements of these offenses are established wholly by case law. The DCCA has said that malicious disfigurement requires proof that a person caused a permanent disfigurement[47] and

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2011). However, as provided in RCC § 22E-301(c) and described in the accompanying commentary, the penalty for general attempts in the RCC differs from existing law.

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

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

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

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

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

mayhem requires proof that someone caused a permanently disabling injury.[48] Both offenses require a mental state of malice[49] and proof of the absence of mitigating circumstances,[50] although the DCCA has said that malicious disfigurement requires a specific intent to injure that mayhem does not.[51] Yet, while such requirements are similar to, and for some fact patterns more demanding than, the current aggravated assault statute,[52] mayhem and malicious disfigurement have the same ten-year maximum penalty as the current aggravated assault statute. In contrast, the revised assault statute has two new gradations in subsection (a)(1) and subsection (a)(2) that require purposeful, permanent injuries. These new gradations cover conduct currently prohibited by mayhem and malicious disfigurement. The culpable mental state of "malice" no longer applies to conduct currently prohibited by mayhem and maliciously disfiguring, nor does the special mitigating circumstances defense[53] that accompanies malice. Conduct currently

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body is to some appreciable degree less useful or functional than it was before the injury) (quoting *United States v. Cook*, 149 U.S. App. D.C. 197, 200, 462 F.2d 301, 304 (1972)).

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

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

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

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

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

[53] *Burton v. United States*, 818 A.2d 198, 200 (D.C. 2003) (approving a jury instruction for malicious disfigurement that, instead of using the term "malice," listed the requirements of the mental state, including that "there were no mitigating circumstances."); *see also Brown v. United States*, 584 A.2d 537, 539 (D.C. 1990) ("In other non-homicide areas of the law," including malicious disfigurement, "we have defined

prohibited by mayhem and malicious disfigurement that does not satisfy the purposely culpable mental state or required injuries in subsection (a)(1) or subsection (a)(2) of the revised assault offense is covered by subsection (b)(1) as second degree assault. This change clarifies and reduces unnecessary overlap in the current D.C. Code.

Fourth, the RCC does not codify a separate assault with a dangerous weapon (ADW) offense. Under current D.C. Code § 22-402, ADW is a separate offense with a ten-year maximum penalty.[54] ADW prohibits engaging in any conduct that constitutes a simple assault, including intent-to-frighten assaults and offensive physical contact, "with" a dangerous weapon.[55] In contrast, the revised assault statute incorporates into its gradations enhanced penalties for causing different types of bodily injury "by displaying or using" a dangerous weapon. The term "use" is intended to include making physical contact with the weapon and conduct other than oral or written language, symbols, or gestures, that indicates the presence of a weapon.[56] The dangerous weapon must, directly or indirectly,[57] cause the resulting bodily injury.[58] The use or display of a

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malice as intentional conduct done without provocation, justification, or excuse . . . Therefore, provocation would be a defense to charges in these areas of the law as well.") (citations and quotations omitted); D.C. Crim. Jur. Instr. §§ 4.104 and 4.105 (requiring as an element of mayhem and of malicious disfigurement that "there were no mitigating circumstances.").

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

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

[55] The current ADW statute merely requires "an assault with a dangerous weapon," D.C. Code § 22-402, and DCCA case law establishes that the ADW statute requires "the common law crime of simple assault, plus the fact that the assault is committed with a dangerous weapon." *Perry v. United States*, 36 A.3d 799, 811 (D.C. 2011). Thus, the broad range of conduct included under "assault" is subject to a weapons enhancement under the current ADW statute. *See, e.g.*, *Frye v. United States*, 926 A.2d 1085, 1094 (D.C. 2005) (finding that the evidence was sufficient for ADW when "appellant intended to and did try to injure or frighten [the complaining witness] by using his van as a weapon in a manner likely to cause [the complaining witness] to have a car accident" and listing as an element of ADW that there "was an attempt, with force or violence, to injure another person, or a menacing threat, which may or may not be accompanied by a specific intent to injure.").

[56] The commentary to the RCC menacing statute (RCC § 22E-1203) further discusses the meaning of "use."

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

[58] If an individual merely possesses a dangerous weapon during an assault, or uses such a weapon, but the weapon does not cause the required bodily injury, the individual may still be subject to liability for possessing a dangerous weapon in furtherance of an assault per RCC § 22E-[XXXX revised PFCOV-type offense]. A defendant may not, however, be convicted of both a gradation of assault based on the use of a deadly or dangerous weapon and RCC § 22E-[XXXX revised PFCOV-type offense]. In addition, depending on the facts of a given case, the display of a deadly or dangerous weapon may be sufficient to establish liability for first degree menacing per RCC § 22E-1203 or an attempt to commit a gradation of the revised assault statute requiring the harm be caused by "displaying or using" such a weapon.

dangerous weapon that falls short of causing the required types of bodily injury is no longer criminalized as assault. Instead, such threatening acts or offensive physical contact are prohibited by first degree menacing (RCC § 22E-1203).[59] In addition, through the definition of "dangerous weapon" in RCC § 22E-701, the use or display of objects that the complaining witness incorrectly perceives to be a dangerous weapon, as well as imitation firearms, no longer receives an assault enhanced penalty as they do under current District law.[60] Excluding these objects does not change District case law holding that circumstantial evidence may be sufficient to establish that a deadly or dangerous weapon was used.[61] This change reduces unnecessary overlap in the current D.C. Code between multiple means of enhancing assaults committed with a weapon and improves the proportionality of the revised offense.[62]

Fifth, the revised assault statute is no longer subject to a separate penalty enhancement for committing assault-type crimes "while armed" or "having readily

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

[60] Current District case law establishes that "any object which the victim perceives to have the apparent ability to produce great bodily harm can be considered a dangerous weapon," *Paris v. United States*, 515 A.2d 199, 204 (D.C. 1986), and that "an imitation or blank pistol used in an assault by pointing it at another is a 'dangerous weapon' in that it is likely to produce great bodily harm." *See, e.g.*, *Harris v. United States*, 333 A.2d 397, 400 (D.C. 1975). Under the revised assault statute, the "use" of such an object receives an enhanced penalty only if it causes the required bodily injury and satisfies subsection (F) of the RCC definition of "dangerous weapon"—"any object or substance, other than a body part, that in the manner of its actual, attempted, or threatened use is likely to cause serious bodily injury." The "display" of such an object would likely constitute first degree menacing (RCC § 22E-1203), or, if bodily injury results from the display of the object and the other requirements of the revised offense are met, there would be liability in the non-weapons gradations of the assault statute.

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

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

The RCC removes the overlap between these multiple means of enhancing an armed assault and grades the offense according to the role of the weapon in the offense. In the RCC, the use or display of a dangerous weapon, including a firearm, that causes the required bodily injury receives a single enhancement in the revised assault statute. If an individual merely possesses a dangerous weapon during an assault, or uses such a weapon, but the weapon does not cause the required bodily injury, the individual may still be subject to liability for purposely possessing a dangerous weapon per RCC § 22E-[XXXX revised PFCOV-type offense]. A defendant may not be convicted of both a gradation of assault based on the use of a deadly or dangerous weapon and RCC § 22E-[XXXX revised PFCOV-type offense].

available" a dangerous weapon. Current D.C. Code § 22-4502 provides severe, additional penalties for committing, attempting, soliciting, or conspiring to commit an array of assault-type offenses[63] "while armed" with or "having readily available" a dangerous weapon.[64] In contrast, the revised assault statute requires an individual to cause the injury "by displaying or using" a "dangerous weapon," as that term is defined in RCC § 22E-701, resulting in several changes to current District law. First, merely being armed with or having the weapon readily available is not sufficient for an enhanced assault penalty. The term "use" is intended to include making physical contact with the weapon and conduct other than oral or written language, symbols, or gestures, that indicates the presence of a weapon.[65] Second, through the definition of "dangerous weapon" in RCC § 22E-701, the use or display of objects that the complaining witness incorrectly perceives to be a dangerous weapon, as well as imitation firearms, no longer receives an enhanced penalty as they do under current District law.[66] Excluding these objects does not change District case law holding that circumstantial evidence may be sufficient to establish that a dangerous weapon was used.[67] Third, because the revised assault statute incorporates enhancements for the display or use of a dangerous weapon in the offense gradations, it is no longer possible to enhance an assault with both a weapon

[63] 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.

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

[65] The commentary to the RCC menacing statute (RCC § 22E-1203) further discusses the meaning of "use."

[66] Current District case law establishes that "any object which the victim perceives to have the apparent ability to produce great bodily harm can be considered a dangerous weapon," *Paris v. United States*, 515 A.2d 199, 204 (D.C. 1986), and the current "while armed" enhancement specifically includes imitation firearms. D.C. Code § 4502(a). Under the revised assault statute, the "use" of such an object receives an enhanced penalty only if it causes the required bodily injury and satisfies subsection (F) of the RCC definition of "dangerous weapon"—"any object or substance, other than a body part, that in the manner of its actual, attempted, or threatened use is likely to cause serious bodily injury." The "display" of such an object would likely constitute first degree menacing (RCC § 22E-1203), or, if bodily injury results from the display of the object and the other requirements of the revised offense are met, there would be liability in the non-weapons gradations of the assault statute.

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

enhancement and an enhancement based on the identity of the complainant,[68] or to double-stack different weapon penalties and offenses.[69] Fourth, the revised assault statute caps the maximum penalty for an enhancement based on the display or use of a dangerous weapon to never be greater than the most egregious type of physical harm that the revised assault statute prohibits—the purposeful infliction of a permanently disabling injury in subsections (a)(1) and (a)(2) of the revised assault statute.[70] This change clarifies and reduces unnecessary overlap between multiple means of enhancing assaults committed with a weapon and improves the proportionality of the revised statute.[71]

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[68] 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).

[69] 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 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).

[70] 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.

[71] Under current District law, simple assault involving the use of a deadly or dangerous weapon may be enhanced by three different, largely overlapping, provisions. First, the assault may be charged as ADW under D.C. Code § 22-402, which is a felony with a ten year maximum prison sentence. Second, ADW is

Sixth, the revised assault statute criminalizes for the first time negligently causing bodily injury to another person by discharging an object that, in fact, is a firearm, as defined in D.C. Code § 22-4501(2A). Current District law does not criminalize such conduct when done negligently, but case law establishes that a culpable mental state of at least recklessness is required for ADW[72] and suggests that it may suffice for simple assault.[73] In contrast, the revised assault statute requires a lower culpable mental state of negligence for causing "bodily injury" by discharging a firearm. The lower culpable mental state is justified because the grade is limited to "firearm," an inherently dangerous weapon that warrants heightened caution in its use. This change fills a gap in existing District law for misuse of a firearm.

Seventh, the revised assault statute's enhanced penalties for harming a law enforcement officer (LEO) replace the separate assault on a police officer (APO) offenses. Under current District law, a simple assault against a LEO "on account of, or while that law enforcement officer is engaged in the performance of his or her official duties"[74] is a misdemeanor, with a maximum term of imprisonment of 6 months,[75] and an

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subject to further enhancement under D.C. Code § 22-4502 as a "crime of violence" if the offense is committed "when armed with or having readily available" any dangerous weapon. D.C. Code § 22-4502(a). ADW is not subject to the "while armed" enhancement under D.C. Code § 22-4501(a)(1), but the recidivist "while armed" enhancement does apply under D.C. Code § 22-4501(a)(2). *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982). Finally, if, while committing the assault, a person possessed a "pistol, machine gun, shotgun, rifle, or any other firearm or imitation firearm," he or she is guilty of the additional offense of possession of a firearm during a crime of violence (PFCOV). PFCOV is a felony with a maximum term of imprisonment of 15 years and a mandatory minimum term of imprisonment of five years. Despite the substantial overlap in prohibited conduct, the offenses of ADW and PFCOV do not merge. *Freeman v. United States*, 600 A.2d 1070, 1070 (D.C. 1991).

The RCC removes the overlap between these multiple means of enhancing an armed assault and grades the offense according to the role of the weapon in the offense. In the RCC, the use or display of a dangerous weapon, including a firearm,that causes the required bodily injury receives a single enhancement in the revised assault statute. If an individual merely possesses a dangerous weapon during an assault, or uses such a weapon, but the weapon does not cause the required bodily injury, the individual may still be subject to liability for purposely possessing a dangerous weapon per RCC § 22E-[XXXX revised PFCOV-type offense]. A defendant may not be convicted of both a gradation of assault based on the use of a deadly or dangerous weapon and RCC § 22E-[XXXX revised PFCOV-type offense].

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

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

[74] D.C. Code § 22-405(b), (c).

[75] D.C. Code § 22-405(b).

assault that causes "significant bodily injury" or "a violent act that creates a grave risk of causing significant bodily injury" carries a maximum penalty of ten years imprisonment.[76] In contrast, the revised assault statute provides enhanced penalties for injuries to LEOs for serious bodily injury, significant bodily injury, and bodily injury.

Codifying the LEO enhancement in the revised assault statute results in several changes to current District law. First, the LEO enhancement in the revised assault statute is limited to assaults that cause specified types of "bodily injury."[77] Conduct that fails to satisfy the revised assault statute, as well as "a violent act that creates a grave risk of significant bodily injury," may be criminalized elsewhere in the RCC.[78] Second, the revised assault statute provides substantial penalty enhancements for inflicting "serious bodily injury" on a LEO[79] and for causing "bodily injury" to a LEO,[80] both of which are absent in current District law. [Third, per subsection (i), if the defendant demands a jury trial for sixth degree assault when the complainant is a LEO in specified circumstances, the court must impanel a jury.] Fourth, the enhanced gradations of the revised assault offense require recklessness as to whether the LEO is a "protected person," rather than

[76] D.C. Code § 22-405(c).

[77] Limiting enhanced penalties for assaulting a LEO to causing specified physical injury is consistent with recent District legislation that amended the APO statute. Prior to June 30, 2016, in addition to an assault, the APO statute prohibited "resist[ing], oppos[ing], imped[ing], intimidate[ingt], or interfer[ing] with a law enforcement officer" in the course of his or her official duties or on account of those duties. D.C. Code § 22-405(b), (c) (repl.). On January 28, 2016, the Office of the District of Columbia Auditor issued a report titled "The Durability of Police Reform: The Metropolitan Police Department and Use of Force, 2008-2015," available at http://www.dcauditor.org/sites/default/files/Full%20Report_2.pdf (Office of the District of Columbia Auditor Report). The report recommended that the APO misdemeanor statute "be amended so that the elements of the offense require an actual assault rather than mere resistance or interference with a [Metropolitan Police Department] officer." Office of the District of Columbia Auditor Report at 107.
The Neighborhood Engagement Achieves Results Amendment Act of 2016 ("NEAR Act") amended the current APO statute by limiting it to "assault[s]" and created a new statute for resisting arrest (D.C. Code § 22-405.01). The Committee Report for this legislation cited the Office of the District of Columbia Auditor Report. Committee on the Judiciary, *Report on Bill 21-0360, the "Neighborhood Engagement Achieves Results Amendment Act of 2016)* (January 27, 2016).

[78] Unwanted physical contacts that fail to satisfy the revised assault statute may entail liability for offensive physical contact (RCC § 22E-1205). Intent-to-frighten assaults and incomplete batteries against LEOs may be punishable under the criminal threats (RCC § 22E-1204) or menacing (RCC § 22E-1203) statutes. A violent act against a LEO may constitute an attempt to commit second degree assault per RCC § 22E-1202(c)(2) or a fourth degree assault per RCC § 22E-1202(e)(1).

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

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

negligence.[81] A culpable mental state of recklessness makes the enhanced LEO gradations of the revised assault statute consistent with the other enhancements in the revised offense that are based on the complainant's status. Fifth, the revised definition of "law enforcement officer" in RCC § 22E-701 excludes certain members of fire departments, investigators, and code inspectors[82] that are included in the current APO statute,[83] but also expands the definition with a broad catch-all provision. Lastly, the revised assault statute does not enhance assaults against family members of LEOs due to their relation to a LEO, which is part of the repeal of the general provision prohibiting targeting family members of District officials and employees in D.C. Code § 22-851.[84] Collectively, these changes replace the APO offenses in current law with enhanced penalties in the gradations of the revised assault statute, improve the clarity of existing statutes, and generally provide for consistent treatment of LEOs and other specially protected complainants. The changes reduce unnecessary gaps and overlap between offenses, and improve the proportionality of the statutes as well.

Eighth, the revised assault statute replaces the current offenses of assault and aggravated assault on a public vehicle inspection officer. Under current District law, "assault[ing]" a "public vehicle inspection officer" or "imped[ing], intimidate[ing], or interfer[ing] with" that officer while that officer "is engaged in or on account of the performance of his or her official duties" is a misdemeanor with a maximum term of imprisonment of 180 days.[85] If the accused causes "serious bodily injury," the offense is

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

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

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

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

[85] D.C. Code § 22-404.02.

a felony with a maximum penalty of ten years imprisonment.[86] In contrast, in the revised assault statute, assaults against a "vehicle inspection officer"[87] receive enhanced penalties, but are no longer separate offenses. A "vehicle inspection" officer is included in the definition of "protected person" in RCC § 22E-701 as a "public safety employee," also defined in RCC § 22E-701. Since they are included in the definition of "public safety employee," vehicle inspection officers are also included in the enhanced gradations for an assault "caused with the purpose of harming the complainant" due to the complainant's status. However, the conduct that receives an enhanced penalty is narrowed to causing bodily injury, significant bodily injury, or causing serious bodily injury. Conduct that falls short of these requirements no longer receives an enhanced penalty,[88] nor does conduct that consists merely of "imped[ing], intimidat[ing], or interfer[ing] with" a public vehicle inspection officer.

Replacing the offenses of assault and aggravated assault on a public vehicle inspection officer with the revised assault statute results in several additional changes to District law. First, under the revised assault statute, unlike current law,[89] there is no longer an automatic civil penalty of loss of a license to operate public vehicles-for-hire upon conviction of assault of a vehicle inspection officer. Second, the revised assault statute does not enhance assaults against family members of vehicle inspection officers because of their relation to the public vehicle inspection officers, which is part of the repeal of the general provision regarding targeting family members of District officials

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

[87] Although the assault on a public vehicle inspection officer offenses in D.C. Code §§ 22-404.02 and 22-404.03 state that the term "public vehicle inspection officer shall have the same meaning as provided in § 50-303(19)," the term "public vehicle inspection officer" no longer exists in Title 50 of the D.C. Code. The definition of "public vehicle inspection officer" was repealed with the passage of the Vehicle-For-Hire Innovation Amendment Act of 2014 ("VFHIAA") (Mar. 10, 2015, D.C. Law 20-197, § 2(a), 61 DCR 12430). However, the VFHIAA included a substantially similar, new definition for a "vehicle inspection officer" and that RCC uses that term instead. D.C. Code § 50-301.03(30B) ("'Vehicle inspection officer' means a District employee trained in the laws, rules, and regulations governing public and private vehicle-for-hire service to ensure the proper provision of service and to support safety through street enforcement efforts, including traffic stops of public and private vehicles-for-hire, pursuant to protocol prescribed under this act and by regulation."). The VFHIAA legislative history does not appear to include reference to the assault on a public vehicle inspection officer offenses in D.C. Code §§ 22-404.02 and 22-404.03 or discuss how those offenses might be affected by the elimination of the term "public vehicle inspection officer."

[88] Depending on the facts of the case, unwanted touchings that fail to satisfy the revised assault statute may entail liability for RCC § 22E-1205, offensive physical contact, and intent-to-frighten assaults and incomplete batteries against vehicle inspection officers may be punishable under the revised criminal threats (RCC § 22E-1204) or menacing (RCC § 22E-1203) statutes.

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

and employees in D.C. Code § 22-851.[90] Third, the revised assault statute does not bar justification and excuse defenses to resistance to a public vehicle inspection officer's civil enforcement authority.[91] This change clarifies the revised assault statute and reduces unnecessary overlap with other provisions that specially penalize assaults on District officials.

Ninth, the RCC definition of "protected person," discussed in the commentary to RCC § 22E-701, results in several changes to the scope of enhanced assault conduct. First, through the definition of "protected person," assaults against complainants under the age of 18 years or against complainants 65 years of age or older receive enhanced penalties in the revised assault offense, but only if certain age requirements are met. Current District law enhances various assault offenses against complainants under the age of 18 years if there is at least a two year age gap between the complainant and an actor that is 18 years of age or older,[92] and against all complainants 65 years of age or older.[93] In contrast, the "protected person" gradations of the revised assault statute require at least a four year age gap between a complainant under 18 years of age and an actor that is 18 years of age or older, and require that the actor be at least 10 years younger than a complainant that is 65 years of age or older. With respect to minors, these age requirements are consistent with other offenses in current District law[94] and the age gap

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

[91] The current assault on a public vehicle inspection officer statutes bar justification and excuse defenses to resistance to a public vehicle inspection officer's civil enforcement authority. D.C. Code §§ 22-404.02(c), 22-404.03(c) ("It is neither justifiable nor excusable for a person to use force to resist the civil enforcement authority exercised by an individual believed to be a public vehicle inspection officer, whether or not such enforcement action is lawful."). Subsection (i)(3) of the revised assault statute contains such a prohibition, but it is limited to a "law enforcement officer," as that term is defined in RCC § 22E-1001, which excludes vehicle inspection officers.

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

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

[94] Many of the District's offenses against complainants under the age of 18 years require at least a four year age gap between the actor and the complainant. *See, e.g.*, D.C. Code §§ 22-3008, 22-3009, 22-3001(3) (child sexual abuse statutes and defining "child" as "a person who has not yet attained the age of 16

for seniors,[95] while new to District law, reserve the enhanced penalties for predatory behavior. Second, assaults against a driver of a private vehicle-for-hire, a "vulnerable adult," and a "public safety employee" receive new enhanced penalties in the revised assault statute through the definition of a "protected person." A driver of a private vehicle-for-hire does not receive any enhanced penalties under current District law, and a vulnerable adult[96] or "public safety employee"[97] receives enhanced penalties in a few non-assault offenses. By contrast, the "protected person" gradations of the revised assault statute recognize the prevalence of drivers of private vehicles-for-hire and the special status elsewhere under current District law for vulnerable adults and public safety employees. Third, assault offenses against a "citizen patrol member"[98] or a "District employee" no longer receive enhanced penalties in the revised assault offenses as they do under current District law.[99] The breadth of these current enhancements is inconsistent as compared to other penalty enhancements in current District law.

The RCC definition of "protected person" also makes broader changes to the revised assault statute. First, the "protected person" enhanced gradation applies to each type of "bodily injury" in the revised assault statute, whereas the various penalty enhancements in current District law apply inconsistently to simple assault,[100] the "assault with intent to" offenses,[101] and the various felony assault offenses,[102] resulting in

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years."); 22-3010, 22-3001(3) (enticing a child statute and defining "child" as "a person who has not yet attained the age of 16 years."); 22-3010.02 (arranging for a sexual contact with a real or fictitious child and defining "child" as "a person who has not yet attained the age of 16 years."); 22-811(a), (f)(1), (f)(2) (contributing to the delinquency of a minor statute and defining "adult" as "a person 18 years of age or older at the time of the offense" and "minor" as "a person under 18 years of age at the time of the offense.").

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

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

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

[98] D.C. Code § 22-3602.

[99] D.C. Code § 22-851(d).

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

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

disproportionate penalties for similar conduct. Second, the revised assault statute applies a mental state of "recklessness" to whether the complainant is a "protected person." None of the separate penalty enhancements under current District law specify a culpable mental state, but the penalty enhancements for senior citizens[103] and minors[104] have affirmative defenses for a reasonable mistake of age. The "reckless" culpable mental state[105] in the protected person gradations preserves the substance of these affirmative defenses[106] and establishes a consistent culpable mental state requirement for each

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[102] All the separate penalty enhancements under current District law apply to aggravated assault and ADW, D.C. Code §§ 22-3601(b); 22-3602(c); 22-3611(b)(2); 22-3752, but they do not consistently apply to other felony assault offenses. For example, only the separate enhancement for crimes against minors applies to assault with significant bodily injury. D.C. Code § 22-3611(c)(2). The separate penalty enhancements also apply inconsistently to malicious disfigurement and mayhem, with the citizen patrol enhancement applying only to mayhem, D.C. Code § 22-3602, and the other penalty enhancements applying to both offenses. D.C. Code §§ 22-3601(b); 22-3611(b)(2); 22-3752. The protection of District public officials statute does not specifically mention any felony assault offenses or mayhem or disfigurement, but does include "assault[s]" and "injure[s]." D.C. Code § 22-851(c).
The separate enhancements are also inconsistent in whether they apply to attempts, conspiracies, or solicitations to commit the specified offenses, or some combination thereof. D.C. Code §§ 22-3601 (senior citizen enhancement applying to attempt or conspiracy); 22-3602 (citizen patrol enhancement applying to conspiracy); 22-3611 (crimes against minors enhancement applying to attempt, conspiracy, or solicitation); 22-3752 (statute enumerating offenses for enhancement for taxicab drivers, transit operators, and Metrorail station managers applying to attempt and conspiracy).

[103] D.C. Code § 22-3601(c) ("It is an affirmative defense that the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed. This defense shall be established by a preponderance of the evidence.").

[104] D.C. Code § 22-3611(b) ("It is an affirmative defense that the accused reasonably believed that the victim was not a minor at the time of the offense. This defense shall be established by a preponderance of the evidence.").

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

[106] The current enhancement for crimes against senior citizens makes it a defense that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed." D.C. Code § 22-3601(c). Similarly, the current enhancement for crimes against minors has an affirmative defense that "the accused reasonably believed that the victim was not a minor at the time of the offense." D.C. Code § 22-3611(b). In the RCC, it must be proven that an actor was reckless that the complainant was 65 years or older or under 18 years of age. The actor must disregard a substantial risk that a circumstance (here the fact that the complainant is over 65 or under 18) exists; and the risk must be of such a nature and degree that, considering the nature and purpose of the person's conduct (here, assaulting the complainant) and the circumstances known to the person, the person's conscious disregard of it is clearly blameworthy. Per RCC § 22E-206, a reasonable mistake as to the complainant's age would negate the recklessness required for an age-based gradation enhancement for assault. However, given the inherent difficulty in judging the age of another person, an actor who assesses a person's age based on appearance alone likely would be reckless as to the person being over 65 or under 18 if the actor judges a person to be very close in age to the 65 and 18 year old thresholds. For example, if an actor assessed the complainant's age to be in their early 60s based on appearance alone, the actor is likely aware of a substantial risk that the complainant is actually 65 years or older. Whether the actor's disregard of such risk is blameworthy will depend on why the risk was ignored. For example, an assault based on the actor's allegedly knocking down and harming a complainant, reckless that they were 67 year old might reach different conclusions as

category of complainant in the RCC definition of "protected person." Finally, the RCC assault statute prohibits the stacking of multiple penalty enhancements based on the categories in the definition of "protected person" and stacking of penalty enhancements for a protected person and the use of a weapon.[107]

Collectively, these changes provide a consistent enhanced penalty for assaulting the categories of individuals included in the definition of "protected person," removing gaps in the current patchwork of separate enhancements, clarifying the law, and improving the proportionality of offenses.

Tenth, the revised assault statute enhances the penalty for assaults committed against LEOs, public safety employees, or District officials when the assault is committed "with the purpose of harming the complainant because of the complainant's status." Current District law has separate penalty enhancements or enhanced penalties for committing assault-type offenses because of the complainant's status as a LEO,[108] a member of a citizen patrol,[109] a District "official or employee,"[110] or a "family member" of a District "official or employee."[111] Current District law also enhances the penalty for the murder of a "public safety employee"[112] on account of the complainant's status. In contrast, the revised assault statute limits this type of enhanced penalty to a "law

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to blameworthiness depending on whether the actor was running to a hospital to see a family member versus an actor who was running to the front of a line to see a sports star. Ultimately it is up to the factfinder to determine whether an actor's alleged mistake as to age of the complainant is reasonable given the facts of the case.

[107] 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.

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

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

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

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

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

enforcement officer" and a "District official," and extends it to a "public safety employee," resulting in several changes to current District law. First, as is discussed in the commentary to RCC § 22E-§ 22E-701, the revised definitions of "law enforcement officer," "District official," and "public safety employee" change the scope of the revised enhancements as compared to current District law. Second, assaults committed against a citizen patrol member, a District "employee," or the "family member" of a District "official or employee" because of the complainant's status no longer receive an enhanced penalty. These provisions raise a number of difficult definitional issues[113] and current sentencing practices in the District indicate that these penalty enhancements rarely, if ever, are necessary to proportionate sentences. Third, the enhancement applies consistently to each type of "bodily injury" in the revised assault statute, whereas the various penalty enhancements in current District law apply inconsistently to simple assault,[114] the "assault with intent to" offenses,[115] and the various felony assault offenses,[116] resulting in disproportionate penalties for similar conduct. Codifying

[113] For example, the enhancement for District employees in D.C. Code § 22-851(b) states that it applies "while the official or employee is engaged in the performance of his or her duties or on account of the performance of those duties." However, District case law has held, in construing other statutes, that a law enforcement officer may be considered always on duty, *Mattis v. United States*, 995 A.2d 223, 225 (D.C. 2010). There follows an ambiguity whether any assault of a law enforcement officer is subject to heightened liability—regardless whether the assault was part of a domestic dispute or the officer was off-duty and not known to the assailant as an officer. The RCC, instead, through a separate reference to law enforcement officers as protected persons, provides heightened penalties where an officer is assaulted while in the performance of his or her duties.

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

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

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

The separate enhancements are also inconsistent in whether they apply to attempts, conspiracies, or solicitations to commit the specified offenses, or some combination thereof. D.C. Code §§ 22-3601 (senior citizen enhancement applying to attempt or conspiracy); 22-3602 (citizen patrol enhancement applying to conspiracy); 22-3611 (crimes against minors enhancement applying to attempt, conspiracy, or solicitation);

enhanced protection for assaulting individuals based on their status as LEOs, public safety employees, or District officials clarifies the law and improves the proportionality of offenses.

Eleventh, the revised assault statute eliminates the separate assault offense of "willfully poisoning any well, spring, or cistern of water."[117] Current D.C. Code § 22-401 contains a provision that appears to separately criminalize such poisoning of a water supply, regardless of whether the poisoning results in injury to a person or there was intent to injure a person. No case law exists interpreting this provision. In contrast, the revised assault statute does not criminalize such poisoning except insofar as such conduct may constitute an attempted assault. Another District felony currently criminalizes such a poisoning,[118] and, depending on the facts of the case such poisoning may constitute attempted murder under RCC § 22E-1101, or an attempted assault. This change improves the proportionality of District offenses by punishing such conduct consistent with other inchoate attempts to harm persons.

Twelfth, under the revised assault statute, the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "recklessly, under circumstances manifesting extreme indifference to human life," or "purposely" due to his or her self-induced intoxication. Under subsection (h), a factfinder may impute awareness of the risk required to prove the defendant acted with extreme indifference to human life. The current assault statute is silent as to the effect of intoxication. However, District case law appears to have established that assault is a general intent offense,[119] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming the necessary culpable mental state requirement for the crime.[120] This DCCA case law would also likely mean that a defendant would be precluded from directly raising—though not

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22-3752 (statute enumerating offenses for taxicab drivers, transit operators, and Metrorail station managers applying to attempt and conspiracy).

[117] D.C. Code § 22-401.

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

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

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

necessarily presenting evidence in support of[121]—the claim that, due to his or her self-induced intoxicated state, the defendant did not act "recklessly, under circumstances manifesting extreme indifference to human life," or "purposely" as required for more serious forms of assault.[122] By contrast, under the revised assault offense, a defendant would both have a basis for, and will be able to raise and present relevant and admissible evidence in support of, a claim that voluntary intoxication prevented the defendant from forming the culpable mental states of "recklessly, under circumstances manifesting extreme indifference to human life," or "purposely" as required to prove some types of assaults. Likewise, where appropriate, the defendant would be entitled to an instruction, which clarifies that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of "recklessly, under circumstances manifesting extreme indifference to human life," or "purposely" at issue in assault.[123] However, subsection (h) allows a fact finder to impute awareness of the risk required to prove that the defendant acted with extreme indifference to human life, when the lack of awareness was due to self-induced intoxication. But in some rare cases, a defendant's self-induced intoxication may still negate finding that he or she acted with extreme indifference to human life, as required for second degree murder. This change improves the clarity, consistency, and proportionality of the offense.

Thirteenth, due to the revised definition of "serious bodily injury" in RCC § 22E-701, first degree assault and second degree assault in the revised statute no longer specifically include rendering a complainant "unconscious," causing "extreme physical pain," or impairment of a "mental faculty." The current aggravated assault statute prohibits "serious bodily injury."[124] While there is no statutory definition of the term's meaning, the definition of "serious bodily injury" under DCCA case law for aggravated assault includes "unconsciousness, extreme physical pain . . . or protracted loss or impairment of the function of a . . . mental faculty."[125] As discussed in the commentary to the revised definition in RCC § 22E-701, these provisions in the current definition are difficult to measure and may include within the definition physical harms that fall short of the high standard the definition requires. In contrast, the revised definition of "serious bodily injury," and the revised first degree assault and second degree assault offenses, are limited to a substantial risk of death, protracted and obvious disfigurement, or protracted

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

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

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

[124] D.C. Code § 22-404.01(a).

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

loss or impairment of the function of a bodily member or organ. This change improves the clarity, consistency, and proportionality of the revised offenses.

Fourteenth, the revised assault statute replaces certain minimum statutory penalties for assault with intent to commit first degree sexual abuse, second degree sexual abuse, or child sexual abuse[126] and assault with a dangerous weapon on a police officer.[127] These minimum statutory penalties require specified prior convictions, and it is unclear how the general recidivist statutes in the current D.C. Code apply, if at all, to these provisions.[128] There is no clear rationale for such special sentencing provisions in these offenses as compared to other offenses. In contrast, the revised assault statute is subject to a single recidivist penalty enhancement in RCC § 22E-606 that applies to all offenses in the RCC. This change improves the consistency and proportionality of the revised offense.

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

First, the revised assault statute requires a culpable mental state of recklessness for the lower-level gradations of assault: subsection (b)(2) of second degree assault, third degree assault, subsection (e)(1) of fourth degree assault, and fifth degree assault. The current D.C. Code is silent as to the culpable mental states required for simple assault,[129] but the current felony assault with significant bodily injury statute requires recklessness.[130] Current District case law suggests that recklessness may suffice for simple assault,[131] however, the DCCA has recently declined to state that recklessness,

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

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

[128] D.C. Code §§ 22-1804; 22-1804a.

[129] D.C. Code § 22-404(a)(1).

[130] D.C. Code § 22-404(a)(2).

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

versus a higher culpable mental state, is sufficient.[132] Instead of this ambiguity, the revised assault statute clearly establishes that recklessness is sufficient for specified gradations. This is consistent with prevailing District case law (including District case law on voluntary intoxication[133]), and is consistent with current District statutes. This change improves the clarity of the law.

Second, use of the definition of "bodily injury" in the revised assault statute, defined in RCC § 22E-701 as "physical pain, illness, or any impairment of physical condition," clarifies the minimal harm that is required to constitute assault under the revised statute. Current District assault statutes do not address whether they cover any infliction of pain or causing illness or impairment of physical condition. District case law has established that any non-consensual touching, even without pain, is simple assault.[134] However, whether recklessly causing illness or impairment of someone's physical condition constitutes simple assault under current law is not established. Use of the defined term "bodily injury" clarifies that not only physical contacts that result in pain are criminal under the RCC assault statute, but also potentially painless harms such as sickness[135] or impaired physical conditions.[136] Physical contacts that do not meet the

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

[133] Under District law, voluntary intoxication cannot constitute a defense to a "general intent" crime. *Kyle v. United States*, 759 A.2d 192, 199-200 (D.C. 2000). In accordance with this rule, assault appears to be a general intent crime, to which an intoxication defense may not be raised. *Parker v. United States*, 359 F.2d 1009, 1013 n.4 (D.C. Cir. 1966) ("It seems clear that, regardless of the definition, voluntary intoxication is no defense to simple assault.") (citing *McGee v. State*, 4 Ala. App. 54, 58 So. 1008 (1912), and *State v. Truitt*, 21 Del. 466, 62 A. 790 (1904)); *see, e.g.*, *Smith v. United States*, 593 A.2d 205, 206–07 (D.C. 1991) (observing that assault is a general intent crime); *Perry v. United States*, 36 A.3d 799, 823 (D.C. 2011) (same); *see also Buchanan v. United States*, 32 A.3d 990, 996-98 (D.C. 2011) (Ruiz, J. concurring) (discussing the relationship between the law of intoxication and assault's status as a general intent crime). The Revised Criminal Code does not recognize the distinction between general and specific intent crimes for purposes of the law of intoxication; instead, it employs an imputation approach under which the culpable mental state of recklessness, as defined under RCC § 22E-206(d), may be imputed—notwithstanding the absence of awareness of a substantial risk—based upon the self-induced intoxication of the actor. *See* RCC § 209(c) ("When a culpable mental state of recklessness applies to a result or circumstance in an offense, recklessness is established if: (1) The person, due to self-induced intoxication, fails to perceive a substantial risk that the person's conduct will cause that result or that the circumstance exists; and (2) The person is negligent as to whether the person's conduct will cause that result or as to whether that circumstance exists."). Under this new approach, application of a recklessness (or negligence) culpable mental state to a revised offense roughly approximates District law governing general intent crimes. *See* First Draft of Report No. 3, Recommendations for Chapter 2 of the Revised Criminal Code—Mistake, Deliberate Ignorance, and Intoxication, at 27-31 (March 13, 2017)

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

[135] Recklessly engaging in nonconsensual physical contact that transmits a disease to another person may suffice for assault liability. However, particular care should be given to the clear blameworthiness standard

revised definition of "bodily injury" are criminalized under the RCC offensive physical contact offense (RCC § 22E-1205) or second degree nonconsensual sexual conduct (RCC § 22E-1307(b)).[137] This change clarifies the scope of the revised assault offense and, to the extent it changes existing law, fills a gap insofar as the infliction of potentially serious but painless harms may not be subject to assault liability.

Third, the effective consent defense in RCC § 22E-40X limits liability under the revised assault statute. The District's assault statutes do not address whether consent of the complainant is a defense to liability, nor do District statutes otherwise codify general defenses to criminal conduct. Longstanding case law of the United States Court of Appeals District of Columbia Circuit (D.C. Cir.) in *Guarro v. United States* has recognized that consent is a defense to assault, at least in the case of a nonviolent sexual touching.[138] A recent DCCA opinion in *Woods v. United States*, however, held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly declined to rule on the effect of consent in other circumstances.[139] To resolve this ambiguity, the RCC effective consent defense clarifies when the complainant's "effective consent" or a person's belief that the complainant gave "effective consent" is a defense to RCC offenses against persons such as assault. This change improves the clarity of the law and, to the extent it may result in a change, improves the proportionality of the offense by ensuring that consensual and legal activities are not criminalized.

Fourth, the revised assault statute clarifies the prohibition on justification or excuse defenses in the current assault on a police officer (APO) statute.[140] First, the RCC provision in subsection (g) codifies the requirements in DCCA case law and existing

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incorporated into the RCC definition of recklessness, which requires that the person's conscious disregard of a substantial risk, given the "nature and degree" of the risk, as well as the "nature and purpose of the person's conduct and the circumstances known to the person," have been "clearly blameworthy." RCC § 22E-206(d). For example, a sneezy office worker who disregards a substantial risk that he will transmit a cold virus to others by working in proximity to them would not ordinarily satisfy the requirement of bodily injury, whereas, a sneezy surgeon who disregards a substantial risk that she will transmit a cold virus to a patient undergoing a procedure and having a compromised immune system may satisfy the requirement of bodily injury for assault liability. [Note that effective consent may be a defense in any of these examples, however, per RCC § 22E-40XX].

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

[137] As is discussed in the commentary to the revised nonconsensual sexual conduct statute, second degree nonconsensual sexual conduct generally replaces liability for the non-violent sexual touching form of assault. RCC § 22E-1205, the offensive physical contact offense, provides general liability for offensive touching, regardless whether there is an intent to sexually degrade, arouse, or gratify.

[138] 237 F.2d 578, 581 (1956) ("Nevertheless the evidence in the instant case cannot support a conviction for assault unless it appears that there was no actual or apparent consent. Generally where there is consent, there is no assault. 1 Wharton, Criminal Law §§ 180, 751 (12th ed. 1932).").

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

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

District practice[141] that the defendant actively oppose the use of force,[142] that the limitation extends to stops or other detention (not just arrest) for a legitimate police purpose,[143] and that the law enforcement officer's use of force appeared reasonably necessary.[144] Second, the RCC prohibition requires that the defendant is at least reckless as to the complainant's status as a law enforcement officer. The limitation in the District's current APO statute requires that the defendant "knew or should have known" that the complainant was a law enforcement officer.[145] Case law repeats this language,[146] without clarifying whether there is any requirement of subjective awareness on the defendant's part as to the complainant's status.[147] The revised assault statute requires that the defendant is reckless as to the fact that the person harmed is a law enforcement officer. A "reckless" culpable mental state makes the defense consistent with the assault gradations that have an enhancement for "protected persons" (which include law enforcement officers in the course of their duties as a category in the definition of "protected person."). Third, the language "there are no justification or excuse defenses under RCC [§§ 22E-XXX – 22E-XXX] for a person to actively oppose the use of

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

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

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

[144] *Nelson v. United States*, 580 A.2d 114, 117 (D.C.1990) *(on rehearing)*.

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

[146] *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)).

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

physical force by a law enforcement officer when…" clarifies that there may be other circumstances where a person has a justification defense or excuse defense to assault against a LEO under future RCC justification and excuse defenses. These changes clarify the defense, using definitions and requirements consistent with the revised assault offense and existing District law.

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

First, the revised assault statute codifies the culpable mental state in the District's current aggravated assault statute as "recklessly, with extreme indifference to human life" (subsections (a)(3), (a)(4), and (b)(1)). The District's current aggravated assault statute lists two different culpable mental states: "knowingly or purposely causes serious bodily injury" in D.C. Code § 22-404(a)(1) and "under circumstances manifesting extreme indifference to human life . . . intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person and thereby causes serious bodily injury" in D.C. Code § 22-404(a)(2). The DCCA, however, has stated that "[i]n order to give effect to the [aggravated assault] statute as a whole, subsection (a)(2) must be read as requiring a different type of mental element—gross recklessness."[148] The DCCA has also stated that the lower culpable mental state in the current aggravated assault statute "can be proven by evidence of 'conscious disregard of an extreme risk of death or serious bodily injury'"[149] and that it is "substantively indistinguishable from the minimum state of mind required for conviction of second-degree murder,"[150] in that it, too, requires "'extreme recklessness' regarding risk of death or serious bodily injury.'"[151] In the RCC it is only necessary to specify the latter culpable mental state because the higher culpable mental states "knowingly" or "purposely" satisfy the lower culpable mental state under RCC § 22E-206. This revision clarifies without changing[152] existing law on the "gross recklessness" standard in the current aggravated assault statute.

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

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

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

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

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

Second, the revised assault statute, by the use of the phrase, "in fact," clarifies that no culpable mental state is required as to whether the object displayed or used to cause the specified types of "bodily injury" is a "dangerous weapon," as that term is defined in RCC § 22E-701, or a "firearm as defined in D.C. Code § 22-4501(2A)." As discussed above as a substantive change to current District law, the revised assault statute's weapons gradations replace the current offense of assault with a dangerous weapon (ADW), as well as the separate penalty enhancement for committing certain assault offenses "when armed with or having readily available" a deadly or dangerous weapon.[153] The current ADW statute is silent as to what culpable mental state applies to whether the object at issue is a dangerous weapon.[154] However, District case law provides that whether an object qualifies as a "dangerous weapon" hinges upon a purely objective analysis of the nature of the object rather than on the accused's understanding of the object.[155] District case law for the "while armed" enhancement in D.C. Code § 22-4502 similarly supports applying strict liability to whether the object at issue is a dangerous weapon.[156] Applying strict liability to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[157] Notably, however, the revised assault offense requires at least

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constituted plain error that was prejudicial, "affect[ed] the integrity of th[e] proceeding," and "impugn[ed] the public reputation of judicial proceedings in general.").

It should be noted that the revised second degree murder statute in RCC § 22E-1101(b) also requires the culpable mental state of "recklessly, under circumstances manifesting extreme indifference to human life," which will not change DCCA case law interpreting depraved heart murder. *See, e.g., Comber v. United States*, 584 A.2d 26, 39 (D.C.1990) (en banc) (noting that "depraved heart malice exists only where the perpetrator was subjectively aware that his or her conduct created an extreme risk of death or serious bodily injury, but engaged in that conduct nonetheless); *Powell v. United States*, 485 A.2d 596 (D.C.1984) (affirming second degree murder conviction on depraved heart malice theory when defendant led police in a high speed chase at speeds of up to ninety miles an hour); *Perez v. United States*, 968 A.2d 39, 102 (D.C. 2009) (affirming second degree murder conviction on depraved heart malice theory when defendant handed a knife to co-defendant whom he knew wanted to harm the victim, and the co-defendant used the knife to fatally wound the victim).

[153] D.C. Code § 22-4502(a).

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

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

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

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

[157] *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*

recklessness as to causing specified "bodily injury" by the display or use of an object that is, in fact, a dangerous weapon.[158] This change clarifies, and potentially fills a gap in, District law.

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).").

[158] The revised assault statute requires the same object a person is recklessly displaying or using to cause the specified "bodily injury" to be, in fact, a dangerous weapon. So, for example, where a person believes that he or she is causing the complainant bodily injury by displaying or using only a heavy bag, even if the heavy bag contains a per se dangerous weapon, such as a firearm, (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 heavy bag contained a firearm. One cannot conceptualize the assault as being by "displaying or using" a heavy bag, then analyze the assault with respect to a firearm which is one of the unknown contents of the bag. The causation requirement in RCC § 22E-204 may also preclude liability in such a situation to the extent that wielding a bag with an unknown firearm in it causes a bodily injury (e.g. by discharge) that is not reasonably foreseeable.

RCC § 22E-1203. Menacing.

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

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

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[1] RCC § 22E-1204.
[2] D.C. Code §§ 22-407, 22-1810.
[3] D.C. Code § 22-404.
[4] D.C. Code § 22-402.
[5] DCCA case law clarifies in *Evans v. United States*, 779 A.2d 891, 894-95 (D.C. 2001), and the RCC criminal threats statute recognizes, that for there to be a communication of a threat the recipient must be able to access or comprehend it, at the most basic level. For example, there is no communication of a threat if the content of the threat is in a language that the recipient does not comprehend.
[6] *Griffin v. United States*, 861 A.2d 610, 616 (D.C. 2004) (citing *Clark v. United States*, 755 A.2d 1026, 1030 (D.C. 2000)).
[7] The term "speech" is defined in RCC § 22E-701 and means oral or written language, symbols, or gestures.
[8] A person may communicate through non-verbal conduct such as displaying a weapon. *See State v. Murphy*, 545 N.W.2d 909, 915 (Minn. 1996) ("Many physical acts considered in context communicate a terroristic threat. We may find our examples in the case law, such as drawing a finger across one's throat or discharging a firearm over the telephone; in the movies, such as boiling a rabbit on the stove in the tranquil setting of former paramour's new family home, or placing a severed horse's head in a bed; or as here, depositing dead animals at a residence or planting a fake bomb. Life is replete with such examples, and whatever the source, the principle is the same: physical acts communicate a threat that its originator will act according to its tenor." (Internal quotations omitted.)).
[9] "Cause" includes personally engaging in criminal conduct and soliciting or allowing an accomplice or innocent instrumentality to engage in criminal conduct.
[10] For example, a jury may evaluate whether the accused's gesture of drawing a finger across his throat communicated that the accused would kill the recipient of the communication.

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

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

Paragraphs (a)(3) and (b)(2) require the defendant make the communication "with intent that" it be perceived as a serious expression of an intent to do harm.[14] "Intent" is a defined term in RCC § 22E-206 that here requires that the defendant was practically certain that his or her communication would be perceived as a serious expression of an intent to do harm. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the communication was perceived as a serious expression of an intent to do harm, only that the actor believed to a practical certainty that it would be so perceived. Not all insulting, abusive, or violent language is threatening.[15] For example, a statement about what a person believes ought to happen, may not be intended and understood as an expression that the declarant will cause it to happen.[16] Whether a particular communication amounts

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

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

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

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

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

[16] *Compare State v. Draskovich*, 904 N.W.2d 759, 761 (S.D. 2017) (upholding a threats conviction where a defendant told a court employee, "Well, that deserves 180 pounds of lead between the eyes.") *with People v. Wood*, 2017 WL 5617926, at *3 (Ill. App. Ct. Nov. 20, 2017) (reversing a threats conviction where a

to a serious expression of intent to inflict harm is a question of fact that will often require judgment by a factfinder.

Paragraphs (a)(4) and (b)(3) require proof that the accused's communication is objectively threatening, under the circumstances. "In fact," a defined term,[17] is used to indicate that there is no culpable mental state requirement for paragraphs (a)(3) and (b)(3). Rather, the only proof required with respect to this element of the revised offense is that the defendant's message would cause a reasonable person in the complainant's circumstances to believe that the harm would occur.[18] This is an objective standard, but it is evaluated contextually, assuming awareness of the circumstances known to the parties in the case.[19] The relevant facts and circumstances in an individual case may include prior interactions between the declarant and the listener and the power dynamics between the declarant and the target of the threat.[20] Paragraphs (a)(4) and (b)(3) do not require that the defendant actually have the ability or apparent ability to carry out the threatened harm.[21] The offense also does not require proof that the defendant actually intended to eventually carry out the threat.

Subsection (c) cross-references the U.S. Constitution, the District's First Amendment Assemblies Act, and the District's Open Meetings Act. This conflict-of-laws provision is intended to encourage readers to consider what First Amendment polices, if any, are implicated by prosecutions of the offense and makes clear that this language leaves the Act unchanged. Not all conduct involved in the offense, of course, will implicate First Amendment rights.

Subsection (d) provides a jury trial for defendants charged with criminal threats or attempted criminal threats. Inclusion of a jury trial right is intended to ensure that the First Amendment rights of accused are not infringed. The District has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve exercise of civil liberties.[22] The jury trial right also helps ensure that an array of community perspectives are brought to bear in determining what communications are serious expressions of intent to cause harm.

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

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defendant expressed a "dream for revenge," stating, "There is not a day that goes by since I was sentenced at that courthouse that I have not dreamed about revenge and the utter hate I feel for the judge," and "there's not a day that goes by that I don't pray for the death and destruction upon the judge.")

[17] RCC § 22E-207.

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

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

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

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

[22] *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.").

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

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

First, the revised second degree menacing statute uses the word "communicates," which includes all verbal and non-verbal conduct that conveys a message. The current District assault statutes are silent as to the type of conduct that may constitute an "intent-to-frighten" form of assault. However, District case law holds that "mere words do not constitute an assault."[23] Under centuries-old common law, non-verbal conduct is required for intent-to-frighten assault,[24] although case law does not specify what conduct is required. The current District threats statutes are silent as to the type of conduct that may convey a threat, simply referring to a person who "threatens"[25] or issues a "threat."[26] However, in at least one case, the District of Columbia Court of Appeals ("DCCA") has stated that a threat "requires *words* to be communicated to another person" in contrast with intent-to-frighten assault which "requires threatening conduct."[27] Case law describes an element of threats as having "uttered words,"[28] which has been explicitly construed to cover not only oral but written threats.[29] In contrast, the RCC second degree[30] menacing offense punishes menacing words (written or oral), gestures, and symbols.[31] Assuming other elements of the offense are proven, the social harm at issue—the immediate, intentional infliction of fear upon a person—occurs whether the message is conveyed verbally or non-verbally.[32] This change eliminates an unnecessary gap in District law and improves the proportionality of the revised offense.

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

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

[25] D.C. Code § 22-1810.

[26] D.C. Code § 22-407.

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

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

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

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

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

[32] *See, e.g.*, *State v. Murphy*, 545 N.W.2d 909, 915 (Minn. 1996) ("Many physical acts considered in context communicate a terroristic threat. We may find our examples in the case law, such as drawing a finger across one's throat or discharging a firearm over the telephone; in the movies, such as boiling a rabbit on the stove in the tranquil setting of former paramour's new family home, or placing a severed

Second, the revised statute clarifies that both gradations require a threat of immediate criminal harm involving a bodily injury, a sexual act, a sexual contact, or confinement. The current District assault statutes are silent as to the type of conduct that may constitute an "intent-to-frighten" form of assault. However, District case law holds that intent-to-frighten assault covers a defendant's "conduct as could induce in the victim a well-founded apprehension of peril."[33] District case law concerning intent-to-frighten assault has upheld convictions for placing a person in fear of "immediate injury."[34] However, there is no District case law deciding whether placing someone in fear of an offensive physical contact, the lowest level of assault recognized under current District law,[35] suffices for intent-to-frighten assault liability.[36] Current District threats statutes refer to a few types of conduct: to "kidnap," "injure the person of another," "physically damage the property of any person," or "do bodily harm."[37] Neither the current statutes nor case law define the precise meaning of terms like "injure" or "do bodily harm," and it is unclear whether the phrases are equivalent to the harm described in case law for simple assault.[38] In contrast, the RCC menacing statute specifies the relevant harms that may be the basis for a menacing prosecution. This change narrows the scope of the offense by excluding non-sexual, merely offensive physical contacts (that fall short of inflicting bodily injury),[39] but broadens the offense to include kidnapping conduct that does not

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horse's head in a bed; or as here, depositing dead animals at a residence or planting a fake bomb. Life is replete with such examples, and whatever the source, the principle is the same: physical acts communicate a threat that its originator will act according to its tenor." (Internal quotations omitted.)).

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

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

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

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

[37] D.C. Code §§ 22-407, 22-1810.

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

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

involve a bodily harm.[40] This change reduces an unnecessary gap in liability, and improves the clarity and proportionality of the offense.

Third, the RCC menacing offense eliminates liability based on an "intent to injure." The current District assault statutes are silent as to the types of intent that may constitute an "intent-to-frighten" form of assault. However, District case law has indicated that, in addition to an intent to scare a victim, intent-to-frighten assault liability also may exist where there is an intent to cause bodily injury to the victim.[41] This "intent to cause injury" form of intent-to-frighten assault appears to be distinct from criminal liability for an attempted battery form of simple assault in District case law.[42] By contrast, the RCC menacing offense requires only that the defendant intend that communication be perceived as a threat. A person who engages in conduct with an intent to inflict bodily injury may be liable under the RCC assault statute,[43] but unless the person has an intent that the communication be perceived as a threat and meets the other offense elements, such a person is not liable under the revised menacing offense. This new division of criminal liability between the revised assault and revised menacing statutes may limit punishment for some conduct currently recognized as a completed form of intent-to-frighten assault to an attempted assault in the revised statute.[44] The change clarifies the revised offenses of assault and a menacing and eliminates unnecessary overlap in current District law between attempted battery forms of assault and intent-to-frighten forms of assault.

Fourth, the RCC menacing offense eliminates penalty enhancements based on the victim's status as a minor, a senior citizen, a transportation worker, a District official or employee, or a citizen patrol member. Under current District statutes, certain penalty enhancements apply to simple assault (including intent-to-frighten assault)[45] and assault with a deadly weapon.[46] By contrast, under the RCC, the only means of increasing a menacing penalty is to prove the defendant used a dangerous or imitation weapon, making the offense first degree menacing. Enhancements based on the status of the complainant no longer apply. This change simplifies current law and improves

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

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

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

[43] RCC § 22E-1202.

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

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

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

proportionality by limiting these complainant-based penalty enhancements to offenses involving bodily injury and other serious crimes such as sexual assault.

Fifth, under the revised criminal menacing statute, the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "knowingly" or with "intent" due to his or her self-induced intoxication. The current intent-to-frighten form of assault statute is silent as to the availability of an intoxication defense. However, because the offense has been characterized as a general intent crime,[47] defendants may be precluded from receiving a jury instruction on voluntary intoxication[48] or presenting evidence in support thereof.[49] Under the RCC menacing statute, a defendant will be able to raise and present relevant and admissible evidence in support of a claim of that voluntary intoxication prevented the defendant from forming the knowledge or intent required to prove a criminal threat. Likewise, where appropriate, a defendant will be entitled to an instruction on intoxication.[50] This change improves the clarity, consistency, and proportionality of the offense.

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

First, the revised menacing statute clarifies that the defendant must act with intent—i.e. must believe to a practical certainty—that his or her communication will be perceived as a serious expression that the defendant would cause the harm. The District's current simple assault and assault with a deadly weapon statutes are silent as to the offenses' requisite culpable mental states. Current District case law has often indicated that recklessness may suffice for such assaults,[51] however, in some instances a higher

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

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

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

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

[51] Simple assault is a lesser included offense of offenses such as ADW, assault with significant bodily injury, and aggravated assault. *See Williams*, 106 A.3d at 1065 & n.5 (referring to simple assault as a lesser included offense of ADW); *Woods v. United States*, 65 A.3d 667, 668 (D.C. 2013) (referring to simple assault as a lesser included offense of assault with significant bodily injury); *McCloud v. United States*, 781 A.2d 744, 746 (D.C. 2001) (referring to simple assault as a lesser included of aggravated assault). The lesser included offense relationship between simple assault and ADW and simple assault and aggravated

level of intent has been required,[52] and the DCCA recently declined to hold that recklessness is sufficient.[53] While the District's threats statutes are silent as to required culpable mental states, knowledge or as least some subjective intent is required by case law interpreting the threats statutes, and knowledge as to the criminal nature of the harm is consistent with this case law.[54] The RCC menacing offense resolves these ambiguities by requiring a culpable mental state of knowledge in paragraphs (a)(1), (a)(2) and (b)(1) and intent for subsections (a)(3) and (b)(2).[55] Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[56] A knowledge culpable mental state requirement is also more appropriate given that the menacing offense requires only a communication, not a bodily injury or use of overpowering physical force,[57] which may be more easily misconstrued as a threat.[58] This change improves the clarity of the law, and is consistent with prevailing District law and the revised criminal threats offense.

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assault suggests that recklessness should suffice for simple assault because proof of recklessness or extreme recklessness satisfies these greater offenses. *See Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), *as amended* (Sept. 19, 2013) ("[I]t is clear that a conviction for ADW can be sustained by proof of reckless conduct alone."); D.C. Code § 22-404.01(a)(2) (aggravated assault statute requiring "under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person and thereby causes serious bodily injury.").

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

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

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

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

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

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

[58] *See*, e.g., *Furl J. Williams v. United States*, 113 A.3d 554, 561-62 (D.C. 2015) In *Furl J. Williams*, the alleged victim of robbery felt threatened by being approached by three African Americans late at night and handed them his wallet. *Id*. The DCCA reversed their convictions, stating that the victim's fear was not objectively reasonable. *Id*. at 564. *See also*, Rachel D. Godsil & L. Song Richardson, *Racial Anxiety*, 102 Iowa L. Rev. 2235 (2017) (discussing how racial anxiety can influence behavior and perceptions); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 Iowa L. Rev. 293 (2012)

Second, the revising menacing statute includes an "objective element" in paragraphs (a)(4) and (b)(3), subject to strict liability.[59] The District's current assault statutes are silent as to whether the communication must be one that would cause a reasonable recipient to believe that the threatened harm would take place. However, District case law on intent-to-frighten assault requires that the defendant had the "apparent present ability to injure" the complainant.[60] The DCCA further qualified that a reasonable person test is to be used to determine such an ability.[61] Although the District's current threats statutes are silent on the matter, longstanding District case law has required that for a defendant to be convicted of threats, there must be proof that that the "ordinary hearer would reasonably believe that threatened harm would take place."[62] longstanding District case law requires proof that that the "ordinary hearer would reasonably believe that threatened harm would take place."[63] Case law further specifies that this reference to an "ordinary hearer" takes into account all the context-specific factual circumstances of the case.[64] The DCCA's recent *en banc* opinion in *Carrell* reaffirmed that there must be proof of this "objective element,"[65] while adding the additional requirement "that the defendant acted with the purpose to threaten or with knowledge that his words would be perceived as a threat."[66] However, the *Carrell* decision did not fully specify the relationship between the objective standard and the defendant's culpable mental state of knowledge that his communication be a threat.[67] In contrast, the RCC menacing offense clarifies that while the defendant must act with intent that the communication be perceived as a threat,[68] the objective elements in paragraphs (a)(4) and (b)(3) are additional, separate elements, independent of the defendant's own awareness of the threatening nature of the message. The RCC's use of "in fact" with the objective requirement in the threats statutes clarifies the state of the law and appears to be

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(racial bias research, and specifically a phenomenon called "the suspicion heuristic" "demonstrates how easily honest—but mistaken—beliefs can occur when the person being judged fits a criminal stereotype.").

[59] *See Anthony v. United States*, 361 A.2d 202, 206 (D.C. 1976*)* ("In our view the better position holds that although the question whether the defendant's conduct produced fear in the victim is relevant, the crucial inquiry remains whether the assailant acted in such a manner as would under the circumstances portend an immediate threat of danger to a person or reasonable sensibility.").

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

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

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

[63] *Id*.

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

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

[66] *Id*.

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

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

consistent with District practice[69] and the recent DCCA ruling in *Carrell*. This change improves the clarity of the law and is consistent with prevailing District law on criminal threats.

Third, the RCC menacing offense clarifies that the defendant need not threaten to carry out the harm himself. The District's current simple assault and assault with a deadly weapon statutes do not address whether a threat to have another person harm someone is sufficient for liability.[70] Although the District's threats statutes are silent as to threats involving an accomplice committing a harm, at least one case suggests that it is sufficient for liability that a defendant communicates that another person will harm the victim,[71] but there is no case law directly on point. In contrast, paragraphs (a)(1) and (b)(1) of the revised statute prohibit threats that "the actor immediately will cause a criminal harm." This includes causing the harm personally, remotely, through an accomplice, through an innocent instrumentality, or otherwise. This change improves the clarity of the revised offense.

Fourth, the RCC first degree menacing offense explicitly prohibits menacing by displaying or using imitation dangerous weapons. The current District assault with a dangerous weapon statute is silent as to whether the offense may be completed using an imitation weapon.[72] The DCCA has held that imitation *firearms* are within the scope of the assault with a dangerous weapon statute[73] but has not yet explicitly addressed non-firearm imitation weapons (e.g., fake knives).[74] The current District threats statutes do not include the use of dangerous weapon as an element.[75] In contrast, the RCC menacing offense explicitly includes all imitation dangerous weapons, a term defined in RCC § 22E-701. Assuming other elements of the offense are proven, the social harm at issue—the immediate, intentional infliction of fear upon a person—occurs whether the weapon is

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

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

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

[72] D.C. Code § 22-402.

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

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

[75] D.C. Code §§ 22-407, 22-1810.

real or an imitation that a reasonable person would believe is real. This change improves the clarity of the statute and may fill a gap in existing law.

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

First, the revised offense clarifies that a threat to harm a third party is sufficient for criminal liability. The current District intent-to-frighten and assault with a deadly weapon statutes (as well as the District's threats statutes) are silent on this matter. This does not appear to have been addressed in District assault case law.[76] While the District's threats statutes also are silent as to a threat to harm a third party present, DCCA case law has long recognized that threats to harm a third party, other than the recipient of the communication, are sufficient for liability if other elements of the offense are met.[77]

Second, the revised menacing statute specifies that the offense is complete only when the message is communicated to another person. Thus, a person is not guilty of a completed menacing if the communication does not reach a person other than the defendant.[78] This requirement is well established in District threats case law.[79] Of course, a failed attempt to deliver a message to another person could constitute attempted menacing, as could a message that is transmitted but "garbled and not understood."[80] This, too, is well established in District case law.[81]

Third, the revised menacing clarifies that there is no gradation distinction based on whether harm did or did not result from the defendant's communication. Current District law provides more severe penalties for causing assaults that result in more severe physical harms—for example, the felony assault statute punishes anyone who "unlawfully assaults…[and] causes significant bodily injury to another," thus creating the offense of "felony assault."[82] Consequently, it may be possible under current District law

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

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

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

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

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

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

[82] D.C. Code § 22-404(a)(2).

for a person whose conduct amounts to an intent-to-frighten form of assault to be liable for felony punishment if that frightening conduct results in significant or serious bodily injury. No DCCA case law has addressed such felony-level liability based on intent-to-frighten conduct versus battery. The fact patterns that would give rise to such liability are unlikely,[83] though arguably possible.[84] District threats statutes do not grade on the basis of the infliction of a bodily harm.[85] While the criminal menacing statute does not grade based on whether there are any resulting physical harms, conduct that causes such a harm may be punishable under the RCC assault statute.[86]

Fourth, the RCC menacing statute requires that the defendant's conduct be directed at a person physically present with the defendant, and that the harm threatened must be immediate. The current District simple assault and assault with a dangerous weapon statutes are silent as to physical presence and immediacy. However, District case law on intent-to-frighten assault and assault with a dangerous weapon implicitly require immediacy, particularly through requirements that the defendant have the "apparent present ability to injure" the complainant.[87] As noted above, the DCCA held "that at the time of the assault the surrounding circumstances must connote the intention and present ability to do immediate violence."[88] Although the District's threats statutes are silent on the matter, District case law has affirmed liability for threats regardless of physical presence or the immediacy of harm.[89] The revised menacing statute clarifies these immediacy and physical presence requirements in existing law.

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

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

[85] D.C. Code §§ 22-407, 22-1810.

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

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

[88] *Id*. at 205.

[89] See commentary to RCC § 22E-204.

RCC § 22E-1204. Criminal Threats.

Explanatory Note. *This section establishes the criminal threats offense and penalty gradations for the Revised Criminal Code (RCC). The offense punishes efforts to inflict fear of a future or conditional criminal harm. The offense is graded according to the type of criminal harm the defendant threatens: a bodily injury, a sexual act, a sexual contact, or confinement (first degree) or $250 or more loss or damage to property (second degree). The revised criminal threats offense and revised menacing offense*[1] *together replace the misdemeanor and felony threats statutes*[2] *in the current D.C. Code.*

Paragraphs (a)(1) and (b)(1) state the prohibited conduct—that the defendant communicates to another person. Communication requires not only that the defendant take action to convey a message, but also that the message is received and understood by another person.[3] No precise words are necessary to convey a threat; it may be bluntly spoken, or done by innuendo or suggestion.[4] The verb "communicates" is intended to be broadly construed, encompassing all speech[5] and other messages[6] that are received and understood by another person. The communication must be that the defendant, at any time in the future or if any condition is met,[7] will cause a criminal harm.[8] First degree criminal threats, paragraph (a)(1), requires the defendant communicate that he or she will cause a criminal harm involving a bodily injury, a sexual act, a sexual contact, or confinement, to any person. Second degree criminal threats, paragraph (b)(1), requires the defendant indicate that he or she will cause a criminal harm involving $250 or more loss or damage to property of any natural person.[9] Whether particular words, gestures,

[1] RCC § 22E-1203.

[2] D.C. Code §§ 22-407, 22-1810.

[3] DCCA case law clarifies in *Evans v. United States*, 779 A.2d 891, 894-95 (D.C. 2001), and the RCC criminal threats statute recognizes, that for there to be a communication of a threat the recipient must be able to access or comprehend it, at the most basic level. For example, there is no communication of a threat if the content of the threat is in a language that the recipient does not comprehend.

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

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

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

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

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

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

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

Paragraphs (a)(1) and (b)(1) also require a culpable mental state of knowledge, a term defined at RCC § 22E-206. Applied to the elements here, the accused must at least be aware to a practical certainty that his or her conduct: 1) communicates to a complainant[11] that, anytime in the future or if any condition is met; 2) that the actor will cause a criminal harm; and 3) the criminal harm involves a bodily injury, a sexual act, a sexual contact, or confinement (first degree) or a $250 or more loss or damage to property of any natural person (second degree).

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

Paragraphs (a)(3) and (b)(3) require proof that the accused's communication is objectively threatening, under the circumstances.[15] "In fact," a defined term,[16] is used to

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[10] For example, a jury may evaluate whether the accused's gesture of drawing a finger across his throat communicated that the accused would kill the recipient of the communication. A jury may also evaluate whether texting a photograph of someone's car communicated that the accused would damage the car.

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

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

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

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

[15] The government must prove a conduct element and a result element: that the defendant (1) "uttered words to another person" (2) with a result that "the ordinary hearer [would] reasonably…believe that the

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

Subsection (c) cross-references the U.S. Constitution, the District's First Amendment Assemblies Act, and the District's Open Meetings Act. This conflict-of-laws provision is intended to encourage readers to consider what First Amendment polices, if any, are implicated by prosecutions of the offense and makes clear that this language leaves the Act unchanged. Not all conduct involved in the offense, of course, will implicate First Amendment rights.

Subsection (d) provides a jury trial for defendants charged with criminal threats or attempted criminal threats. Inclusion of a jury trial right is intended to ensure that the First Amendment rights of accused are not infringed. The District has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve exercise of civil liberties.[23] The jury trial right also helps ensure that an array of community perspectives are brought to bear in determining what communications are serious expressions of intent to cause harm.

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

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

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threatened harm would take place." *In re S.W.*, 45 A.3d 151, 155 (D.C. 2012); *see also Clark v. United States*, 755 A.2d 1026, 1030 (D.C. 2000) (acknowledging these two actus reus elements).

[16] RCC § 22E-207.

[17] *Carrell v. United States*, 165 A.3d 314, 320 (D.C. 2017).

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

[19] For example, a complainant who testifies, "I knew that the defendant would not ever actually try to hit me," has not suffered a criminal threat, even if the defendant intended the puffery to be taken seriously.

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

[21] A threat on a condition that victim believes will never occur does not amount to a criminal threat. *Postell v. United States*, 282 A.2d 551, 553 (D.C. 1971). Additionally, a statement that a person will defend themselves or another person from criminal harm does not amount to a criminal threat. Consider, for example, a parent who warns, "If you touch my child, you are going to regret it!"

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

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

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

First, the revised criminal threats statute establishes two gradations based on the nature of the threatened harm. Under current District law, a felony threats offense punishes threats to kidnap, injure, or damage property, whereas a misdemeanor threats offense punishes infliction of bodily harm only.[24] Consequently, although there are two penalty gradations under current law, the gradations do not limit liability for less severe threats.[25] In contrast, the RCC criminal threats offenses grades according to the severity of the harm threatened. First degree liability requires a threat to inflict a bodily injury, a sexual act, a sexual contact, or confinement. Second degree liability requires a threat to cause $250 or more in property loss or damage. These changes bring the threats offenses into conformity with the approach to penalty gradations used through most of the current D.C. Code and the RCC[26] and improve the proportionality of the revised offense.

Second, the revised criminal threats statute uses the word "communicates," which includes all verbal and non-verbal conduct that conveys a message, expanding the means by which a threat may be issued. The current District threats statutes are silent as to the type of conduct that may convey a threat, simply referring to a person who "threatens"[27] or issues a "threat."[28] However, in at least one case, District of Columbia Court of Appeals ("DCCA") has stated that a threat "requires *words* to be communicated to another person" in contrast with intent-to-frighten assault which "requires threatening conduct."[29] Case law describes an element of threats as having "uttered words,"[30] which has been explicitly construed to cover not only oral but written threats.[31] In contrast, the

[24] D.C. Code §§ 22-407, 22-1810.

[25] The current statutory structure provides no lesser-included offenses for threats of kidnapping or threats to property.

[26] Virtually all criminal offenses that have penalty gradations in the current D.C. Code, or in the RCC, are structured such that the more severe penalty is for more harmful conduct that is a subset of the broader set of conduct covered by the less severe gradation. The District's current threats statutes reverse the usual approach to statutory drafting, making the least harmful conduct a subset of the broader set of conduct covered by the more severe gradation. Interestingly, the DCCA has noted that the legislative history behind the District's felony threats offense is somewhat muddled, and actually suggests that the offense was intended to cover extortionate conduct, not merely threatening conduct in the abstract. See *United States v. Young*, 376 A.2d 809, 814-16 (D.C. 1977) (discussing legislative history). The relatively harsh penalty associated with felony threats has been explained by reference to this history. *Id.*

[27] D.C. Code § 22-1810.

[28] D.C. Code § 22-407.

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

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

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

RCC criminal threats statute punishes threatening words (written or oral), gestures, and symbols,[32] as well as conduct. Assuming other elements of the offense are proven, the social harm at issue—the intentional infliction of fear upon a person—occurs whether the message is conveyed verbally or non-verbally.[33] This change improves the consistency and proportionality of the revised offense.

Third, the second degree of the revised statute includes only threats to cause property loss or damage amounting to less than $250. One current District threats statute refers to a threat to "physically damage the property of any person."[34] Neither the current statutory language nor case law defines the precise meaning of terms like "damage," or "property," and it is unclear whether the terms are equivalent to the harm described in the malicious destruction of property statute.[35] There is no apparent limitation on the value of the damage to property under current law, however. In contrast, the RCC criminal threats statute specifies the relevant harm for second degree threats as "criminal harm involving $250 or more loss or damage to property of any natural person." This change broadens the offense to include threats of theft-type conduct that involve loss to the complainant (but not damage to the property) and non-physical harms.[36] This is consistent with the RCC and current D.C. Code which do not recognize a significant distinction between the harms of stealing and destroying property. This change also narrows the scope of the current D.C. Code offense by excluding minor (based on the value of the property) property loss or damage.[37] This change clarifies the offense, improves the consistency of RCC property offenses, and improves the proportionality of the offense.

Beyond these three substantive changes to current District law, four other aspects of the revised criminal threats statute may constitute a substantive change of law.

First, the revised criminal threats statute clarifies the content of the threats required for each gradation, specifically including conduct that would cause "criminal harm involving a bodily injury, a sexual act, a sexual contact, or confinement." Current District threats statutes refer to a few types of conduct harming persons: to "kidnap,"

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

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

[34] D.C. Code § 22-1810.

[35] *See* D.C. Code § 22-303. Malicious destruction of property covers damage to property of *any value* and punishes such damage with a penalty of 180 days if the value of the object damaged does not reach $1,000.

[36] For example, a threat to put a hold on a person's bank account access before a commercial real estate purchase such that they are subject to liquidated damages may, depending on the facts of the case, constitute a threat to engage in conduct constituting second degree criminal damage to property.

[37] For example, under the plain language of the current District statute, it would appear to be a criminal threat—subject to a 20-year imprisonment penalty—for a person to threaten to crush another person's plastic drinking cup, or to scratch or blemish a cheap movie poster.

"injure the person of another," or "do bodily harm."[38] Neither current statutes nor case law define the precise meaning of terms like "injure," or "do bodily harm," and it is unclear if the phrases are equivalent to the harm described in case law for simple assault.[39] To clarify, the RCC criminal threat statute specifies the relevant harms for first-degree threats as "criminal harm involving a bodily injury, a sexual act, a sexual contact, or confinement." It may be that the additional conduct described in the RCC (e.g. a threat to commit a sexual act) is already subject to liability in the current statutes insofar as those statutes all appear to involve a threat to "injure the person of another."[40] Also, it may be that the conduct clearly excluded in the RCC (i.e. a threat to commit a non-sexual, merely offensive physical contact that does not cause bodily injury) would also be excluded under the current District statutes as not "injur[ing] the person of another." However, the RCC clarifies the content of the most serious threats that provide for heightened punishment through the use of the defined terms "bodily injury," "sexual act," and "sexual contact," consistent with the RCC assault and other statutes.[41] These changes improve the clarity and consistency of the offense.

Second, the revised criminal threats statute clarifies that the defendant must act with intent—i.e. must believe to a practical certainty—that his or her communication will be perceived as a serious expression that the defendant would cause a criminal harm. The District's current threats statutes are silent as to the offense's requisite culpable mental states, and recent DCCA case law has addressed but not entirely resolved the culpable mental state as to whether the communication will be understood as a threat. In 2017, an *en banc* DCCA decision, *Carrell v. United States*, held that something more than negligence, but less than purpose, is necessary.[42] The DCCA, following recent Supreme Court precedent,[43] said that acting with intent that the communication be perceived as a threat is sufficient for liability, but did not decide whether recklessness is also sufficient and acknowledged that it was leaving the law unsettled.[44] To resolve this ambiguity, the revised statute clarifies that the defendant must act with intent, not mere recklessness, as to whether the communication is perceived as a threat. Applying an intent culpable mental state requirement (an inchoate form of a knowledge requirement, as defined in the RCC[45]) to statutory elements that distinguish innocent from criminal behavior is a well-

[38] D.C. Code §§ 22-407, 22-1810.
[39] D.C. Code § 22-404. *See Mungo v. United States*, 772 A.2d 240, 245 (D.C. 2001) ("[A]ssault is defined as the unlawful use of force causing injury to another…"). The DCCA has further held that "assault" includes "non-violent sexual touching assault as a distinct type of assault." *Id*. And in fact, even non-sexual but "offensive" touchings can constitute assault. *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990). In at least one case, the DCCA has upheld a threats conviction where the threat consisted of saying, "I'm going to smack the s*** out of you." *Jones v. United States*, 124 A.3d 127, 131 (D.C. 2015). It's unclear whether slapping a person would constitute simple assault *qua* inflicting bodily harm, or simple assault *qua* engaging in an offensive touching.
[40] D.C. Code § 22-1810.
[41] The revised statute's use of "criminal harm involving…confinement" provides an ordinary language approach to specifying the harm commonly involved in kidnapping.
[42] *Carrell v. United States*, 165 A.3d 314, 324-25 (D.C. 2017).
[43] *Elonis v. United States*, 135 S. Ct. 2001 (2015).
[44] 165 A.3d 314, 323-24 (D.C. 2017) ("[W]e decline to decide whether a lesser threshold mens rea for the second element of the crime of threats—recklessness—would suffice.").
[45] RCC § 22E-206(b).

established practice in American jurisprudence.[46] Requiring an intent culpable mental state in the revised threats offense also appears to be consistent with existing District practice.[47] These changes improve the clarity and consistency of the offense.

Third, the revised criminal threats statute includes an "objective element" in paragraphs (a)(3) and (b)(3), subject to strict liability.[48] The District's current threats statutes are silent as to whether the communication must be one that would cause a reasonable recipient to believe that the threatened harm would take place. However, longstanding District case law requires proof that that the "ordinary hearer would reasonably believe that threatened harm would take place."[49] Case law further specifies that this reference to an "ordinary hearer" takes into account all the context-specific factual circumstances of the case.[50] The DCCA's recent *en banc* opinion in *Carrell* reaffirmed that there must be proof of this "objective element,"[51] while adding the additional requirement "that the defendant acted with the purpose to threaten or with knowledge that his words would be perceived as a threat."[52] However, the *Carrell* decision did not fully specify the relationship between the objective standard and the defendant's culpable mental state of knowledge that his communication be a threat.[53] In contrast, the RCC criminal threats offense specifies that while the defendant must act with intent that the communication be perceived as a threat,[54] the objective elements in paragraphs (a)(3) and (b)(3) are additional, separate elements,[55] independent of the defendant's own awareness of the threatening nature of the message. The RCC's use of "in fact" with the objective requirement in the threats statutes clarifies the state of the law

[46] *See Elonis*, 135 S. Ct. at 2009 ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[47] *See* D.C. Crim. Jur. Instr. § 4.130 (applying knowledge). The DCCA also noted that "the United States Attorney's Office [ ] disclaims reliance on recklessness…and states that it does not intend to prosecute future threats cases on a recklessness theory." *Carrell v. United States*, 165 A.3d 314, 325 (D.C. 2017). Of course, other parties, including the Office of the Attorney General, may rely on the threats statute as well.
[48] *See Carrell v. United States*, 165 A.3d 314, 320 (D.C. 2017).
[49] *Id*.
[50] The DCCA has noted that "the factfinder must weigh not just the words uttered, but also the complete context in which they were used." *Gray v. United States*, 100 A.3d at 136. For example, words that on their face are innocuous or ambiguous can become threatening in the circumstances of the threat; the opposite is true, as well. *See Clark v. United States*, 755 A.2d at 1031; *In re S.W.*, 45 A.3d 151, 157 (D.C. 2012) ("Even when words are threatening on their face, careful attention must be paid to the context in which those statements are made to determine if the words may be objectively perceived as threatening."). The DCCA has noted that words "often acquire significant meaning from context, facial expression, tone, stress, posture, inflection, and like manifestations of the speaker…" *Id*.
[51] *Carrell v. United States*, 165 A.3d 314, 324 (D.C. 2017).
[52] *Id*.
[53] For example, the opinion does not address whether, in addition to believing to a practical certainty that the communication would be perceived as a threat, the defendant must also believe that a "reasonable recipient" would believe that the harm would take place.
[54] *Carrell v. United States*, 165 A.3d 314, 325 (D.C. 2017).
[55] Even though paragraphs (a)(3) and (b)(3) provide for an objective assessment, the factfinder may take into account, among other factors, the subjective reactions of the recipients of the communication. *See Gray*, 100 A.3d at 134-35 ("[W]hether an ordinary hearer would understand words to be in the nature of a threat of serious bodily harm is a highly context-sensitive question.").

and appears to be consistent with District practice[56] and the recent DCCA ruling in *Carrell.* This change improves the clarity of the law and is consistent with prevailing District law on criminal threats.

Fourth, the revised criminal threats statute specifies that the defendant must know that the communication conveys that the defendant will cause a criminal harm, and have intent that the communication be perceived as a serious expression that the actor would cause the harm. The District's current threats statutes are silent as to whether the harm that is threatened is criminal, and case law has not directly addressed the issue. However, a knowledge requirement as to the nature of the communication as a threat is consistent with the DCCA's recent *en banc* opinion in *Carrell*.[57] Moreover, in other contexts, District case law has recognized that consent may be a valid general defense to harms that otherwise would be criminal, [58] and that a parent or other person in a custodial relationship is not liable for committing some harms that are in fulfillment of the duties of that relationship.[59] The RCC criminal threats statute clarifies that the actor must know and have intent that the harm he or she communicates to another is a criminal harm. The requirement that the harm be "criminal" clarifies that there is no liability for a communication of a harm to which there is an effective consent[60] or other general defense, or other harms that do not rise to the level of criminality. Moreover, District practice[61] has long recognized the general existence of a consent defense that is consistent with the RCC criminal threat requirement that the harm be criminal. This change improves the clarity of the law and, to the extent it may result in a change, improves the proportionality of the offense by ensuring that consensual and legal activities are not criminalized.

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

First, the revised offense clarifies that a threat to harm a third party is sufficient for criminal liability. The current District threats statutes are silent on this matter. However, DCCA case law has long recognized that threats to harm a third party, other than the recipient of the communication, are sufficient for liability if other elements of

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

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

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

[59] *See, e.g., Faunteroy v. United States*, 413 A.2d 1294, 1300 (D.C. 1980) (Parents have common law duty of care to provide medical care for minor dependent children.)

[60] For example, but for the requirement that the harm be "criminal," a surgeon describing the procedure he is intends to carry out on a patient would appear to be liable under the plain language of the statute. Similarly, threats made as part of sports, acting, sexual interactions, and other activity not forbidden by law would appear to fall within the scope of the criminal threat offense.

[61] D.C. Crim. Jur. Instr. § 9-320 ("If [name of complainant] voluntarily consented to [the act] [insert description of the act], or [name of defendant] reasonably believed [name of complainant] was consenting, the crime of [insert offense] has not been committed.").

the offense are met.[62] Additionally, although the current statutes do not explicitly note that the offenses only apply to natural persons, the revised statute incorporates current DCCA case law holding that business and government entities are not protected by the threats statutes.[63]

Second, the revised criminal threats statute specifies that the offense is complete only when the message is communicated to another person. Thus, a person is not guilty of a completed criminal threat if the communication does not reach a person other than the defendant. This requirement is well established in District case law.[64] Of course, a failed attempt to deliver a message to another person could constitute attempted criminal threats, as could a message that is transmitted but "garbled and not understood."[65] This, too, is well established in District case law.[66]

Third, under the revised criminal threats statute, the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "knowingly" or with "intent" due to his or her self-induced intoxication. The current threats statutes are silent as to the availability of an intoxication defense, and case law has not addressed the matter since the DCCA's recent *en banc* opinion in *Carrell* found that knowledge or some subjective intent is required for liability.[67] Under the RCC criminal threats statute, a defendant will be able to raise and present relevant and admissible evidence in support of a claim of that voluntary intoxication prevented the defendant from forming the knowledge or intent required to prove a criminal threat. Likewise, where appropriate, a defendant will be entitled to an instruction on intoxication.[68]

Fourth, the revised criminal threats offense clarifies that the defendant need not threaten to carry out the harm himself. The District's current threats statutes do not address whether a threat to have another person harm someone is sufficient for liability.[69] At least one case suggests that it is sufficient for liability that a defendant communicates

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

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

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

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

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

[67] *Id.* at 324.

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

[69] Arguably, however, the current statutory language suggests that the utterer of the threat must directly inflict the harm. *See, e.g.*, D.C. Code § 22-1810: "Whoever threatens within the District of Columbia to kidnap any person or to injure the person of another or physically damage the property of any person or of another person, in whole or in part…"

that another person will harm the victim,[70] but there is no case law directly on point. In contrast, paragraphs (a)(2) and (b)(2) of the revised statute prohibit threats that "the actor will cause a criminal harm." This includes causing the harm personally, remotely, through an accomplice, through an innocent instrumentality, or otherwise. This change improves the clarity of the revised offense.

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

RCC § 22E-1205. Offensive Physical Contact.

Explanatory Note. *This section establishes the offensive physical contact offense and penalty for the Revised Criminal Code (RCC). The offense proscribes a conduct in which the accused knowingly causes offensive physical contact with another person. Offensive physical contact includes behavior that does not rise to the level of causing bodily injury as the revised assault offense requires.*[1] *The offense has two gradations. First degree offensive physical contact is distinguished from second degree by requiring the contact be made with bodily fluid or excrement. Along with the assault offense,*[2] *the offensive physical contact offense replaces eighteen distinct offenses in the current D.C. Code: assault with intent to kill,*[3] *assault with intent to commit first degree sexual abuse,*[4] *assault with intent to commit second degree sexual abuse,*[5] *assault with intent to commit child sexual abuse,*[6] *and assault with intent to commit robbery;*[7] *willfully poisoning any well, spring, or cistern of water;*[8] *assault with intent to commit mayhem;*[9] *assault with a dangerous weapon;*[10] *assault with intent to commit any other felony;*[11] *simple assault;*[12] *assault with significant bodily injury;*[13] *aggravated assault;*[14] *assault on a public vehicle inspection officer*[15] *and aggravated assault on a public vehicle inspection officer;*[16] *assault on a law enforcement officer*[17] *and assault with significant bodily injury to a law enforcement officer;*[18] *mayhem*[19] *and maliciously disfiguring.*[20] *The revised offensive physical contact offense is not subject to any offense-specific penalty enhancements. To the extent that the protection of District public officials statute,*[21] *certain minimum statutory penalties for assault-type offenses,*[22] *and various offense-specific penalty*

[1] RCC § 22E-1202.
[2] RCC § 22E-1202.
[3] D.C. Code § 22-401.
[4] D.C. Code § 22-401.
[5] D.C. Code § 22-401.
[6] D.C. Code § 22-401.
[7] D.C. Code § 22-401.
[8] D.C. Code § 22-401.
[9] D.C. Code § 22-401.
[10] D.C. Code § 22-402.
[11] D.C. Code § 22-403.
[12] D.C. Code § 22-404(a)(1).
[13] D.C. Code § 22-401(a)(2).
[14] D.C. Code § 22-404.01.
[15] D.C. Code § 22-404.02.
[16] D.C. Code § 22-404.03.
[17] D.C. Code § 22-405.
[18] D.C. Code § 22-405.
[19] D.C. Code § 22-406.
[20] D.C. Code § 22-406.
[21] D.C. Code § 22-851.
[22] D.C. Code § 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of assault with intent to commit first or second degree sexual abuse or child sexual abuse in violation of § 22-401…shall be not less than 2 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence as defined in § 22-4501, providing for the control of dangerous weapons in the District of Columbia."); D.C. Code § 24-403.01(f) ("The sentence imposed under this section shall not be less than 1 year for a

enhancements[23] *apply to the current assault statute, these provisions are replaced in relevant part by the revised offensive physical contact offense.*

Subsection (a)(1) specifies the prohibited conduct for first degree offensive physical contact, the most serious gradation of the offense—causing the complainant to come in physical contact with bodily fluid or excrement. Subsection (a)(1) specifies that the required culpable mental state is "knowingly." Per the rule of construction in RCC § 22E-207, the culpable mental state "knowingly" in subsection (a)(1) applies to each element in subsection (a)(1). "Knowingly" is a defined term in RCC § 22E-206 that here means the accused must be practically certain that his or her conduct will cause physical contact between the complainant and bodily fluid or excrement.

Subsection (a)(2) further requires that the accused act "with intent that" the physical contact be offensive to the complainant. "Intent" is a defined term in RCC § 22E-206 meaning here that the accused was practically certain that the physical contact was offensive to the complainant. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the physical contact actually offended the complainant, only that the actor believed to a practical certainty that it would do so. Subsection (a)(3) requires that a reasonable person in the situation of the complainant would regard the physical contact as offensive. "In fact," a defined term in § 22E-207, here is used to indicate that there is no culpable mental state requirement as to whether a reasonable person in the situation of the complainant would regard the physical contact as offensive.

Subsection (b) establishes the second degree offensive physical contact offense. Second degree offensive physical contact is identical to first degree offensive physical contact except for the omission of the requirement that the contact be made with bodily fluid or excrement. Any means of committing the offense, including direct touching of the complainant by the actor, is included.

Subsection (c) prohibits justification or excuse defenses under RCC §§ 22E-[X – 22E-X] when an individual actively opposes a use of physical force by a law enforcement officer and, in doing so, allegedly commits offensive physical contact against the law enforcement officer. No such defense exists where a person is "reckless" as to the complainant's status as a law enforcement officer, and when the officer's use of physical force occurs for a legitimate police purpose during an arrest, stop or detention and the amount of physical force used appeared reasonably necessary. "Reckless," a defined term in RCC § 22E-206, here means that the accused was aware of a substantial risk that

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person who was over 18 years of age at the time of the offense and was convicted of: (1) Assault with a dangerous weapon on a police officer in violation of § 22-405, occurring after the person has been convicted of a violation of that section or of a felony, either in the District of Columbia or in another jurisdiction;").

[23] The enhancement for committing an offense while armed (D.C. Code § 22-4502); the enhancement for senior citizens (D.C. Code § 22-3601); the enhancement for citizen patrols (D.C. Code § 22-3602); the enhancement for minors (D.C. Code § 22-3611); the enhancement for taxicab drivers (D.C. Code §§ 22-3751; 22-3752); and the enhancement for transit operators and Metrorail station managers (D.C. Code §§ 22-3751.01; 22-3752).

the complainant was a "law enforcement officer," as that term is defined in RCC § 22E-701.

Subsection (d) specifies the requirements for jury demandability in the revised offensive physical contact offense and is bracketed pending a review of penalties for all RCC offenses.

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

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

Relation to Current District Law. *The offensive physical contact statute changes current District law in five main ways.*

First, the RCC offensive physical contact offense punishes as a separate offense, with a distinct name, low-level conduct that is part of assaultive conduct in current law. Current District assault statutes are silent as to whether offensive physical contacts are sufficient for liability,[24] but DCCA case law establishes that a simple assault includes: 1) non-violent sexual touching[25] that causes no pain or impairment to the complainant's body; and 2) any completed battery where the accused inflicts an unwanted touching on the complainant that causes no pain or impairment to the complainant's body.[26] In contrast, in the RCC, the revised assault statute (RCC § 22E-1201) criminalizes physical contacts that result in "bodily injury," as that term is defined in RCC § 22E-701, as well as more severe forms of bodily injury. The RCC offensive physical contact statute criminalizes offensive physical contacts that fall short of inflicting "bodily injury." The RCC second degree nonconsensual sexual conduct offense (RCC § 22E-1307(b)) criminalizes offensive sexual touching. This change improves the organization and proportionality of the District's current law on assaults, by distinguishing harms of different severity.

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

The DCCA has stated that the elements of non-violent sexual touching assault are: 1) That the defendant committed a sexual touching on another person; 2) That when the defendant committed the touching, s/he acted voluntarily, on purpose and not by mistake or accident; and 3) That the other person did not consent to being touched by the defendant in that matter. *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001) (quoting Criminal Jury Instructions for the District of Columbia, No. 4.06(C) (4th ed.1993)). "Touching another's body in a place that would cause fear, shame, humiliation or mental anguish in a person of reasonable sensibility, if done without consent, constitutes sexual touching." *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001) (citations omitted). "The government need not prove that the victim actually suffered anger, fear, or humiliation." *Mungo*, 772 A.2d at 246 (citations omitted). For discussion of non-violent sexual touching assault, see the commentary to the RCC nonconsensual sexual conduct offense (RCC § 22E-1307).

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

Second, the RCC offensive physical contact statute is not subject to a penalty enhancement for the involvement of a dangerous weapon. The District's current assault with a dangerous weapon (ADW) statute is a separate offense with a ten-year maximum penalty.[27] Although the statute is silent as to what level of conduct suffices as a predicate for liability, District case law specifies that engaging in any conduct that constitutes a simple assault is sufficient.[28] In contrast, the RCC offensive physical contact offense makes no provision for enhancement due to the use of a dangerous weapon. Instead, there may be liability under first degree menacing (RCC § 22E-1203) for displaying or making physical contact with a dangerous weapon or imitation weapon that falls short of causing bodily injury, or liability under the revised assault statute (RCC § 22E-1202) if the use or display of a dangerous weapon results in a specified type of "bodily injury."[29] In addition, simple possession of a dangerous weapon during offensive physical contact may also entail liability.[30] This change improves the law's clarity and proportionality by distinguishing harms of different severity.

Third, the conduct in the RCC offensive physical contact offense no longer is a predicate for liability when an assault occurs with intent to commit another crime. Current District law recognizes as separate offenses assault with intent to kill,[31] assault with intent to commit first degree sexual abuse,[32] assault with intent to commit second degree sexual abuse,[33] assault with intent to commit child sexual abuse,[34] assault with intent to commit robbery,[35] assault with intent to commit mayhem,[36] and assault with intent to commit any other felony,[37] collectively referred to as the "assault with intent to" or "AWI" offenses. Current District case law generally indicates that conduct constituting a simple assault, with the appropriate intent, is sufficient for liability for the AWI offenses[38]—and insofar as the conduct in the RCC offensive physical contact

[27] D.C. Code § 22-402 ("Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than 10 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").
The more stringent 10-year maximum penalty, as opposed to 180 days for simple assault in D.C. Code § 22-404(a)(1), is "imposed as 'a practical recognition of the additional risks posed by use of the weapon.'" *Williamson v. United States*, 445 A.2d 975, 979 (D.C. 1982) (*quoting Parker v. United States*, 359 F.2d 1009, 1012 (D.C. Cir. 1966)).

[28] *Perry v. United States*, 36 A.3d 799, 811 (D.C. 2011) ("Because there was no crime of "assault with a dangerous weapon" at common law, we have interpreted the statute to require no more than is required to prove the common law crime of simple assault, plus the fact that the assault is committed with a dangerous weapon . . . .").

[29] The term "use" is intended to include making physical contact with the weapon and conduct other than oral or written language, symbols, or gestures, that indicates the presence of a weapon. The commentary to the RCC menacing statute (RCC § 22E-1203) further discusses the meaning of "use."

[30] *See, e.g.*, [RCC § 22E-XXXX Possession of Deadly or Dangerous Weapon During Crime].

[31] D.C. Code § 22-401.

[32] D.C. Code § 22-401.

[33] D.C. Code § 22-401.

[34] D.C. Code § 22-401.

[35] D.C. Code § 22-401.

[36] D.C. Code § 22-402.

[37] D.C. Code § 22-403.

[38] *See, e.g.*, *Anthony v. United States*, 361 A.2d 202, 204 (D.C. 1976) ("The assault which comprises an essential element of the offense of assault with intent to commit robbery is common law assault.").

offense constitutes simple assault in current law, such conduct also would be a predicate for liability under existing AWI offenses. In contrast, in the RCC, the AWI offenses no longer exist and liability for the conduct criminalized by the AWI offenses is provided through application of the general attempt statute in RCC § 22E-301 to the completed offenses.[39] The RCC general attempt provision provides for liability that is *at least as expansive* as that afforded by AWI offenses.[40] The change improves the clarity of the revised offensive physical contact statute, and eliminates unnecessary overlap between the AWI offenses and general attempt liability for assault-type offenses.

Fourth, under the revised offensive physical contact statute the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "knowingly" or with "intent" due to his or her self-induced intoxication. The current assault statute from which the offense of offensive physical contact is derived is silent as to the effect of intoxication. However, District law seems to have established that assault is a general intent offense,[41] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming the necessary culpable mental state requirement for the crime.[42] This DCCA case law would also likely mean that a defendant would be precluded from directly raising—though not necessarily presenting evidence in support of[43]—the claim that, due to his or her self-induced intoxicated state, the defendant did not possess the knowledge or intent required for any element of offensive physical contact.[44] In contrast, under the revised offensive physical contact offense, a defendant would both have a basis for, and will be able to raise and present relevant and admissible evidence in support of, a claim that voluntary intoxication prevented the defendant from forming the knowledge or intent required to prove offensive physical contact. Likewise, where appropriate, the

[39] For example, rather than having a separate offense of assault with intent to kill, as is codified in current D.C. Code § 22-401, the RCC criminalizes that conduct as an attempt to commit an offense such as murder or aggravated assault.

[40] For more details, see Commentary to the revised assault statute (RCC § 22E-1202).

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

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

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

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

defendant would be entitled to an instruction, which clarifies that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge or intent at issue in offensive physical contact.[45] This change improves the clarity, consistency, and proportionality of the offense.

Fifth, to the extent that the protection of District public officials statute,[46] various offense-specific penalty enhancements,[47] and certain statutory minimum penalties[48] apply to the current assault statute and related assault offenses, the RCC offensive physical contact offense partially replaces them. These statutes are silent as to whether the provisions are intended to apply to low-level assaultive conduct and there is no DCCA case law on the issue. In contrast, in the RCC, low-level assaultive conduct is no longer subject to these enhancements and provisions. For the RCC offensive physical contact offense specifically, offensive physical contacts that fall short of "bodily injury" required in the revised assault statute are no longer subject to these provisions.[49] This change improves the proportionality of the revised offense.[50]

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

[46] D.C. Code § 22-851.

[47] The enhancement for committing an offense while armed (D.C. Code § 22-4502); the enhancement for senior citizens (D.C. Code § 22-3601); the enhancement for citizen patrols (D.C. Code § 22-3602); the enhancement for minors (D.C. Code § 22-3611); the enhancement for taxicab drivers (D.C. Code §§ 22-3751; 22-3752); and the enhancement for transit operators and Metrorail station managers (D.C. Code §§ 22-3751.01; 22-3752).

[48] D.C. Code §§ 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of assault with intent to commit first or second degree sexual abuse or child sexual abuse in violation of § 22-401…shall be not less than 2 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence as defined in § 22-4501, providing for the control of dangerous weapons in the District of Columbia."); D.C. Code § 24-403.01(f) ("The sentence imposed under this section shall not be less than 1 year for a person who was over 18 years of age at the time of the offense and was convicted of: (1) Assault with a dangerous weapon on a police officer in violation of § 22-405, occurring after the person has been convicted of a violation of that section or of a felony, either in the District of Columbia or in another jurisdiction.").

[49] As discussed in this commentary, in addition to unwanted touchings that do not cause pain or impairment to the complainant, current District law includes in assault: 1) non-violent sexual touching that causes no pain or impairment to the complainant's body; and 2) intent-to-frighten assaults that do not result in physical contact with the complainant's body. In the RCC, this conduct is no longer covered by the revised assault statute, but may be covered by attempted assault under the general attempt provision (RCC § 22E-301), or by menacing (RCC § 22E-1203), criminal threats (RCC § 22E-1204), or second degree nonconsensual sexual conduct (RCC § 22E-1307(b)). As with the RCC offensive physical contact offense, menacing (RCC § 22E-1203), criminal threats (RCC § 22E-1204), and second degree nonconsensual sexual conduct (RCC § 22E-1307(b)) are no longer subject to the protection of District public officials statute and these offense-specific penalty enhancements and statutory minimums, which is discussed further in the commentaries to these RCC statutes. The commentary to the RCC assault statute discusses the scope of the revised offense as it pertains to these provisions.

[50] For further discussion of how these enhancements and provisions apply to the District's current assault statutes, see the commentary to the revised assault statute (RCC § 22E-1202).

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

First, the RCC offensive physical contact statute limits liability to contacts that are intended to be, and objectively are, "offensive." Current District assault statutes are silent as to whether physical contacts that are merely offensive to another person are sufficient for liability.[51] DCCA case law establishes that a simple assault includes any completed battery where the accused inflicts an unwanted touching on the complainant,[52] but contains conflicting statements as to whether there is any requirement that the battery be objectively "offensive."[53] In addition, under DCCA case law, a simple assault consisting of conduct undertaken with intent to frighten another person has been held to require proof that the defendant's conduct would induce fear in "a person of reasonable sensibility."[54] Following this case law, District practice appears to require that for assault liability, physical contact must be "offensive to a person of reasonable sensibility."[55] Instead of this ambiguity, the RCC offensive physical contact statute clearly establishes that the contact in question must be "offensive" as evaluated from the perspective of a reasonable person in the complainant's position, and that the accused must have at least believed to a practical certainty that the contact was "offensive." This change improves the clarity of the law by specifying the requisite culpable mental state, and improves the

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

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

[53] *Compare, e.g., Mahaise v. United States*, 722 A.2d 29, 30 (D.C. 1988) ("A battery is any unconsented touching of another person. Since an assault is simply an attempted battery, every completed battery necessarily includes an assault. Appellant's statement that he removed the phone from the complainant's hand and then took her cigarette from her other hand and extinguished it is thus an admission, at least *prima facie*, of two separate assaultive acts".") (citing *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990) *with* Ray v. United States, 575 A.2d 1196, 1198–99 (D.C. 1990) ("What we distill from these cases, particularly *Harris*, is that an assault conviction will be upheld when the assaultive act is merely offensive, even though it causes or threatens no actual physical harm to the victim.") *and Comber v. United States*, 584 A.2d 26, 50 (D.C. 1990) ("Although some misdemeanors, at least when viewed in the abstract, prohibit activity which seems inherently dangerous, they may also reach conduct which might not pose such danger. A special difficulty arises in the case of simple assault, as presented here, because that misdemeanor is designed to protect not only against physical injury, but against all forms of offensive touching….").

[54] *Antony v. United States*, 361 A.2d 202, 206 (D.C. 1976).

[55] D.C. Crim. Jur. Instr. § 4.100. See also, *id.*, cmt. 4-5 ("The instruction explains that 'injury' includes an offensive touching. [citations omitted] To ensure the jury uses an objective standard of judging "offensive," the Committee borrowed the "reasonable sensibility" standard from *Anthony v. U.S.*, [citation omitted], where it was used in a related context.").

proportionality of the statute by excluding conduct that is ordinarily considered non-criminal.[56]

Second, the RCC offensive physical contact statute requires a culpable mental state of "knowingly" as to causing the physical contact and the fact that bodily fluid or excrement is used, and "intent" as to the offensive nature of the contact. The current D.C. Code is silent as to the culpable mental states required for simple assault.[57] Current District case law suggests that recklessness may suffice for simple assault,[58] but the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient.[59] The RCC offensive physical contact statute clearly establishes that knowledge is required as to causing the physical contact and the fact that bodily fluid or excrement is used, and "intent" as to the offensive quality of the contact. This change improves the clarity of the law by specifying the requisite culpable mental states, and improves the proportionality of the statute by excluding conduct that is ordinarily considered non-criminal.[60]

Third, the effective consent defense in RCC § 22E-40X applies to the RCC offensive physical contact statute. The District's assault statutes do not address whether consent of the complainant is a defense to liability, nor do District statutes otherwise codify general defenses to criminal conduct. Longstanding case law of the United States Court of Appeals District of Columbia Circuit (D.C. Cir.) in *Guarro v. United States* has recognized that consent is a defense to assault, at least in the case of a nonviolent sexual

[56] Without requiring that a non-consensual physical contact be "offensive," even the most casual touching of another person—e.g., brushing elbows on a bus or a pat on a colleague's back—could be potentially be subject to criminal liability.

[57] D.C. Code § 22-404(a)(1).

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

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

[60] A culpable mental state of recklessness as to the physical contact and its offensive nature may, for instance, criminalize a person's efforts to pass through a crowded Metro car in which it is likely the person will brush against other passengers in a way they would find offensive. While such conduct may be rude, it is not ordinarily considered criminal absent some intent to cause offense by such action.

touching.[61] A recent DCCA opinion in *Woods v. United States*, however, held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly declined to rule on the effect of consent in other circumstances.[62] The RCC effective consent defense clarifies when the complainant's "effective consent" or a person's belief that the complainant gave "effective consent" is a defense to RCC offenses against persons such as offensive physical contact. This change improves the clarity of the law and, to the extent it may result in a change, improves the proportionality of the offense by ensuring that consensual and legal activities are not criminalized.

Fourth, the RCC offensive physical contact statute clarifies the prohibition on a justification defense or an excuse defense in the current assault on a police officer (APO) statute.[63] First, the RCC provision in subsection (c) codifies the requirements in DCCA case law and existing District practice[64] that the defendant actively oppose the use of force,[65] that the limitation extends to stops or other detention (not just arrest) for a legitimate police purpose,[66] and that the law enforcement officer's use of force must have appeared reasonably necessary.[67] Second, the RCC prohibition requires that the defendant is at least reckless as to the complainant's status as a law enforcement officer. The limitation in the District's current APO statute requires that the defendant "knew or should have known" that the complainant was a law enforcement officer.[68] Case law

[61] 237 F.2d 578, 581 (1956) ("Nevertheless the evidence in the instant case cannot support a conviction for assault unless it appears that there was no actual or apparent consent. Generally where there is consent, there is no assault. 1 Wharton, Criminal Law §§ 180, 751 (12th ed. 1932).").
[62] *Woods v. U.S.*, 65 A.3d 667, 672 (D.C. 2013).
[63] D.C. Code § 22-405(d) ("It is neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful.").
[64] D.C. Crim. Jur. Instr. § 4-114 ("A police officer may stop or detain someone for a legitimate police purpose. And the officer may use the amount of force that appears reasonably necessary to make or maintain the stop. This is the amount of force that an ordinarily careful and intelligent person in the officer's position would think necessary. If the officer uses only the force that appears reasonably necessary, the person stopped may not interfere with the officer, even if the stop later turns out to have been unlawful. If s/he does interfere, s/he acts without justification or excuse. If the officer uses more force than appears reasonably necessary, the person stopped may defend against the excessive force, using only the amount of force that appears reasonably necessary for his/her protection. If that person uses more force than is reasonably necessary for protection, s/he acts without justification.").
[65] *See, e.g.*, *Foster v. United States*, 136 A.3d 330, 332 (D.C. 2016) ("In this case, however, appellant was also found guilty of APO for resisting efforts by the police to handcuff him. We have held that in order to constitute such a violation, 'a person's conduct must go beyond speech and mere passive resistance or avoidance, and cross the line into active confrontation, obstruction or other action directed against an officer's performance in the line of duty[ ]' by 'actively interposing some obstacle that precluded the officer from questioning him or attempting to arrest him.'") (quoting *In re C.L.D.*, 739 A.2d 353, 357–58 (D.C.1999) (footnotes omitted)).
[66] *Speed v. United States*, 562 A.2d 124, 129 (D.C. 1989).
[67] *Nelson v. United States*, 580 A.2d 114, 117 (D.C.1990) *(on rehearing)*.
[68] D.C. Code § 22-405 ("It is neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful.").

repeats this language,[69] without clarifying whether there is any requirement of subjective awareness on the defendant's part as to the complainant's status.[70] The RCC offensive physical contact statute requires that the defendant is reckless as to the fact that the complainant is a law enforcement officer. A "reckless" culpable mental state makes the defense consistent with the gradations in the revised assault statute (RCC § 22E-1202) that have an enhancement for "protected persons" (which include law enforcement officers in the course of their duties, as a category in the definition of "protected person."). Third, the language "there are no justification or excuse defenses under RCC §§ 22E-[X – 22E-X]" clarifies that there may be other circumstances where a person has a justification or excuse defense to offensive physical contact against a LEO under future RCC justification and excuse defenses. These changes clarify the provision, using definitions and requirements consistent with the revised offensive physical contact offense and existing District law.

[69] *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)).

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

RCC § 22E-1206. Stalking.

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

Paragraph (a)(1) specifies that the accused must purposely engage in a course of conduct directed at a particular complainant. "Purposely," a term defined in RCC § 22E-206, here requires a conscious desire to cause a pattern of misconduct. A course of conduct does not have to consist of identical conduct, but the conduct must share an uninterrupted purpose[1] and must consist of one or more of the activities listed in subparagraphs (a)(1)(A), (a)(1)(B), and (a)(1)(C). The behavior must be directed at a specific person, not merely be disturbing to the general public.[2] The pattern may be established by any combination of conduct described in subparagraphs (a)(1)(A), (B), and (C).

Subparagraph (a)(1)(A) provides that one means of committing stalking is physically following or physically monitoring a specific individual. The term "physically following" is defined in RCC § 22E-701 and means maintaining close proximity to a person as they move from one location to another.[3] "Physically monitoring" is also defined in RCC § 22E-701 and means appearing in close proximity to someone's residence, workplace, or school, to detect the person's whereabouts or activities. Such following or monitoring may be accomplished by means of a third party,[4] however, the revised stalking statute does not reach unauthorized electronic surveillance.[5] Per the rule of construction in RCC § 22E-207, the "purposely" culpable mental state also applies to this element. The accused must consciously desire to physically follow or monitor the complainant.[6]

Subparagraph (a)(1)(B) provides that another means of committing stalking is to persistently communicate to someone after receiving a notice to stop. Communication requires not only that the defendant take action to convey a message, but also that the

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

[2] Conduct in a public place that causes a person to reasonably fear a crime is likely to occur may be punishable as disorderly conduct. RCC § 22E-4201.

[3] The phrase "close proximity" refers to the area near enough for the accused to see or hear the complainant's activities and does not require that the defendant be near enough to reach the complainant. Distances may vary widely, depending on facts including crowd density, noise, and height. Examples may include walking a couple of stores down the street from the complainant or driving near the complainant in a vehicle.

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

[5] [Unauthorized electronic surveillance will be addressed in a separate RCC provision.]

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

message is received and understood by another person.[7] The verb "communicates" is intended to be broadly construed, encompassing all speech[8] that is received and understood by another person. Per the rule of construction in RCC § 22E-207, the "purposely" culpable mental state requires that the accused consciously desire to communicate to the specified individual. The method of communication is irrelevant, whether it be in person speech, electronic correspondence, or messages sent through a third party.[9] The government must prove that the accused previously received notice, directly or indirectly, to cease such communication and that the accused purposely disregarded that directive.[10] A person may convey their desire to not be contacted either directly, by telling the person to stop, or indirectly through an attorney, government entity, or a third party. In some instances, blocking electronic communications may also suffice to notify to the accused that further communication is unwelcome.[11] To ensure constitutional application of the stalking statute, a complainant's directive should be to cease all communication by the specified means (time, place, or manner), not merely to cease offensive content in communications.[12] The accused must know, a defined term requiring practical certainty,[13] that he or she has previously received notice to cease such communication. The accused must also know, that the notice was conveyed on behalf of the complainant.[14] Subparagraph (a)(1)(B) does not reach communications *about* the specific individual to other (third) persons.[15] This restriction on communication is

[7] In the context of criminal threats, DCCA case law clarifies in *Evans v. United States*, 779 A.2d 891, 894-95 (D.C. 2001), that for there to be a communication of a threat the recipient must be able to access or comprehend it, at the most basic level. For example, there is no communication if the content of the message is in a language that the recipient does not comprehend.

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

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

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

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

[12] Where a complainant (or a person acting on behalf of a complainant) notifies the defendant to cease all communication (e.g., "Do not call me again.") as opposed to all *offensive* communication (e.g., "Do not call me 'a jerk' again."), it is clearer that criminal liability is based on a reasonable time, place, or manner restriction on communication.

[13] RCC § 22E-206.

[14] Consider, for example, a person who is told by a love interest's parent, "Never contact my daughter again." If the person believes that this is the command only of the parent and not the love interest, disobeying the command will not amount to stalking.

[15] For example, a person who posts disparaging remarks about a former spouse on her own Facebook page, without tagging the subject of the post, does not commit stalking. *But see Matter of Welfare of A.J.B.*, 910 N.W.2d 491 (Minn. Ct. App. 2018) (concluding that tweets tagging a specific individual are both public and specifically targeted because the act of tagging someone is intended so that the tagged individual sees the posts). Note, however, that communications about the specific individual that amount to a criminal threat may constitute a separate basis for finding stalking conduct per subparagraph (a)(1)(C).

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

Subparagraph (a)(1)(C) provides that a third means of committing stalking is to a criminal harm involving a trespass, threat, taking of property, or damage to property. "In fact," a defined term,[16] is used to indicate that there is no separate or additional culpable mental state required as to whether the accused committed one of the specified offenses. The use of "in fact" does not change the culpable mental states required in the specified offenses.

Paragraph (a)(2) requires that the conduct described in paragraph (a)(1) have either the intent or the effect of causing the victim to experience fear or distress. Under (a)(2)(A), a person commits stalking when they act "with intent to" cause someone fear or significant distress. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that his or her conduct would cause someone fear or significant distress. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such fear or significant distress occurred, just that the defendant believed to a practical certainty that such fear or significant distress would result.[17] Under (a)(2)(B), a person commits stalking when they negligently cause fear or significant distress, even if they did not subjectively intend to do so.[18] "Negligently" is a defined term and, applied here, means the actor should be aware of a substantial risk that the pattern of conduct will frighten or significantly distress that particular individual[19] and grossly deviates from the standard of care that a reasonable person would observe in that situation.[20] Sub-subparagraphs (a)(2)(A)(i) and (a)(2)(B)(i) specify fear of physical harm or confinement to any person[21] is one of two alternative emotional injuries that may establish stalking liability. The term "safety" is a defined term that refers to ongoing security from significant intrusions on one's bodily integrity or bodily movement.[22] Sub-subparagraphs (a)(2)(A)(ii) and (a)(2)(B)(ii) also provide that "significant emotional distress" is a second type of emotional injury that may establish stalking liability.

[16] RCC § 22E-207.

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

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

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

[20] RCC § 22E-206.

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

[22] RCC § 22E-701.

"Significant emotional distress" is a defined term that means substantial, ongoing mental suffering.[23]

Subsection (b) clarifies that the statute excludes constitutionally protected activity from the reach of the stalking statute.[24] Not all patterns of behavior that have the intent or effect of causing significant emotional distress are subject to prosecution. Paragraph (b)(1) cross-references the U.S. Constitution, the District's First Amendment Assemblies Act, and the District's Open Meetings Act. This conflict-of-laws provision is intended to encourage readers to consider what First Amendment polices, if any, are implicated by prosecutions of the offense and makes clear that the revised statute leaves all rights conferred under these Acts unchanged. Not all conduct involved in the offense, of course, will implicate First Amendment rights.

Paragraph (b)(2) specifically excludes from stalking liability certain speech about social issues that is usually constitutionally protected speech.[25] The paragraph makes clear that the stalking statute does not punish activities such as participating in a labor strike, advocating a boycott, publishing harsh reviews of a restaurant, acting as a whistleblower, or criticizing a city official's fitness for office. Although such applications of the stalking statute likely would be constitutionally invalid without this statutory language, codifying the exception provides better notice to the public and criminal justice system actors.

Pursuant to (b)(2)(A), (B), and (C), a person who is a government official, a candidate for elected office, or an employee of a business that is open to the public, is expected to tolerate the opinions of the community they serve, at least while they are on duty.[26] However, depending on the facts in a particular case, the First Amendment may offer broader or narrower protection than the speech highlighted in this special exception. Free speech on matters of public concern is not limited to speech directed at political figures and businesses nor is it limited to communications that occur while those persons are engaged in their official duties.[27]

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[23] RCC § 22E-701.

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

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

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

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

> The Supreme Court has defined speech on a matter of public concern as speech that either can be fairly considered as relating to any matter of political, social, or other concern to the community or is on a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.

Paragraph (b)(3) specifically excludes from stalking liability persons who are engaged in activities that are vital to a free press and to the fair administration of justice. A journalist, law enforcement officer, professional investigator,[28] attorney, process server, *pro se* litigant, or compliance investigator who is acting within the reasonable scope of his or her professional duties or court obligations does not commit a stalking offense.[29]

Subsection (c) provides that where conduct is of a continuing nature, each 24-hour period constitutes one occasion. [30]

Subsection (d) provides a jury trial for defendants charged with stalking or attempted stalking. Inclusion of a jury trial right is intended to ensure that the First Amendment rights of the accused are not infringed. The District has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve exercise of civil liberties.[31]

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

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

Subparagraph (e)(2)(A) authorizes an enhancement when the defendant was subject to a court order or condition of release prohibiting contact with the specific individual at the time the elements of the stalking offense were completed. Per the rules of interpretation in RCC § 22E-207, the phrase "in fact" indicates that the accused is strictly liable with respect to whether a court order or condition of release prohibited contact with the complaining witness.[32] The term "court order" includes any judicial directive, oral or written, that clearly restricts contact with the stalking victim.[33] A condition of release may be imposed by a court or by the United States Parole Commission.[34]

Subparagraph (e)(2)(B) allows a sentence increase for any person who has a prior stalking conviction within ten years of the instant offense. This includes any criminal

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

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

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

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

[31] *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.").

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

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

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

offense against the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, with elements that would necessarily prove the elements of a District criminal offense in subparagraph (a)(1)(C).

Subparagraph (e)(2)(C) establishes a minor victim enhancement, which includes two distinct culpable mental states. First, the actor must recklessly disregard the fact that the victim is a minor. The term "recklessly" is defined in the revised code and here means the person must be aware of a substantial risk that the complainant is under 18 years of age and grossly deviate from the standard of care that a reasonable person would observe.[35] Per the rules of interpretation in RCC § 22E-207, the phrase "in fact" indicates that the accused is strictly liable with respect to whether he or she is an adult who is at least four years older than the complainant. It is not a defense to this enhancement that the accused believed, even reasonably, that the age difference was something less than four years.

Subparagraph (e)(2)(D) provides an enhancement for stalking conduct that causes the affected persons to incur expenses that amount to more than $2,500. "Financial injury" is a defined term that includes all reasonable monetary costs, debts, or obligations that were sustained as a result of the stalking.[36] This provision does not affect the sentencing court's discretion with respect to ordering restitution. The government's decision to not seek a penalty enhancement will not preclude the government from seeking reimbursement under the restitution statute.[37]

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

Paragraph (f)(2) defines "safety" means ongoing security from significant intrusions on one's bodily integrity or bodily movement.[38]

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

First, the revised statute limits stalking liability for non-threatening communications to those communications that occur after having received notice from the individual, directly or indirectly, to cease such communication.[39] The current District stalking statute does not limit liability for communications to a specific individual to situations where the accused has received notice to cease such communications,[40] nor has

[35] *See* RCC § 22E-701. For example, a 20-year-old who knows that the target of the stalking conduct attends middle school has likely disregarded a substantial risk that the victim is less than 16 years old, absent evidence to the contrary. On the other hand, a person may engage in pattern of unwelcome communication toward an anonymous person online, without having any reason to suspect that it is operated by a child.

[36] RCC § 22E-701.

[37] *See* D.C. Code § 16-711.

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

[39] RCC § 22E-1206(a)(2)(B).

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

the District of Columbia Court of Appeals ("DCCA") required proof of such notice.[41] Given that D.C. Code § 22-3133(a)(3) provides for stalking liability when the defendant does not have any subjective awareness of the impact of his or her non-threatening speech, the lack of a notice requirement in the current statute means the defendant may be guilty of stalking while never having been aware that their non-threatening speech was unwanted.[42] In contrast, the revised statute requires that, although the complaining witness does not have to affirmatively notify the actor to cease following, monitoring, or criminal behavior,[43] non-criminal speech does not become a predicate for stalking until it is clear that it is unwelcome. Notice to cease effectively any transforms future communications into a verbal act of ignoring the victim's directive to be left alone and invading the victim's privacy. The revised statute thereby criminalizes behavior that is calculated to torment without reaching other legitimate speech.[44] This change improves the clarity, proportionality, and, perhaps, the constitutionality of the revised statutes.[45]

Second, the revised stalking statute provides as a possible basis of liability that a person negligently causes the targeted person to fear for his or her safety or that of another person, or to suffer significant emotional distress. Current D.C. Code § 22-3133(a) provides as one possible basis of liability that there be a course of conduct that "the person should have known *would cause* a reasonable person in the individual's circumstances" to experience fear for safety or emotional distress.[46] The DCCA has held

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

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

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

[44] The "mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 414 (1992) (White, Blackmun, O'Connor & Stevens, JJ., concurring). There are many instances when one may communicate with another with the intention of causing a slight annoyance in order to emphasize an idea or opinion, or to prompt a desired course of action that one is legitimately entitled to seek. *See State v. Brobst*, 151 N.H. 420, 423 (2004); *People v. Klick*, 66 Ill. 2d 269, 273 (1977). Bill collectors, global warming activists, well-intentioned family members, personal coaches, and religious leaders are among the many persons who may purposely make repeated communications to a specific individual, with messages that they know or should know will cause the hearer significant emotional distress. Absent the RCC requirement that the person making such communications have notice to cease such communications, any two such contacts (e.g. two phone calls) may constitute stalking under current District law.

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

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

> [T]he proscription against "communicat[ions] to or about" a person that negligently would cause a reasonable person to suffer emotional distress criminalizes certain types of speech based on the impact that the communication has on the recipient…Therefore, it is clear that the challenged statutory provision must be considered a content-based restriction because it cannot be justified without reference to the content of the prohibited communications. *See Reed*, 576 U.S. at ——, 135 S.Ct. at 2227; *see also Matal v. Tam*,

that this element is satisfied where the defendant's conduct is "objectively frightening and alarming." [47] In contrast, under the revised statute an actor is liable for causing an unintended harm only if: (1) he or she should have been aware of a substantial risk that conduct would cause fear for safety or be distressing to *the complainant* and nevertheless grossly deviates from the standard of care that a reasonable person would observe, and (2) the complainant did experience significant emotional distress.[48] This change applies the standard culpable mental state definition of "negligently" used throughout the RCC,[49] even though it is highly unusual to provide criminal liability for merely negligent conduct.[50] The lack of any subjective awareness by the accused, however, is offset to some degree by the new requirement that the complainant actually experience harm.[51] Requiring actual harm may also better reflect the Council's prior stated intent that stalking liability be focused on harms to targeted individuals rather than communications and behaviors that are inappropriate but do not actually cause distress.[52] This change

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> 582 U.S. ——, ——, 137 S.Ct. 1744, 1764–65, 198 L.Ed.2d 366 (2017) (plurality opinion) (holding that the 'disparagement clause,' which prohibits federal registration of a trademark based on its offensive content, violates the first amendment).

See also State v. Shackelford, COA18-273, 2019 WL 1246180, at *9 (N.C. Ct. App. Mar. 19, 2019).

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

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

[49] RCC § 22E-206.

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

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

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

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

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

Third, the revised statute limits liability for "monitoring" to in-person monitoring at a person's residence, workplace, or school. Current law defines a course of stalking conduct to include acts to "monitor" and "place under surveillance."[53] These terms are not defined and the DCCA has not interpreted their meaning.[54] In contrast, the revised stalking statute defines "physically monitoring" to mean being in the immediate vicinity of the person's residence, workplace, or school, with intent to detect the person's whereabouts or activities.[55] Limiting monitoring to locations where the specific individual is obliged to be and there is a heightened expectation of privacy avoids prosecutions for "mutual stalking"[56] and may help ensure first amendment protections for conduct in public spaces is not burdened.[57] The revised code punishes indirectly observing or recording someone's location or activities as a separate offense focused on nonconsensual electronic monitoring.[58] This change eliminates unnecessary gaps and overlap between criminal offenses.

Fourth, the revised statute does not specifically authorize multiple convictions for stalking and identity theft based on the same facts. Current D.C. Code § 22-3134(d) provides that, "A person shall not be sentenced consecutively for stalking and identify theft based on the same act or course of conduct." Although there is no case law on point, this language appears to categorically authorize multiple convictions for identity theft and stalking based on the same act or course of conduct. In contrast, the revised stalking statute does not contain such a concurrent sentencing provision and treats identity theft the same as other criminal conduct that may subject a person to stalking liability. There is no apparent reason for specially treating identity theft in this manner,

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> (a) The Council finds that stalking is a serious problem in this city and nationwide. Stalking involves severe intrusions on the victim's personal privacy and autonomy. It is a crime that can have a long-lasting impact on the victim's quality of life, and creates risks to the security and safety of the victim and others, even in the absence of express threats of physical harm…(b)…The Council recognizes that stalking includes a pattern of following or monitoring *the victim*, or committing violent or intimidating acts *against the victim*, regardless of the means.

(Emphasis added.) Notably, behavior that alarms the general public may be separately punished as disorderly conduct in D.C. Code § 22-1321 and corresponding RCC § 22E-4201.

[53] D.C. Code § 22-3132(8)(a).

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

[55] RCC § 22E-1206(d).

[56] Consider, for example, a recently divorced couple that continues to attend the same church services, each experiencing significant emotional distress upon seeing the other. If the revised statute included churches, both people may be said to have committed stalking.

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

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

and there may be situations where convictions for identity theft and stalking based on the same acts or course of conduct should merge. The revised code includes a comprehensive merger provision in its general part that applies to charges for identity theft (and other predicate crimes) and stalking arising from the same act or course of conduct.[59] This change improves the proportionality of penalties and the consistency of the code.

Fifth, the revised provides a jury trial for defendants charged with stalking or attempted stalking. The District has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve the exercise of civil liberties[60] and expressly acknowledged the appropriateness of a trial by jury in stalking cases.[61] Although following and monitoring does not constitute protected speech, other civil rights such as freedom of movement, freedom of intimate association, and due process may be implicated. This change improves the consistency of the revised code.

Sixth, the revised statute provides a distinct penalty enhancement for having one prior stalking conviction that increases the penalty by one class. The current D.C Code penalty provisions for stalking include distinct enhancements for a second offense[62] and a third offense.[63] The revised statute retains the second-strike enhancement but eliminates the third-strike enhancement. Instead, the RCC's general repeat offender penalty enhancement may apply when a defendant has two or more prior convictions for a comparable offense.[64] This change improves the consistency and proportionality of District statutes.

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

First, the revised statute specifies that one means of committing stalking is by committing a criminal harm involving a trespass, threat, taking of property, or damage to property. Current D.C. Code § 22-3132(8) defines a "course of conduct" for the stalking statute and provides an extensive list of activities that already appear to be criminal, such as efforts to "threaten,"[65] "[i]nterfere with, damage, take, or unlawfully enter an individual's real or personal property or threaten or attempt to do so,"[66] and "[u]se another individual's personal identifying information."[67] The DCCA has not addressed whether the conduct listed in the current stalking statute's definition of a "course of conduct" requires proof equal to corresponding criminal offenses or how such conduct

[59] *See* RCC § 22E-212. A stalking offense may reasonably account for the predicate offenses in some cases and not in others.
[60] *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.").
[61] *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.").
[62] D.C. Code § 22-3134(b)(2).
[63] One or more of the convictions must have been jury-demandable. D.C. Code § 22-3134(c).
[64] RCC §§ 22E-606(a) and (b).
[65] D.C. Code § 22-3132(8)(A).
[66] D.C. Code § 22-3132(8)(B).
[67] D.C. Code § 22-3132(8)(C).

differs from corresponding criminal offenses. The revised statute specifies that only conduct constituting a criminal threat or a specified property offense in the RCC is predicate conduct for stalking, replacing the corresponding general references to threats, property damage, and misuse of personal information in the current statute.[68] This change improves the clarity and consistency of District statutes.

Second, the revised statute provides stalking liability for communications "about" a person only when such communications are otherwise criminal.[69] Current law defines a course of stalking conduct to include both communications to a person and communications about a person without distinction.[70] The current language appears to capture all speech that a person should know would cause an individual to feel alarmed, disturbed, or distressed.[71] However, the current stalking statute also states that it "does not apply to constitutionally protected activity."[72] To resolve ambiguities as to the constitutional scope of the offense, the revised stalking statute more narrowly proscribes speech that is not merely insensitive to the subject of the commentary but also has the intent or effect of tormenting the listener[73] or threatening bodily harm. This approach

[68] For example, "threaten" in the current stalking statute generally corresponds to the criminal threat offense codified at RCC § 22E-1204 or the menacing offense codified at RCC § 22E-1203. "Interfere with, damage, take, or unlawfully enter an individual's real or personal property or threaten or attempt to do so," generally corresponds to the offenses of theft (RCC § 22E-2101), unauthorized use of property (RCC § 22E-2102; arson (RCC § 22E-2501), damage to property (RCC § 22E-2503), graffiti (RCC § 22E-2504), trespass (RCC § 22E-2601), and trespass of motor vehicle (RCC § 22E-2602). "Use another individual's personal identifying information" generally corresponds with references to the offenses of forgery (RCC § 22E-2204) and identity theft (RCC § 22E-2205).

[69] Providing stalking liability for other communications "about" a person may criminalize publicizing matters of public concern, or "public shaming." For example, a victim who posts six signs to raise public awareness about the identity of her rapist may be liable for stalking under existing law if that victim knew that it would reasonably cause the perpetrator to suffer emotional distress. *See* Amy Brittain and Maura Judikis, *'The man who attacked me works in your kitchen': Victim of serial groper took justice into her own hands*, Washington Post, January 31, 2019 (available at https://www.washingtonpost.com/investigations/the-man-who-attacked-me-works-in-your-kitchen-victim-of-serial-groper-took-justice-into-her-own-hands/2019/01/30/bda43adc-deae-11e8-b3f0-62607289efee_story.html?utm_term=.4a1744304476).

[70] D.C. Code § 22-3132(8)(C).

[71] D.C. Code § 22-3133(a)(3)(B). Consider, for example, a person who exposes another person's extramarital affair to several other people. Although the revelation may be disturbing or distressing, it is not the kind of behavior that is typically considered stalking behavior and it is likely protected as free speech. *United States v. Stevens*, 559 U.S. 460, 479 (2010) ("*Most* of what we say to one another lacks "religious, political, scientific, educational, journalistic, historical, or artistic value" (let alone serious value), but it is still sheltered from government regulation." (emphasis in original)). Civil tort remedies, including monetary damages and injunctive relief, exist for defamation, invasion of privacy – false light, tortious interference, intentional infliction of emotional distress, and negligent infliction of emotional distress.

[72] D.C. Code § 22-3133(b).

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

may be more consistent with the Council's prior stated intent, as there are many distressing communications "about" an individual that do not amount to the "severe intrusions on the victim's personal privacy and autonomy" that the current statute aims to curtail.[74] This change improves the clarity, proportionality, and perhaps the constitutionality of the revised statutes.

Third, the revised statute excludes stalking liability for communications concerning political and public matters to on-duty government officials, candidates for elected office, or employees of businesses that serve the public.[75] The current stalking statute provides no specific exceptions for particular types of communications or recipients, but states that the statute "does not apply to constitutionally protected activity."[76] While the DCCA has not directly addressed First Amendment challenges to the stalking statute, the issue has been litigated in D.C. Superior Court in the context of communications to a member of the D.C. Council.[77] To resolve ambiguities as to the constitutional scope of the offense, the revised stalking statute explicitly recognizes an exercise of free speech that is especially common in Washington, DC: contacting elected representatives to urge or criticize political action.[78] The revised code provides that expressions of opinion about public issues are not a basis for stalking liability,[79] while

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through her own Facebook account, and only received the alarming posts via email from a colleague); *see also State v. Shackelford*, COA18-273, 2019 WL 1246180, at *9 (N.C. Ct. App. Mar. 19, 2019).

[74] D.C. Code § 22-3131(a); *see also Rowan v. United States Post Office Department*, 397 U.S. 728 (1970) (holding that nonconsensual one-to-one communications that impinge on the privacy rights of the recipient are not protected under the first amendment); *People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017) (invalidating language in the state's stalking statute identical to the District's current law as overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.); *State v. Shackelford*, COA18-273, 2019 WL 1246180, at *9 (N.C. Ct. App. Mar. 19, 2019).

[75] RCC § 22E-1206(e)(2).

[76] D.C. Code § 22-3133(b).

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

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

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> '[A]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.' *Hustler Magazine v. Falwell*, 485 U.S. 46, 50, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988). Speech on 'public issues should be uninhibited, robust, and wide-open…[because such] speech occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.' *Snyder v. Phelps*, 562 U.S. 443, 131 S. Ct. 1207, 1215, 179 L. Ed. 2d 172 (2011) (citing to *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) and *Connick v. Myers*, 461 U.S. 138, 145, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)) (internal quotation marks omitted).
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> *Gray v. Sobin*, 2014 D.C. Super. LEXIS 1, *11.

cautioning the reader that harassing and insulting one-to-one communications[80] sent after hours may not enjoy the same protection.[81] The exception also applies to employees of businesses that serve the public, who may be the subject of distressing criticism of their goods or services. This change improves the clarity, proportionality, and perhaps the constitutionality of the revised statutes.

Fourth, the revised statute more precisely specifies the nature of the social harm in stalking to be a course of conduct that causes "ongoing" safety concerns or emotional distress. The current stalking statute requires proof that the defendant engaged in a "course of conduct," a defined term that refers to conduct "on 2 or more occasions" but is silent as to whether or how the conduct on these occasions is related.[82] The current stalking statute does not define the meaning of "safety" and its definition of "emotional distress"[83] is silent on whether such distress is of an ongoing nature. The DCCA has explained only that each term requires a severe degree of intrusion.[84] To resolve these ambiguities, the revised statute defines the terms "safety" and "significant emotional distress" as *ongoing* fear or distress.[85] Because stalking is most commonly understood to mean an obsessive, protracted pursuit,[86] the revised statute's definitions refer to both the degree and the duration of the harm. This change improves the clarity of the revised statute.

Fifth, the revised definition of "financial injury" more precisely defines the types of expenses that will trigger a penalty enhancement. Current D.C. Code § 22-3132(5) includes expenses incurred by the complainant, member of the complainant's household, a person whose safety is threatened by the stalking, or a person who is financially responsible for the complainant. In contrast, the revised definition includes expenses incurred by any natural person,[87] but requires that the expenses be reasonably incurred by the criminal conduct. Additionally, the revised definition includes more examples in the non-exhaustive list of costs, such as the cost of clearing a debt and "lost compensation," which includes employment benefits and other earnings. These changes clarify and improve the consistency of District statutes.

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

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

[82] D.C. Code § 22-3132(8).

[83] D.C. Code § 22-3132(4).

[84] *See Coleman v. United States*, 16-CM-345, 2019 WL 1066002, at *11 (D.C. Mar. 7, 2019).

[85] RCC §§ 22E-1206(d)(8) and (9).

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

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

Sixth, the revised stalking statute excludes liability for conduct that is reasonably within the scope of a person's journalistic, law enforcement, legal, or other specified duties. Current D.C. Code § 22-3133(b) contains a general statement that the offense "does not apply to constitutionally protected activity," but otherwise is silent as to whether other activities are excluded. The DCCA has not addressed whether a person's bona fide action pursuant to their occupational duties is excepted from stalking liability.[88] However, to resolve these ambiguities as to the constitutional scope of the offense, the revised statute specifically excludes from stalking liability activities that, despite being distressing, are generally recognized as legitimate occupational activities. Even if the current and RCC stalking statutes' general statements regarding the protection of constitutional activities provide adequate notice that certain activities do not constitute stalking, such statements do not obviously extend to activities beyond the First Amendment.[89] Without a clear exclusion, such legitimate activities may constitute stalking.[90] This change improves the clarity, proportionality and perhaps the constitutionality of the revised offenses.

Seventh, the revised statute extends jurisdiction for stalking only to instances where some aspect of the crime occurs in the District. Current D.C. Code § 22-3135(b) states that jurisdiction extends to communications if "the specific individual lives in the District of Columbia" and "it *can be* electronically accessed in the District of Columbia" (emphasis added). The DCCA has not interpreted the meaning of this phrase. The revised statute does not extend jurisdiction to harms where the accused and the complainant and all relevant action occurs outside the District, even though the complainant is a District resident.[91] Authority to exercise jurisdiction over acts that occur outside the District's physical borders has traditionally been limited to acts that occur in, or are intended to have, and actually do have, a detrimental effect within the District.[92] There is no clear precedent for states to extend jurisdiction based solely on the residency of the alleged victim,[93] and such an extension, if intended, may be unconstitutional.[94] This change improves the clarity and perhaps the constitutionality of the revised statutes.

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

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[88] Notably, in *White v. Muller*, 2017 D.C. Super. LEXIS 1, the court's analysis did not focus on the fact that Muller had duties as a member of the press so much as the status of White as a Councilmember.

[89] Many of the professional activities excepted in the RCC stalking statute, e.g. a private investigator, are not constitutionally protected activities. Notably, the District's current voyeurism statute contains an exception for monitoring by law enforcement. D.C. Code § 22-3531(e)(1).

[90] The intent requirements in the current and revised stalking statutes do not necessarily exempt persons engaged in bona fide, legitimate occupational activities. For example, a process server may need to repeatedly lie in wait near someone's home and workplace to hand-serve that person with a distressing pleading. Similarly, a business owner monitoring an employee's compliance with worker safety laws may cause the person some degree of emotional unrest.

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

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

[93] Wayne R. LaFave, 1 Subst. Crim. L. § 4.4(c)(1) (3d ed.).

[94] Wayne R. LaFave, 1 Subst. Crim. L. § 4.4(a) (3d ed.).

First, the revised statute separately criminalizes only conduct that intends or causes another to experience fear for safety or emotional distress. Current D.C. Code § 22-3133(a) specifically refers to conduct that would cause another person to "feel seriously alarmed, disturbed, or frightened" without defining these terms. Current D.C. Code §22-3133(a) also refers to fear for "safety," undefined, and "emotional distress" which is defined.[95] The DCCA has explained that serious alarm, disturbance, and fright should be understood as mental harms comparable to fear for one's safety or significant emotional distress.[96] Accordingly, the revised stalking statute eliminates a distinct reference to conduct that causes a person to "feel seriously alarmed, disturbed, or frightened" because such results are adequately captured in the statute by other terminology.[97] This change improves the clarity of District statutes.

Second, the revised statute does not specially codify a statement of legislative intent for the stalking offense. Current D.C. Code § 22-3131 codifies a lengthy statement of legislative intent that, e.g., "urges intervention by the criminal justice system before stalking escalates into behavior that has serious or lethal consequences." [98] No other criminal offense in the current D.C. Code contains a comparable statement of legislative intent. Instead, the DCCA routinely uses the Council's legislative documents (e.g. Committee reports) to determine legislative intent. The revised stalking statute relies upon the usual sources of legislative intent rather than a special codified statement. This change improves the clarity and consistency of the revised statutes.

Third, the revised statute applies standardized definitions for the "purposefully" and "with intent" culpable mental states required for stalking liability. The current stalking statute requires that the accused "purposefully engages in a course of conduct," and provides alternative culpable mental state requirements of acting "with the intent" or "[t]hat the person knows" would cause an individual a specified harm. However, the terms "purposely," "with the intent," and "knows," are not defined and it is unclear to what extent that mental state applies to the language that follows. There is no DCCA case law on point. The revised statute uses the RCC's general provisions that define "purposefully" and "with intent"[99] and specify that culpable mental states apply until the

[95] Under D.C. Code § 22-3132(4), "emotional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.
[96] *Coleman v. United States*, 16-CM-345, 2019 WL 1066002, at *11 (D.C. Mar. 7, 2019).
[97] *See* Merriam-Webster.com, *"alarmed"*, 2018, *available at* https://www.merriam-webster.com/dictionary/alarmed (defining alarmed as feeling a sense of danger : urgently worried, concerned, or frightened); Merriam-Webster.com, *"disturbed"*, 2018, *available at* https://www.merriam-webster.com/dictionary/disturbed (defining disturbed as showing symptoms of emotional illness); Merriam-Webster.com, *"frightened"*, 2018, *available at* https://www.merriam-webster.com/dictionary/frightened (defining frightened as feeling fear : made to feel afraid).
[98] The statement of legislative intent appears to be based on model language recommended by the National Center for Victims of Crime. *See Revised Model Code*, at page 24.
[99] RCC § 22E-206. Note that the RCC definition of "with intent" requires that a person "believes that conduct is practically certain to cause the result," which is the same standard as for "knowing." Also, proof that a person acts purposely, consciously desiring to cause the result, will meet the culpable mental state requirement that a person act "with intent" per RCC § 22E-206(f)(3). Consequently, the revised stalking statute's use of "with intent" appears to match the requirements of both "with the intent" and "knows" in current D.C. Code § 22-3133(a)(1) and (a)(2).

occurrence of a new culpable mental state in the offense.[100] These changes clarify and improve the consistency of District statutes.

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

[100] RCC § 22E-207(a).

RCC § 22E-1301. Sexual Assault.

Explanatory Note. *The RCC sexual assault offense prohibits causing a complainant to engage in or submit to specified acts of sexual penetration or sexual touching by means of physical force, the use of a weapon, threats, nonconsensual intoxication of the complainant, or when the complainant is physically or mentally impaired. The penalty gradations are based on the nature of the sexual conduct, as well as the means by which the actor causes the complainant to engage in or submit to the sexual conduct. The revised sexual assault offense replaces four distinct offenses in the current D.C. Code: first degree sexual abuse,[1] second degree sexual abuse,[2] third degree sexual abuse,[3] and fourth degree sexual abuse.[4] The revised sexual assault offense also replaces in relevant part three distinct provisions for the sexual abuse offenses: the consent defense,[5] the attempt statute,[6] and the aggravating sentencing factors.[7] Insofar as they are applicable to first degree through fourth degree sexual abuse, the revised sexual assault offense also replaces the penalty enhancement for committing an offense "while armed,"[8] the penalty enhancement for committing an offense against minors,[9] the penalty enhancement for committing an offense against senior citizens,[10] certain minimum statutory penalties,[11] and the heightened penalties and aggravating circumstances in D.C. Code § 24-403.01(b-2).*

Subsection (a) specifies the various types of prohibited conduct in first degree sexual assault, the highest gradation of the revised sexual assault offense. Subsection (a)(1) specifies part of the prohibited conduct—causing the complainant to engage in or submit to a "sexual act." "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts. Subsection (a)(1) specifies a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here means that the actor must be "practically certain" that his or her conduct causes the complainant to engage in or submit to a sexual act. Subsection (a)(2) specifies the prohibited means by which the actor must cause the complainant to engage in or submit to the sexual act. Per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state in subsection (a)(1) applies to each type of prohibited conduct in subsection (a)(2). Per the definition in RCC § 22E-206, "knowingly" here

[1] D.C. Code § 22-3002.
[2] D.C. Code § 22-3003.
[3] D.C. Code § 22-3004.
[4] D.C. Code § 22-3005.
[5] D.C. Code § 22-3007.
[6] D.C. Code § 22-3018.
[7] D.C. Code § 22-3020.
[8] D.C. Code § 22-4502.
[9] D.C. Code § 22-3611.
[10] D.C. Code § 22-3601.
[11] D.C. Code § 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of first or second degree sexual abuse or child sexual abuse in violation of § 22-3002, § 22-3003, or § 22-3008 through § 22-3010, shall not be less than 7 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence, as so defined.").

means that the actor must be "practically certain" that his or her conduct will cause the complainant to engage in or submit to a sexual act in the prohibited manner.

For subsection (a)(2)(A), the actor must be "practically certain" that he or she caused the complainant to engage in or submit to a sexual act by using physical force that overcomes, restrains, or causes "bodily injury" to the complainant. "Bodily injury" is defined in RCC § 22E-701 as "physical pain, illness, or any impairment of physical condition." For subsection (a)(2)(B), the actor must be "practically certain" that he or she caused the complainant to engage in or submit to a sexual act by using a weapon against the complainant. For subsection (a)(2)(C), the actor must be "practically certain" that he or she caused the complainant to engage in or submit to the sexual act by threatening to kill or kidnap any person or threatening to commit any unwanted sexual act or cause "significant bodily injury" to any person. "Significant bodily injury" is a defined term in RCC § 22E-701 that means an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone.

For subsection (a)(2)(D), the actor must be "practically certain" that he or she caused the complainant to engage in or submit to a sexual act by administering or causing to be administered to the complainant an intoxicant or other substance without the complainant's "effective consent." "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception." In addition, the actor must administer the intoxicant or other substance "with intent" to impair the complainant's ability to express unwillingness to engage in the sexual act (subsection (a)(2)(D)(i)). "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that administering the intoxicant or other substance would impair the complainant's unwillingness to engage in the sexual act. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the drug or intoxicant "impaired the complainant's ability to express unwillingness to engage in the sexual act," only that the defendant believed to a practical certainty that it would. However, subsection (a)(2)(D)(ii) does require that the intoxicant or other substance have a specified effect on the complainant. The intoxicant or other substance must, "in fact," render the complainant asleep, unconscious, substantially paralyzed, or passing in and out of consciousness (subsection (a)(2)(D)(ii)(I)), "substantially incapable," mentally or physically, of appraising the nature of the sexual act (subsection (a)(2)(D)(ii)(II)), or "substantially incapable," mentally or physically, of communicating unwillingness to engage in the sexual act (subsection (a)(2)(D)(ii)(III)). "In fact," a defined term, is used to indicate that there is no culpable mental state requirement as to the required effect of the intoxicant or other substance.

Subsection (b) specifies the various types of prohibited conduct in second degree sexual assault. Like first degree sexual assault, second degree sexual assault requires the actor to "knowingly" cause the complainant to engage in or submit to a "sexual act," but the prohibited means of doing so differ. Subsection (b)(1) specifies a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here means that the actor must be "practically certain" that his or her conduct causes the complainant to engage in or submit to a sexual act. Per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state in subsection (b)(1) applies to each of the prohibited

means of causing the complainant to engage or submit to the "sexual act" in subsection (b)(2). Per the definition in RCC § 22E-206, "knowingly" here means that the actor must be "practically certain" that his or her conduct will cause the complainant to engage in or submit to a sexual act in the prohibited manner. For subsection (b)(2)(A), the actor must be "practically certain" that he or she caused the complainant to engage in or submit to the sexual act by a "coercive threat," a defined term in RCC § 22E-701 that prohibits specific threats such as accusing someone of a criminal offense, as well as sufficiently serious threats that would cause a reasonable person to comply. For subsection (b)(2)(B), the actor be "practically certain" that the complainant is asleep, unconscious, paralyzed, or passing in and out of consciousness (subsection (b)(2)(B)(i)), "substantially incapable," mentally or physically, of appraising the nature of the sexual act (subsection (b)(2)(B)(ii)), or "substantially incapable," mentally or physically, of communicating unwillingness to engage in the sexual act (subsection (b)(2)(B)(iii)).

Subsection (c) specifies the various types of prohibited conduct in third degree sexual assault. Subsection (c)(1) specifies part of the prohibited conduct—causing the complainant to engage in or submit to "sexual contact." "Sexual contact" is a defined term in RCC § 22E-701 that means touching specified body parts, such as genitalia, of any person with the desire to sexually degrade, sexually arouse, or sexually gratify any person. Subsection (c)(1) specifies a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here means that the actor must be "practically certain" that his or her conduct causes the complainant to engage in or submit to sexual contact. Subsection (c)(2) specifies the prohibited the means by which the actor must cause the complainant to engage in or submit to the sexual contact. Per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state in subsection (c)(1) applies to each type of prohibited conduct in subsection (c)(2). Per the definition in RCC § 22E-206, "knowingly" here means that the actor must be "practically certain" that his or her conduct will cause the complainant to engage in or submit to sexual contact in the prohibited manner. The prohibited means of causing the sexual contact for third degree sexual assault are the same as they are for first degree sexual assault.

Subsection (d) specifies the various types of prohibited conduct in fourth degree sexual assault. Like third degree sexual assault, fourth degree sexual assault requires the actor to "knowingly" cause the complainant to engage in or submit to "sexual contact," but the prohibited means of doing so differ. Subsection (d)(1) specifies a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here means that the actor must be "practically certain" that his or her conduct causes the complainant to engage in or submit to sexual contact. Per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state in subsection (d)(1) applies to each of the prohibited means of causing the complainant to engage or submit to the "sexual contact" in subsection (d)(2). Per the definition in RCC § 22E-206, "knowingly" here means that the actor must be "practically certain" that his or her conduct will cause the complainant to engage in or submit to sexual contact in the prohibited manner. The prohibited means of causing the sexual contact for fourth degree sexual assault are the same as they are for second degree sexual assault.

Subsection (e) codifies an effective consent defense to the sexual assault offense. Subsection (e) specifies that the effective consent defense is in addition to any defenses otherwise applicable to the actor's conduct under District law. The effective consent

defense requires either the complainant's "effective consent" to the actor's conduct or the actor's reasonable belief that the complainant gave "effective consent" to the actor's conduct. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception." Subsection (e) codifies several limits to the effective consent defense. First, the conduct cannot inflict "significant bodily injury" or "serious bodily injury" or involve the use of a "dangerous weapon," as those terms are defined in RCC § 22E-701 (subsection (e)(1)(A)). In addition to these requirements, certain categories of complainants are excluded from the effective consent defense: a complainant that is under 16 years of age when the actor is at least four years older than the complainant (subsection (e)(1)(B)(i)) and a complainant under 18 years of age when the actor is in a position of trust with or authority over the complainant, at least 18 years of age, and at least four years older than the complainant (subsection (e)(1)(B)(ii)). Subsection (e)(3) describes the burden of proof for the effective consent defense, clarifying that, where any evidence supporting the defense is raised at trial by either the government or the defense, the government then has the burden of proving the absence of such circumstances beyond a reasonable doubt.

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

Subsection (g) codifies several penalty enhancements for the revised sexual assault offense and specifies that these penalty enhancements are in addition to any general penalty enhancements that are applicable in RCC §§ 22E-605 through 22E-608. If one or more of the penalty enhancements in subsection (g) is proven, the penalty for the offense "may" be increased by one class. Subsection (g)(1) codifies a penalty enhancement for recklessly causing the sexual conduct by displaying or using an object that, in fact, is a "dangerous weapon" or "imitation dangerous weapon." Per the rule of construction in RCC § 22E-207, the culpable mental state of recklessly applies to both causing serious bodily injury and causing such injury by displaying or using an object. "Recklessly" is a defined term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that he or she caused the sexual conduct by displaying or using an object. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to whether the object is a "dangerous weapon" or "imitation dangerous weapon" as those terms are defined in RCC § 22E-701.

Subsection (g)(2) codifies a penalty enhancement if the actor "knowingly" acted with one or more accomplices that were present at the time of the offense. "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that he or she acted with an accomplice that was present or accomplices that were present. Subsection (g)(3) codifies a penalty enhancement if the actor "recklessly" caused "serious bodily injury" to the complainant during the sexual conduct. "Recklessly" is a defined term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that he or she caused "serious bodily injury." "Serious bodily injury" is a defined term in RCC § 22E-701 that means injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ.

Subsection (g)(4)(A), subsection (g)(4)(B), subsection (g)(4)(C), subsection (g)(4)(D), subsection (g)(4)(E), and subsection (g)(4)(F) codify additional penalty enhancements based on the age of the complainant and whether the complainant is a "vulnerable adult." These penalty enhancements use the phrase "in fact," a defined term

in RCC § 22E-207 that indicates there is no culpable mental state for a given element, and the culpable mental state of "reckless." "Reckless" is a defined term in RCC § 22E-206 that means the actor was aware of a substantial risk of a given element.

For the penalty enhancement in subsection (g)(4)(A), the complainant must be "in fact" under the age of 12 years and the actor must be "in fact" at least four years older the complainant. There is no culpable mental state requirement for either the age of the complainant or the required age gap. For the penalty enhancement in subsection (g)(4)(B), the actor must be "reckless" as to the fact that the complainant was under 16 years of age and the actor must be, "in fact," at least four years older than the complainant. The actor must be aware of a substantial risk that the complainant was under the age of 16 years, but there is no mental state requirement for the required age gap. For the penalty enhancement in subsection (g)(4)(C), the actor must be "reckless" as to the fact that the complainant was under 18 years of age and that the actor was in a "position of trust with or authority over" the complainant, and the actor must be, "in fact," at least four years older than the complainant. "Position of trust with or authority over" is a defined term in RCC § 22E-701 that includes individuals such as parents, siblings, school employees, and coaches. The actor must be aware of a substantial risk that the complainant is under the age of 18 years and that the actor is in a "position of trust with or authority over" the complainant, but there is no mental state requirement for the required age gap. For the penalty enhancement in subsection (g)(4)(D), the actor must be "reckless" as to the fact that the complainant was under 18 years of age and the actor must be, "in fact," 18 years of age or older and at least four years older than the complainant. The actor must be aware of a substantial risk that the complainant was under the age of 18 years, but there is no culpable mental state requirement for the age of the actor or the required age gap. The penalty enhancement in subsection (g)(4)(E) requires that the actor be "reckless" as to the fact that the complainant was 65 years of age or older and the actor was, "in fact," at least ten years younger than the complainant. The actor must be aware of a substantial risk that the complainant was 65 years of age or older, but there is no culpable mental state requirement for the required age gap. Finally, the penalty enhancement in subsection (g)(4)(F) requires that the actor be "reckless" as to the fact that the complainant was a "vulnerable adult." The actor must be aware of a substantial risk that the complainant was a "vulnerable adult" as that term is defined in RCC § 22E-701.

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

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

First, first degree and third degree of the revised sexual assault statute prohibit threats of "significant bodily injury," as well as threats of an "unwanted sexual act." The current first degree[12] and third degree[13] sexual abuse statutes prohibit threatening to

[12] D.C. Code § 22-3002(a)(2).
[13] D.C. Code § 22-3004(2).

subject any person to "bodily injury,"[14] a defined term for the current sex offense statutes that differs from the levels of physical harm required for the District's current assault statutes. There is no DCCA case law interpreting the definition of "bodily injury" for the sex offenses or specifically comparing the definition to the level of physical harm required for the current assault statutes.[15] In contrast, 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-701 as an injury that, to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer.[16] Per 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, as are threats of "disease" or "sickness," unless the threatened harm otherwise satisfies the definition of "significant bodily injury."[17]

[14] 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.").

[15] The District's current simple assault statute does not specify a required level of physical harm, D.C. Code § 22-404(a), but case law has established that any non-consensual touching, even without pain, is sufficient for simple assault. *See, e.g.*, *Mahaise v. United States*, 722 A.2d 29, 30 (D.C. 1988) ("A battery is any unconsented touching of another person. Since an assault is simply an attempted battery, every completed battery necessarily includes an assault. Appellant's statement that he removed the phone from the complainant's hand and then took her cigarette from her other hand and extinguished it is thus an admission, at least prima facie, of two separate assaultive acts.") (citing *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990)). The current assault with significant bodily injury statute requires and defines "significant bodily injury." D.C. Code § 22-404(a)(2) ("'significant bodily injury' means an injury that requires hospitalization or immediate medical attention."). The current aggravated assault statute requires "serious bodily injury," which is not statutorily defined in D.C. Code § 22-404.01, although DCCA case law has adopted the sex offense statutory definition of "serious bodily injury." *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999).

[16] 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-701

[17] The current definition of "bodily injury" for the sex offense statutes is "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." D.C. Code § 22-3001(2). Given this definition, the current first degree and third degree sexual abuse statutes extend to threats of a specified injury to a "mental faculty," as well as to threats of disease or sickness. There is no DCCA case law discussing the meaning of impairment of a "mental faculty" or "disease" or "sickness" in the current definition of "bodily injury." The RCC definition of "significant bodily injury" is limited to physical harm. Thus, threats of injury to a "mental faculty" and threats of "disease" or "sickness" are not sufficient for first degree and third degree of the revised sexual assault statute, unless the threatened harms otherwise satisfy the definition of "significant bodily injury."

The RCC definition of "significant bodily injury" may result in additional changes to current District law for threats of "bodily injury" in first degree and third degree sexual abuse. First, the current D.C. Code sexual offense definition of "bodily injury" includes "loss or impairment of the function of a bodily member [or] organ" or "physical disfigurement." It is unclear what level of physical harm is required for this part of the current definition and there is no DCCA case law on this issue. Thus, it is unclear how this language differs, if at all, from the level of physical harm required for the RCC definition of "significant bodily injury." Similarly, the current D.C. Code sexual offense definition of "bodily injury" includes

Threats to commit an unwanted sexual act are included in first degree and third degree of the revised sexual assault statute because an unwanted sexual act is a serious harm that may fall outside the definition "significant bodily injury." This change improves the clarity, completeness, and consistency of the revised statutes.

Second, as applied to first degree and third degree of the revised sexual assault statute, the general culpability principles for self-induced intoxication in RCC § 22E-209 allow an actor to claim that he or she did not act "knowingly" or "with intent" due to his or her self-induced intoxication. The current first degree and third degree sexual abuse statutes do not specify any culpable mental states. DCCA case law has determined that first degree sexual abuse is a "general intent" crime for purposes of an intoxication defense,[18] and similar logic would appear to apply to third degree sexual abuse. This case law precludes an actor from receiving a jury instruction on whether intoxication prevented the actor from forming the necessary culpable mental state requirement for the crime.[19] 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[20]—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.[21] 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.[22] This change improves the clarity, consistency, and proportionality of the offense.

Third, the revised sexual assault statute specifies one set of offense-specific penalty enhancements that is capped at a penalty increase of one class. Some or all of the

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"injury involving significant pain." There is no DCCA case law interpreting this requirement. Thus, it is unclear whether the required level of pain for "bodily injury" under current District law differs from the injuries that satisfy the requirements of the RCC definition of "significant bodily injury."

[18] *Kyle v. United States*, 759 A.2d 192, 199 (D.CD. 2000) ("Voluntary intoxication, however, is not a defense to a general intent crime such as first degree sexual abuse.").

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

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

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

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

current sex offenses[23] are subject to general penalty enhancements based on the age of the complainant,[24] a general "while armed" penalty enhancement in D.C. Code § 22-4502,[25] and the enhancements in the current sex offense aggravators in D.C. Code § 22-3020.[26] The D.C. Code is silent as to whether or how these different penalty

[23] 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).

[24] Current District law has a general penalty enhancement for committing specified crimes against complainants under the age of 18 years and a general penalty enhancement for committing specified crimes against complainants that are 65 years of age or older. The penalty enhancement for crimes committed against complainants under the age of 18 years applies to child sexual abuse and first degree, second degree, or third degree sexual abuse, and authorizes a possible term of imprisonment of 1 ½ times the maximum term of imprisonment otherwise authorized. D.C. Code §§ 22-3611(a), (c). The penalty enhancement for crimes committed against complainants that are 65 years of age or older authorizes a possible term of imprisonment of 1 ½ times the maximum term of imprisonment otherwise authorized and applies to first degree, second degree, and third degree sexual abuse. D.C. Code § 22-3601(a), (c).

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

[26] The current sexual abuse aggravators apply to all the sex offenses. D.C. Code § 22-3020(a) ("Any person who is found guilty of an offense under this subchapter may receive a penalty up to 1 1/2 times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse, if any of the following aggravating circumstances exists: (1) The victim was under the age of 12 years at the time of the offense; (2) The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim; (3) The victim sustained serious bodily injury as a result of the offense; (4) The defendant was aided or abetted by 1 or more accomplices; (5) The defendant is or has been found guilty of committing sex offenses against 2 or more victims, whether in the same or other proceedings by a court of the District of Columbia, any state, or the United States or its territories; or (6) The defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.").

enhancements can be stacked, although case law suggests stacking at least some penalty enhancements is permitted.[27] In contrast, the revised sexual assault statute specifies a single set of enhancements, including age-based and weapon enhancements, that is capped at a penalty increase of one class.[28] Because the revised statute incorporates multiple enhancements in the offense, the statute clarifies that it is not possible to enhance a sexual assault with, for example, both a weapon enhancement and an enhancement based on the identity of the complainant, or to double-stack different weapon penalties[29] and offenses. In addition, the scope of the revised weapons aggravator is slightly narrower than the current "while armed" enhancement as it pertains to mere possession[30] and excludes objects the complainant incorrectly perceives as being a dangerous weapon.[31] Consolidating the multiple penalty enhancements improves the consistency and proportionality of the revised sexual assault offense.

Fourth, the revised sexual assault penalty enhancements require at least a four year age gap between the actor and the complainant when the complainant is under the age of 12 years, and, by the use of the phrase "in fact," require strict liability for the age gap. The current sex offense aggravators include an aggravator for when the "victim was under the age of 12 at the time of the offense."[32] The aggravator does not require an age gap between the complainant and the actor, unlike the current child sexual abuse statutes, which require at least a four year age gap between the actor and a person under the age of 16.[33] In contrast, the revised penalty enhancement requires at least a four year age gap between the actor and a complainant under the age of 12 years. A four year age gap ensures that the enhancement is reserved for predatory behavior targeting very young

[27] For example, the facts as discussed in several DCCA cases on offenses against persons other than sexual abuse indicate that such stacking does occur with the weapon enhancement and senior citizen enhancement. *See, e.g.*, *McClain v. United States*, 871 A.2d 1185 (D.C. 2005) (determining "whether the trial court committed plain error when it instructed the jury regarding to lesser-included offenses of the crime of armed robbery of a senior citizen," charged under the enhancements in now D.C. Code §§ 22-4502 and 22-3601).

[28] Note, however, that subtitle I of the RCC specifies certain penalty enhancements (e.g. hate crime) that may apply *in addition to* the penalty enhancements specified in the revised sexual assault offenses.

[29] In addition to the "while armed" enhancement in D.C. Code § 22-4502(a) applicable to child sexual abuse and first degree, second degree, and third degree sexual abuse, the current sex offense aggravators include an aggravator if "the defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon." D.C. D.C. Code § 22-3020(a)(6).

[30] The current "while armed" enhancement applies if the actor merely has "readily available" a dangerous weapon. D.C. Code § 22-4502(a). Having a dangerous weapon "readily available" is insufficient for the revised weapon aggravator in the sexual assault statute. However, possessing a dangerous weapon or a firearm during sexual assault, without using or displaying it, is still subject to liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-XXXX) or the revised possession of a firearm during a crime of violence statute (RCC § 22E-XXXX).

[31] The current "while armed" enhancement in D.C. Code § 22-4502 includes the use of objects that the complaining witness incorrectly perceives to be a dangerous or deadly weapon. *See, e.g.*, *Paris v. United States*, 515 A.2d 199, 204 (D.C. 1986) ("In this jurisdiction, any object which the victim perceives to have the apparent ability to produce great bodily harm can be considered a dangerous weapon."). The definitions of "dangerous weapon" and "imitation dangerous weapon" in RCC § 22E-701 exclude these objects.

[32] D.C. Code § 22-3020(a)(1).

[33] 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.").

complainants. An actor with less than a four year age gap that commits a sexual assault against a complainant under the age of 12 years continues to face criminal liability, but the penalty would not be enhanced. The revised enhancement also uses the phrase "in fact" to require strict liability for the age gap, which is consistent with strict liability for the age gap in the other revised age-based penalty enhancements and the revised sexual abuse of a minor statute (RCC § 22E-1302). These changes improve the clarity, consistency, and proportionality of the revised sex assault offense.

Fifth, the revised sexual assault statute codifies a penalty enhancement for the actor recklessly disregarding the fact that the complainant was under the age of 16 years when the actor, in fact, was at least four years older. The current sex offense aggravators include a penalty aggravator for when "the victim was under the age of 12 years"[34] and when "the victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim."[35] There is no aggravator for a complainant under the age of 16 years. However, the current first degree and second degree sexual abuse of a child statutes punish sexual acts and sexual contacts when the complainant was under the age of 16 years and the actor was at least four years older.[36] In contrast, the revised sexual assault statute codifies a penalty enhancement for an actor recklessly disregarding the fact that the complainant is under the age of 16 years when the actor is at least four years older than the complainant.[37] A four year age gap ensures that the enhancement is reserved for predatory behavior targeting young complainants. An actor with less than a four year age gap that commits sexual assault against a complainant under the age of 16 years continues to face criminal liability, but the penalty would not be enhanced. The "recklessly" culpable mental state for the complainant's age is consistent with this element in the other revised age-based penalty enhancements. Using "in fact" to require strict liability for the age gap is consistent with the age gap in the other revised age-based penalty enhancements and the revised sexual abuse of a minor statute (RCC § 22E-1302). These changes improve the clarity, consistency, and proportionality of the revised sex assault offense.

Sixth, the revised sexual assault penalty enhancements require at least a four year age gap between the actor and a complainant under the age of 18 years when the actor is in a position of trust with our authority over the complainant, and, by use of the phrase "in fact," require strict liability for the age gap. The current sex offense aggravators include an aggravator for when the "victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim."[38] The current

[34] D.C. Code § 22-3020(a)(1).
[35] D.C. Code § 22-3020(a)(2).
[36] 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.").
[37] It is technically unnecessary to codify this enhancement because it overlaps with the enhancement in subsection (g)(4)(D) for complainants under the age of 18 years when the actor is at least 18 years of age and there is at least a four year age gap. An actor that is at least four years older than a complainant under 16 years of age in subsection (g)(4)(B) could also be at least 18 years of age and have more than a four year age gap with that complainant. However, codifying the enhancement in subsection (g)(4)(B) makes it clear that the penalty enhancements include complainants under the age of 16 years when there is at least a four year age gap with the actor and mirrors the gradations in the revised sexual abuse of a minor statute (RCC § 22E-1302).
[38] D.C. Code § 22-3020(a)(2).

aggravator does not specify any culpable mental states and there is no DCCA case law on this issue. In contrast, the revised penalty enhancement requires at least a four year age gap between the actor and the complainant and, by use of the phrase "in fact," specifies that there is no culpable mental state for this element. A four year age gap ensures that the revised enhancement is reserved for predatory behavior targeting complainants under the age of 18 years. Strict liability for the age gap is consistent with the age gap in the other age-based penalty enhancements and the revised sexual abuse of a minor statute (RCC § 22E-1302). This change improves the consistency and proportionality of the revised sexual assault offense.

Seventh, the revised sexual assault statute applies a penalty enhancement to all gradations when the actor recklessly disregards the fact that the complainant was under 18 years of age and, in fact, the actor was 18 years of age or older and at least four years older than the complainant. Current D.C. Code § 22-3611 codifies a general penalty enhancement for specified crimes, including first degree, second degree, and third degree sexual abuse, when the actor is 18 years of age or older, the complainant is under 18 years of age, and the actor is at least two years older than the complainant.[39] The current enhancement does not specify any culpable mental states, although there is an affirmative defense if the actor "reasonably believed that the victim was not [under the age of 18 years]."[40] There is no DCCA case law on this issue. In contrast, the revised sexual assault statute incorporates this penalty enhancement into the offense and applies it to all gradations, including fourth degree sexual assault.[41] The revised penalty enhancement requires that the actor was reckless as to the fact that the complainant is under the age of 18 years, which preserves the substance of the current affirmative defense[42] and is consistent with several of the other age-based penalty enhancements. The revised penalty enhancement also requires that the actor is at least four years older than the complainant instead of two years older to match the required age gap in the current child sexual abuse statutes[43] and several of the RCC sex offenses, such as sexual abuse of a minor. This change improves the consistency and proportionality of the revised offense.

Eighth, the revised sexual assault statute codifies a penalty enhancement for the actor recklessly disregarding the fact that the complainant is 65 years of age or older when the actor is, in fact, at least 10 years younger than the complainant. Current D.C. Code § 22-3601 provides a general penalty enhancement for any actor, regardless of age,

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[39] D.C. Code §§ 22-3611(a), (c).

[40] D.C. Code §§ 22-3611(b). The current minors penalty enhancement uses the terms "adult" and "minor," and defines "adult" as a "person 18 years of age or older at the time of the offense" and "minor" as a "person under 18 years of age at the time of the offense." D.C. Code § 22-3611(c)(1), (c)(2).

[41] This penalty enhancement differs from the other penalty enhancement for complainants under the age of 18 years in subsection (g)(4)(C) in two ways. First, this penalty enhancement does not require that the actor be in a "position of trust with or authority over" the complainant. Second, for this penalty enhancement, the actor must be at least 18 years of age, whereas the penalty enhancement in subsection (g)(4)(C) extends liability to persons under the age of 18 years.

[42] If an accused reasonably believed that the complaining witness was not a minor, as is required in the current affirmative defense, the accused would not satisfy the culpable mental state of recklessness as to the age of the complaining witness because the accused would not consciously disregard a substantial and unjustifiable risk that the complainant was under 18 years of age.

[43] D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

committing specified crimes against complainants 65 years of age or older, including first degree, second degree, or third degree sexual abuse.[44] The penalty enhancement does not specify any culpable mental states, but there is an affirmative defense if the actor "knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed."[45] There is no DCCA case law on this issue. In contrast, the revised sexual assault statute codifies a penalty enhancement for an actor that was reckless as to the fact that the complainant was 65 years of age or older when the actor, in fact, is at least 10 years younger than the complainant. The revised penalty enhancement applies to all gradations of the revised sexual assault statute, including fourth degree sexual assault. The "reckless" culpable mental state preserves the substance of the current affirmative defense for the senior citizen enhancement[46] and is consistent with the culpable mental states in several of the other revised age-based penalty enhancements. Requiring at least a ten year age gap between the actor and the complainant reserves the enhancement for predatory behavior targeting the elderly, rather than violence between elderly persons. Strict liability for the age of the actor is consistent with several of the other age-based penalty enhancements and the revised sexual abuse of a minor statute (RCC § 22E-1302). The revised penalty enhancement improves the consistency and proportionality of the revised offense.

Ninth, the revised sexual assault statute codifies a penalty enhancement for the actor recklessly disregarding the fact that the complainant is a "vulnerable adult." The current sex offense statutes do not have specific offenses or enhanced penalties for complainants that are "vulnerable adult[s]," as that term is defined in RCC § 22E-701, although some current District statutes prohibit the abuse[47] or neglect[48] of a "vulnerable adult" without specifically addressing sexual violence against these complainants. In contrast, the revised sexual assault statutes codify a penalty enhancement for an actor recklessly disregarding the fact that the complainant was a vulnerable adult, as that term is defined in RCC § 22E-701. The "recklessly" culpable mental state matches the culpable mental state required for several of the other sexual assault penalty enhancements. This change improves the consistency and proportionality of the revised statute.

Tenth, the revised sexual assault penalty enhancement for weapons requires that the actor "recklessly" caused the sexual act or sexual contact by "displaying" or "using" an object that, in fact, is a dangerous weapon or imitation dangerous weapon. The

[44] D.C. Code § 22-3601(a), (b).
[45] D.C. Code § 22-3601(c).
[46] In the RCC, an actor that knew or reasonably believed that the complainant was not 65 years or older or an actor that could not have known or determined the age of the complainant, as is required in the current affirmative defense, would not satisfy the culpable mental state of recklessness as to the age of the complaining witness. The accused would not consciously disregard a substantial that the complainant was 65 years of age or older.
[47] D.C. Code § 22-933. The offense has a misdemeanor gradation and felony gradations that require "serious bodily injury or severe mental distress" or "permanent bodily harm or death." D.C. Code § 22-936.
[48] D.C. Code § 22-934. The offense has a misdemeanor gradation and felony gradations that require "serious bodily injury or severe mental distress" or "permanent bodily harm or death." D.C. Code § 22-936.

current weapons aggravator for the current sex offense statutes requires that the "defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon."[49] No culpable mental state is specified, and. there is no DCCA case law interpreting the current weapons aggravator.[50] In addition to the sex offense weapons aggravator, current D.C. Code § 22-4502 provides severe, additional penalties for committing, attempting, soliciting, or conspiring to commit first degree, second degree, and third degree sexual abuse[51] "while armed" or "having readily available" a dangerous weapon.[52] In contrast, the revised sexual assault penalty enhancement requires that the actor "recklessly" caused the sexual act or sexual contact "by displaying" or "using" an object that, in fact, is a dangerous weapon or imitation weapon.[53] The term "use" is intended to include making physical contact with the weapon and conduct other speech—i.e. other than oral or written language, symbols, or gestures—that indicates the presence of a weapon.[54] The revised enhancement is narrower than the current sex offense aggravator because it requires the use or display of

[49] D.C. Code § 22-3020(a)(6).

[50] However, there is DCCA case law interpreting the repealed armed rape offense that may inform how the DCCA would interpret the current armed aggravator. The previous armed rape offense required that the defendant commit rape "when armed with or [when] having readily available any . . . dangerous or deadly weapon," which is the same language in the current armed aggravator. *Johnson v. United States*, 613 A.2d 888, 897 (D.C. 1992) (quoting D.C. Code § 22-3202(a) (1989 & 1991 Suppl.)). In *Johnson v. United States*, the appellant did not actually use the dangerous weapon during the sexual assault, but used the dangerous weapon prior to the sexual assault to injure the complainant and the weapon was present in the room at the time of the sexual assault. *Johnson v. United States*, 613 A.2d 888, 891, 898 (D.C. 1992). The DCCA held that "the government satisfied its burden of proving the 'armed' element by demonstrating that the coercive element of the sexual assault arose directly from appellant's use of a dangerous weapon." *Johnson*, 613 A.2d at 898. Although the armed rape offense has been repealed, *Johnson* may support requiring a causation element in the current armed aggravator for the sexual abuse statutes because of the identical "while armed" language.

[51] D.C. Code §§ 22-4501(1); 22-4502(a).

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

[53] The current sexual abuse weapons aggravators refers to "a pistol or any other firearm (or imitation thereof). D.C. Code § 22-3020(a)(6). The revised enhancement does not, however, because the revised definitions of "dangerous weapon" and "imitation dangerous weapon" in RCC § 22E-701 specifically include firearms and imitation firearms.

[54] The commentary to the RCC menacing statute (RCC § 22E-1203) further discusses the meaning of "use."

the weapon, and also requires that the use or display of the weapon caused the sexual activity. An actor that is merely "armed with" or "had readily available" a dangerous weapon or imitation dangerous weapon may still face liability under the RCC weapons offenses as well as liability for second degree or fifth degree of the revised sexual assault statute. The "recklessly" culpable mental state is consistent with weapons gradations in other RCC offenses against persons. The revised enhancement includes imitation dangerous weapons because in the context of sexual assault, an imitation dangerous weapon can be as coercive as a real dangerous weapon. This change improves the proportionality of the revised sexual assault statute.

Eleventh, the revised sexual assault penalty enhancement for causing serious bodily injury, due to the revised definition of "serious bodily injury," no longer includes rendering a complainant "unconscious," causing "extreme physical pain," or impairment of a "mental faculty." The current sex offense aggravator for causing serious bodily injury[55] incorporates the current definition of "serious bodily injury" for the sex offenses, which includes "unconsciousness, extreme physical pain . . . or protracted loss or impairment of the function of a . . . mental faculty."[56] As is discussed in the commentary to the revised definition of "serious bodily injury" in RCC § 22E-701, these provisions in the current definition are difficult to measure and may include within the definition physical harms that otherwise fall short of the high standard the definition requires. In contrast, the revised definition of "serious bodily injury," and the revised penalty enhancement using that term, are limited to a substantial risk of death, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ. This change improves the consistency and proportionality of the revised sex offenses.

Twelfth, first degree sexual assault[57] is no longer subject to the heightened penalties and aggravating circumstances in current D.C. Code § 24-403.01(b-2). Current D.C. Code § 24-403.01(b-2) establishes heightened penalties for first degree sexual abuse and first degree sexual abuse while armed if specified procedural requirements are met[58]

[55] D.C. Code § 22-3020(a)(3).

[56] D.C. Code § 22-3001(7).

[57] As will be discussed, current D.C. Code § 24-403.01(b-2) authorizes enhanced penalties for first degree sexual abuse and first degree sexual abuse while armed, and the RCC replaces those enhanced penalties. In the RCC, however, there is no longer a sexual assault "while armed" offense. Depending on the facts of the case, the equivalent offense would be first degree sexual assault with an enhancement under subsection (g) of the revised sexual assault statute or first degree sexual assault with additional liability under [RCC §§ 22E-XXXX revised PFCOV-type offense]. For clarity, the commentary for this entry refers only to first degree sexual assault when discussing the relevant RCC statute, even though the various forms of liability for first degree sexual assault committed with the use or presence of a weapon are also affected by the revision.

[58] D.C. Code § 24-403.01(b-2) ("(1) The court may impose a sentence in excess of 60 years for first degree murder or first degree murder while armed, 40 years for second degree murder or second degree murder while armed, or 30 years for armed carjacking, first degree sexual abuse, first degree sexual abuse while armed, first degree child sexual abuse or first degree child sexual abuse while armed, only if: (A) Thirty-days prior to trial or the entry of a plea of guilty, the prosecutor files an indictment or information with the clerk of the court and a copy of such indictment or information is served on the person or counsel for the person, stating in writing one or more aggravating circumstances to be relied upon; and (B) One or more aggravating circumstances exist beyond a reasonable doubt.").

and "one or more aggravating circumstances exist beyond a reasonable doubt."[59] In contrast, the revised sexual assault statute is subject to a single set of aggravators in subsection (g) of the revised statute, as well as the general enhancements in the RCC for repeat offenders (RCC § 22E-606), hate crimes (RCC § 22E-607), and pretrial release (RCC § 22E-608). As a result, the general aggravating circumstances in D.C. Code § 24-403.01(b-2) no longer apply to first degree sexual assault, although several of them are covered by other provisions in the RCC.[60] The special procedures in D.C. Code § 24-403.01(b-2) to give notice to a defendant are unnecessary because aggravating

[59] The aggravating circumstances that apply to first degree sexual abuse are unclear. D.C. Code § 24-403.01(b-2)(2) establishes that the "[a]ggravating circumstances for first degree sexual abuse . . . are set forth in § 22-3020," but the statute also codifies an additional set of aggravating circumstances that apply to "all offenses." It is unclear whether first degree sexual abuse is included in "all offenses" and is subject to the additional set of aggravating circumstances, or if "all offenses" is limited to the offenses for which D.C. Code § 24-403.01(b-2) authorizes an enhanced penalty that do not have offense-specific aggravating circumstances. The aggravating circumstances that apply for first degree sexual abuse while armed are similarly unclear. D.C. Code § 24-403.01(b-2)(2) does not specify whether first degree sexual abuse while armed is included in the reference to first degree sexual abuse and the aggravating circumstances in D.C. Code § 22-3020, or if it is subject only to the additional set of aggravating circumstances for "all offenses." Regardless, the revised sexual assault statute replaces the aggravating circumstances in D.C. Code § 24-403.01(b-2) insofar as they are applicable to first degree sexual abuse and first degree sexual abuse while armed. The revised sexual assault statute also replaces the aggravating circumstances in D.C. Code § 22-3020, which is discussed elsewhere in this commentary as a substantive change in law.

[60] The general aggravating circumstances in D.C. Code § 24-403.01(b-2)(2) are: "(A) The offense was committed because of the victim's race, color, religion, national origin, sexual orientation, or gender identity or expression (as defined in § 2-1401.02(12A); (B) The offense was committed because the victim was or had been a witness in any criminal investigation or judicial proceeding or was capable of providing or had provided assistance in any criminal investigation or judicial proceeding; (C) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (D) The offense was especially heinous, atrocious, or cruel; (E) The offense involved a drive-by or random shooting; (F) The offense was committed after substantial planning; (G) The victim was less than 12 years old or more than 60 years old or vulnerable because of mental or physical infirmity; [and] (H) Except where death or serious bodily injury is an element of the offense, the victim sustained serious bodily injury as a result of the offense." D.C. Code § 24-403.01(b-2)(2).

In the RCC, none of these aggravating circumstances apply to the revised first degree sexual assault offense. However, the offense is subject to several penalty enhancements that are substantially similar to several of the aggravating circumstances—the general penalty enhancement for hate crimes in RCC § 22E-607, the sexual assault penalty enhancement for recklessly disregarding that the complainant was a "vulnerable adult" (RCC § 22E-1303(g)(4)(F)), and the sexual assault penalty enhancement for recklessly causing serious bodily injury to the complainant (RCC § 22E-1303(g)(3)). In addition, the revised sexual assault statute continues to enhance penalties for complainants under the age of 12 years (RCC § 22E-1303(g)(4)(A)) and for an elderly complainant (RCC § 22E-1303(g)(4)(E)), but has additional requirements for these enhancements that differ from D.C. Code § 24-403.01(b-2)(2).

The remaining aggravators in D.C. Code § 24-403.01(b-2)(2) appear better suited for the homicide offenses that are subject to enhanced penalties in the statute: "(B) The offense was committed because the victim was or had been a witness in any criminal investigation or judicial proceeding or was capable of providing or had provided assistance in any criminal investigation or judicial proceeding; (C) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (D) The offense was especially heinous, atrocious, or cruel; (E) The offense involved a drive-by or random shooting; (F) The offense was committed after substantial planning." To the extent that these aggravators would apply to the revised first degree sexual assault offense, other offenses in the RCC may cover the conduct, such as [RCC §§ 22E-XXX obstruction of justice] or are more appropriate for consideration at sentencing.

circumstances must be charged in the criminal indictment per Supreme Court case law decided after passage of the District statute.[61] This revision improves the consistency and proportionality of the revised sexual assault statute.

Thirteenth, the revised sexual assault statute replaces certain minimum statutory penalties for first degree sexual abuse, second degree sexual abuse, and child sexual abuse in D.C. Code § 24-403.01(e).[62] These minimum statutory penalties require specified prior convictions, and it is unclear how the general recidivist statutes in the current D.C. Code[63] apply, if at all, to these provisions. In contrast, the revised sexual assault statute is subject to a single recidivist penalty enhancement in RCC § 22E-606 that applies to all offenses in the RCC. There is no clear rationale for such special sentencing provisions in these offenses as compared to other offenses. This change improves the consistency and proportionality of the revised offense.

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

First, the revised sexual assault statute consistently requires that the actor "causes the complainant to engage in or submit to" the sexual act or sexual contact. While all of the current sexual abuse statutes require that the actor "engages in" the sexual conduct, they vary in whether there is liability if the actor "causes" the complainant to "engage in" the sexual conduct or "causes" the complainant to "submit to" the sexual conduct.[64] This variation creates different plain language readings of the current sexual abuse statutes and suggests that the current offenses vary in scope as to the prohibited conduct and liability for involvement of a third party. There is no case law on point. However, DCCA case law addressing similar language in the District's current misdemeanor sexual abuse statute suggests that the DCCA may not construe such language variations as legally significant.[65] In addition to case law, District practice does not appear to follow the

[61] The D.C. Council approved D.C. Code § 24-403(b-2) well before *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) was decided, and the statute became law shortly before *Apprendi* was decided. D.C. Code § 24-403(b-2) was approved on August 2, 2000, and became effective on June 8, 2001. The Sentencing Reform Amendment Act of 2000, 2000 District of Columbia Laws 13-302 (Act 13–406). *Apprendi* was decided on June 26, 2000. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[62] D.C. Code § 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of first or second degree sexual abuse or child sexual abuse in violation of § 22-3002, § 22-3003, or § 22-3008 through § 22-3010, shall not be less than 7 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence, as so defined.").

[63] D.C. Code §§ 22-1804; 22-1804a.

[64] First degree sexual abuse, second degree sexual abuse, and sexual abuse of a ward codify "engages in" the sexual conduct, "causes" the complainant to "engage in" the sexual conduct, and "causes" the complainant to "submit to" the sexual conduct. D.C. Code §§ 22-3002 and 22-3003; 22-3013 and 22-3014. Third and fourth degree sexual abuse, child sexual abuse, sexual abuse of a minor, and sexual abuse of a secondary education student are limited to "engages in" the sexual conduct and "causes" the complainant to "engage in" the sexual conduct. D.C. Code §§ 22-3004 and 22-3005; 22-3008 and 22-3009; 22-3009.01 and 22-3009.02. Misdemeanor sexual abuse and sexual abuse of a patient or client require only "engages in." D.C. Code §§ 22-3006; 22-3015 and 22-3016.

[65] In *Pinckney v. United States*, the DCCA held that the misdemeanor sexual abuse statute includes "conduct where a person uses another to touch intimate parts of the person's own body" even though the

variations in statutory language.[66] Instead of these variations in language, the revised sex offenses and the revised definitions of "sexual act" and "sexual contact" consistently require that the actor "causes" the complainant to "engage in" or "submit to" the sexual conduct. Differentiating liability based on whether an actor themselves commits the sexual conduct in question, or whether the actor causes the complainant to engage in or submit to the sexual conduct, may lead to disproportionate outcomes. This change improves the consistency, clarity, and proportionality of the revised offenses, and reduces unnecessary gaps in liability.

Second, first and third degree of the revised sexual assault statute prohibit causing the complainant to engage in or submit to sexual activity "by" causing the nonconsensual intoxication of the complainant. The current first degree[67] and third degree[68] sexual abuse statutes prohibit a sexual act or sexual contact "after" the actor involuntarily intoxicates the complainant. There is no DCCA case law interpreting the current intoxication provision. It is unclear whether a causal connection is required between the sexual conduct and the involuntary intoxication of the complainant, although the legislative history suggests that such a causation requirement may have been intended.[69] Instead of this ambiguity, the revised sexual assault statute clarifies that involuntary intoxication of the complainant must be causally related (a "but for" condition) to the sexual conduct. The causation requirement, in addition to the culpable mental states in the revised intoxication provision discussed elsewhere in this commentary, ensures that the intoxication provision applies only to actors that knowingly cause a sexual act or sexual contact by administering an intoxicant or causing an intoxicant to be

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plain language of the statute requires "engages in a sexual act or sexual contact with another person." *Pinckney v. United States*, 906 A.2d 301, 303, 306 (D.C. 2006) (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA declined "an interpretation that would exclude such an obvious means of offensive touching," in part because the legislature intended to "'strengthen the District's laws against sexual abuse and make them more inclusive, flexible and reflective of the broad range of abusive conduct which does in fact occur.'" *Id.* (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA stated that its interpretation of the misdemeanor sexual abuse statute "as applying to the facts of this case does not require appellant to have caused the victim to engage in or submit to sexual contact" because the appellant engaged in the prohibited sexual contact by his own actions." *Id.* However, the DCCA's reliance on the legislative intent of the Anti-Sexual Abuse Act suggests that it would broadly interpret any variations in the language of the current sexual abuse statutes.

[66] The jury instructions for third degree, fourth degree, child sexual abuse, and sexual abuse of a minor include that the actor "caused" the complainant "to engage in or submit to" a sexual act or sexual contact, even though the statutory language for those offenses does not include "causes" the complainant to "submit to." *Compare* D.C. Crim. Jur. Instr. §§ 4.400 (general sexual abuse); 4.401 (child sexual abuse); 4.402 (sexual abuse of a minor) D.C. Code §§ 22-3003 and 22-3004 (third degree and fourth degree sexual abuse statutes); 22-3008 and 22-3009 (first degree and second degree child sexual abuse statutes); 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor statutes).

[67] D.C. Code § 22-3002(a)(4).

[68] D.C. Code §§ 22-3004(4).

[69] Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 10-87, The "Anti-Sexual Abuse Act of 1994" at 14-15 ("Where the offender covertly administers drugs or intoxicants to the victim with the specific intent to engage in the sexual act . . . the use of force element under the existing rape statute cannot be established because there is no proof that the act was 'against the will' of the victim.").

administered.[70] This change improves the clarity and consistency of the revised sexual assault offense.

Third, first degree and third degree of the revised sexual assault offense require a "knowingly" culpable mental state as to the sexual act or sexual contact being accomplished by a specified use of physical force, use of a weapon, or specified threats. The current first degree[71] and third degree[72] 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,[73] and similarly logic would appear to apply to third degree sexual abuse. However, it is unclear what general intent means in terms of required culpable mental states.[74] Instead of this ambiguity, first degree and third degree of the revised sexual assault statute require a "knowingly" culpable mental state as to the sexual act or sexual contact being accomplished by the specified use of physical force, use of a weapon, or specified threats. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[75] A "knowingly" culpable mental state is consistent with current District law for threats[76] and the RCC threats statute (RCC § 22E-1204) and also may clarify that second degree and fourth degree sexual assault are lesser included offenses, which is an unresolved issued in current DCCA case law.[77] This change improves the clarity and consistency of the revised offense.

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[70] The revised intoxication provision ensures the proper scope of liability when the actor does not directly administer the intoxicant to the complainant, such as when the actor sets out a generally available bowl of punch that is spiked with alcohol. In such a situation, the actor may be "practically certain" that the complainant will consume the punch, satisfying the "knowingly" culpable mental state for administering or causing to be administered an intoxicant to the complainant without the complainant's consent. However, there is only liability for first degree or third degree sexual assault if the actor is "practically certain" that the sexual activity occurs as a result of administering the intoxicant. In addition, there can be no liability for first degree or third degree sexual assault unless the actor set out the punch bowl "with intent to impair the complainant's ability to express unwillingness." If an actor fails to satisfy the requirements of the revised intoxication provision, there may still be liability under second degree or fourth degree of the revised sexual assault statute for engaging in sexual activity with an impaired complainant.

[71] D.C. Code § 22-3002.

[72] D.C. Code § 22-3004.

[73] *Kyle v. United States*, 759 A.2d 192, 199 (D.CD. 2000) ("Voluntary intoxication, however, is not a defense to a general intent crime such as first degree sexual abuse.").

[74] The DCCA has defined "general intent" in different ways, including that a "defendant cannot possess the requisite general intent to commit a crime without 'be[ing] aware of all those facts which make his or her conduct criminal.'" *Campos v. United States*, 617 A.2d 185, 199 (D.C. 1992) (quoting *Hearn v. District of Columbia*, 178 A.2d 434, 437 (D.C. 1962)).

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

[76] While the District's threats statutes are silent as to required culpable mental states, knowledge or as least some subjective intent is required by case law interpreting the threats statutes. See commentary to RCC § 22E-1204.

[77] In *In re E.H.*, the DCCA declined to address whether second degree child sexual abuse is a lesser included offense of first degree child sexual abuse, but noted that"[a]t oral argument, counsel for the government agreed with appellant's counsel that second-degree sexual abuse is not a lesser-included offense of first-degree sexual abuse because, at least in two instances, to prove a "sexual act" (for first-

Fourth, second degree and fourth degree of the revised sexual assault statute require a "knowingly" culpable mental state as to the sexual act or sexual contact being accomplished by "coercion" or with a physically or mentally impaired complainant. The current second degree[78] and fourth degree[79] sexual abuse statutes do not specify any culpable mental states. However, DCCA case law appears to have required specific intent for second degree sexual abuse in one recent case,[80] and the DCCA also has been clear that the statutory definition of "sexual contact" requires specific intent.[81] Instead of this ambiguity, second degree and fourth degree of the revised sexual assault statute require a "knowingly" culpable mental state. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[82] A "knowingly" culpable mental state is consistent with current District law for threats[83] and the RCC threats statute (RCC § 22E-1204) and may also clarify that second degree and fourth degree sexual assault are lesser included offenses of first degree and third degree, which is an

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

Although *In re E.H.* is specific to child sexual abuse, all the current sexual abuse offenses that require a "sexual act" and "sexual contact" have the same issue—the current definition of "sexual contact" has a specific intent requirement that two subsections of the definition of "sexual act" do not. It seems as though the DCCA would find that this specific intent requirement precludes second degree and fourth degree sexual abuse from being lesser included offenses of first degree and third degree sexual abuse in some instances. In the revised sexual assault statute, all gradations require a "knowingly" culpable mental state and the revised definition of "sexual act" in RCC § 22E-1301 requires the same "intent to sexually degrade, arouse, or gratify any person" that the revised definition of "sexual contact" does. Second degree and fourth degree sexual assault are lesser included offenses of first degree and third degree sexual assault in the RCC.

[78] D.C. Code § 22-3003.

[79] D.C. Code §§ 22-3006.

[80] *Way v. United States*, 982 A.2d 1135, 1137 (D.C. 2009) ("There was also evidence from which a reasonable fact-finder could conclude that appellant had the specific intent to obtain sex by placing [the complainant] in fear of arrest."). Older District case law predating the 1994 Anti-Sexual Abuse Act that enacted first degree through fourth degree sexual abuse, characterized rape as a general intent offense. *See, e.g., United States v. Thornton*, 498 F.2d 749, 753 (D.C. Cir. 1974) (internal quotations omitted).

[81] *See, e.g., In re E.H.*, 967 A.2d 1270, 1271, 1275 n.9 (D.C. 2009) ("[a]t oral argument, counsel for the government agreed with appellant's counsel that second-degree sexual abuse is not a lesser-included offense of first-degree sexual abuse because, at least in two instances, to prove a "sexual act" (for first-degree [sexual abuse of a child]) it is not necessary to show the specific intent required to prove "sexual contact" (for second-degree [sexual abuse of a child]).").

[82] *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)").

[83] While the District's threats statutes are silent as to required culpable mental states, knowledge or as least some subjective intent is required by case law interpreting the threats statutes. See commentary to RCC § 22E-1204.

unresolved issue in current DCCA case law.[84] This change improves the clarity and consistency of the revised offense.

Fifth, the revised first degree and third degree sexual assault statutes no longer include "use of a threat of harm sufficient to coerce or compel submission by the victim." The current first degree[85] and third degree[86] sexual abuse offenses prohibit the use of "force" against the complainant, and the current definition of "force" includes "the use of a threat of harm sufficient to coerce or compel submission by the victim."[87] The DCCA has never interpreted the threats part of the current definition of "force." However, inclusion of any type of threat in the first and third degree statutes appears to render moot the overall statutory framework in the current felony sexual abuse statutes, which purports to differentiate threats by the severity of harm involved.[88] To ensure that the revised statute effectively grades on the severity of threats, the revised first and third degree sexual assault statutes are limited to threats to kill or kidnap any person, or to commit an unwanted sexual act or cause significant bodily injury to any person. This change improves the consistency and proportionality of the revised statutes.

Sixth, first degree and third degree of the revised sexual assault statute include liability for the use of "physical force" that "causes bodily injury to the complainant," as "bodily injury" is defined in RCC § 22E-701. The current first degree[89] and third

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

Although *In re E.H.* is specific to child sexual abuse, all the current sexual abuse offenses that require a "sexual act" and "sexual contact" have the same issue—the current definition of "sexual contact" has a specific intent requirement that two subsections of the definition of "sexual act" do not. It seems as though the DCCA would find that this specific intent requirement precludes second degree and fourth degree sexual abuse from being lesser included offenses of first degree and third degree sexual abuse in some instances. In the revised sexual assault statute, all gradations require a "knowingly" culpable mental state, and the revised definition of "sexual act" in RCC § 22E-1301 requires the same "intent to sexually degrade, arouse, or gratify any person" that the revised definition of "sexual contact" does. Second degree and fourth degree sexual assault are lesser included offenses of first degree and third degree sexual assault in the RCC.

[85] D.C. Code § 22-3002(a)(1).

[86] D.C. Code §§ 22-300(1).

[87] D.C. Code § 22-3001(5).

[88] The current first degree and third degree sexual abuse statutes prohibit threats to subject any person to "death, bodily injury, or kidnapping." D.C. Code §§ 22-3002(a)(2); 22-3004(2). The current second degree and fourth degree sexual abuse statutes prohibit threats "other than" threats of death, bodily injury, or kidnapping. D.C. Code §§ 22-3003(1); 22-3005(1).

[89] D.C. Code § 22-3002(a)(1).

degree[90] sexual abuse statutes prohibit the use of "force" against the complainant. The current D.C. Code definition of "force" in the sex offenses chapter requires, in part, "the use of such physical strength or violence as is sufficient to . . . injure a person." It is unclear whether the injury referenced in the definition of "force" is the same as "bodily injury,"[91] a defined term in the current sex offenses. There is no DCCA case law interpreting the current definition of "force." In contrast, instead of referring generally to an injury, first degree and third degree of the revised sexual assault statute prohibit causing "bodily injury," a defined term in RCC § 22E-701 that means "physical pain, illness, or any impairment of physical condition." This change improves the clarity and consistency of the revised sexual assault statute.

Seventh, first degree and third degree of the revised sexual assault statute recognize the use of a "weapon against the complainant" as a basis for liability. The current first degree[92] and third degree[93] sexual abuse statutes prohibit the use of "force" against the complainant. "Force" is currently defined to include "the use or threatened use of a weapon."[94] The sexual abuse statutes do not define "weapon"[95] and there is no DCCA case law on this issue. Instead of this ambiguity, the revised sexual assault statute codifies the use of a "weapon" against the complainant as a distinct basis for liability in first degree and third degree. The term "use" is intended to include making physical contact with the weapon and conduct other than speech—i.e., oral or written language, symbols, or gestures—that indicates the presence of a weapon.[96] This provision recognizes that a weapon that does not satisfy the RCC definition of "dangerous weapon"[97] may still cause a complainant to engage in or submit to sexual activity.[98] The revised penalty enhancement in subsection (g)(1) is reserved for a "dangerous weapon" or "imitation dangerous weapon." This change improves the clarity and consistency of the revised offense.

Eighth, the intoxication provision in first degree and third degree of the revised sexual assault statute specifies several culpable mental states. The current intoxication

[90] D.C. Code §§ 22-300(1).
[91] 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.").
[92] D.C. Code § 22-3002(a)(1).
[93] D.C. Code § 22-3004(1).
[94] D.C. Code § 22-3001(5).
[95] In addition, it is unclear if "weapon" in the current definition of "force" is different from "dangerous or deadly weapon" in the current sexual abuse aggravators in D.C. Code § 22-3020. D.C. Code § 22-3020(a)(6).
[96] The commentary to the RCC menacing statute (RCC § 22E-1203) further discusses the meaning of "use."
[97] RCC § 22E-701 defines "dangerous weapon" as "(A) A firearm as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded; (B) A prohibited weapon; (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."
[98] The American Law Institute Commentary to the revised draft Model Penal Code offense of Forcible Rape notes that "certain weapons (for example a sling shot, paddle, or not stick, can be coercive without necessarily being used in a way that arouses fear of serious bodily injury or other overwhelming intimidation" as required by the Model Penal Code definition of "dangerous weapon."

provision does not specify any culpable mental states,[99] although the legislative history references a specific intent to engage in the sexual activity.[100] DCCA case law has determined that first degree sexual abuse is a "general intent" crime for purposes of an intoxication defense,[101] and similar logic would appear to apply to third degree sexual abuse. It is unclear what general intent means in terms of required culpable mental states, but the DCCA has defined "general intent" in different ways, including that a "defendant cannot possess the requisite general intent to commit a crime without 'be[ing] aware of all those facts which make his or her conduct criminal.'"[102] Instead of this ambiguity, the revised intoxication provision specifies several culpable mental states. First, a "knowingly" culpable mental state applies to administering or causing to be administered an intoxicant, doing so without the complainant's "effective consent," and the fact that the substance is an intoxicant. The "knowingly" culpable mental state also applies to the required causation between administering the intoxicant and the sexual conduct. Second, the actor must act "with intent to impair the complainant's ability to express unwillingness" to engage in the sexual act or sexual contact. Finally, the revised intoxication provision, by the use of "in fact," requires strict liability for the effects of the intoxicant because administering an intoxicant without the complainant's "effective consent" is an assault. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[103] However, an actor may be held strictly liable for elements of an offense that aggravate what is already illegal conduct.[104] If an actor fails to satisfy any of the culpable mental states in the revised intoxication provision, there may still be liability for sexual activity with a physically or mentally impaired person in second degree or fourth degree of the revised sexual assault statute. This change improves the clarity and consistency of the revised sexual assault statute.[105]

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[99] D.C. Code §§ 22-3002(a)(4); 22-3004(4).

[100] Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 10-87, The "Anti-Sexual Abuse Act of 1994" at 14-15 ("Where the offender covertly administers drugs or intoxicants to the victim with the specific intent to engage in the sexual act . . . the use of force element under the existing rape statute cannot be established because there is no proof that the act was 'against the will' of the victim.").

[101] *Kyle v. United States*, 759 A.2d 192, 199 (D.CD. 2000) ("Voluntary intoxication, however, is not a defense to a general intent crime such as first degree sexual abuse.").

[102] *Campos v. United States*, 617 A.2d 185, 199 (D.C. 1992) (quoting *Hearn v. District of Columbia*, 178 A.2d 434, 437 (D.C. 1962)).

[103] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[104] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464)."). In this instance, administering an intoxicant without consent and with the specified intent is already sufficient to impose assault or attempted assault liability.

[105] The revised intoxication provision ensures the proper scope of liability when the actor does not directly administer the intoxicant to the complainant, such as when the actor sets out a generally available bowl of punch that is spiked with alcohol. In such a situation, the actor may be "practically certain" that the complainant will consume the punch, satisfying the "knowingly" culpable mental state for administering or causing to be administered an intoxicant to the complainant without the complainant's consent. However, there is only liability for first degree or third degree sexual assault if the actor is "practically certain" that

Ninth, second degree and fourth degree of the revised sexual assault statute prohibit sexual assault by a "coercive threat," as that term is defined in RCC § 22E-701. The current second degree and fourth degree sexual abuse statutes prohibit a sexual act or sexual contact by "threatening or placing that other person in reasonable fear (other than by threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping)."[106] There is no apparent statutory limit to the type of threats or fear, and the legislative history generally notes that the offenses "encompass other types of coercion."[107] The DCCA has sustained convictions for second degree sexual abuse for placing a complainant in reasonable fear of arrest[108] and reasonable fear of being fired from employment.[109] Instead of a general reference to threats, second degree and fourth degree of the revised sexual assault statute prohibit a "coercive threat," a defined term in RCC § 22E-701 that is used consistently in the RCC. The RCC definition specifies certain common types of coercive threats, but also has a broad catch-all provision for threats that are "sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply." This change improves the clarity and consistency of the revised offense.

Tenth, the revised sexual assault statute details the meaning, burden of proof, and limitations of an effective consent defense to the revised sexual assault statute. The current consent defense to the general sexual abuse statutes simply states that "[c]onsent by the victim is a defense to a prosecution" for first degree through fourth degree sexual abuse, as well as misdemeanor sexual abuse, without discussion as to any limitations on the defense.[110] The statutory definition of "consent"[111] further specifies that such consent must be "freely given," a critical limitation, but the meaning of this language is unclear in the statute. DCCA case law recognizes two situations where consent is an appropriate defense to the use of force in a sexual encounter—when the complainant gave consent

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the sexual activity occurs as a result of administering the intoxicant. In addition, there can be no liability for first degree or third degree sexual assault unless the actor set out the punch bowl "with intent to impair the complainant's ability to express unwillingness." If an actor fails to satisfy the requirements of the revised intoxication provision, there may still be liability under second degree or fourth degree of the revised sexual assault statute for engaging in sexual activity with an impaired complainant.

[106] D.C. Code §§ 22-3003; 22-3005. First degree and third degree sexual abuse prohibit "threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping."). D.C. Code §§ 22-3002; 22-3004.

[107] Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 15 ("The first degree offense would encompass any type of physical force, as well as coercion through threats that any person will be subjected to death, bodily injury, or kidnapping. . . The second degree offense would encompass other types of coercion."). The legislative history refers to "the second degree offense," but also applies to what is now fourth degree sexual abuse. In the legislation as introduced, what is now fourth degree sexual abuse was a lower gradation for a sexual contact. *Id.* at 7.

[108] *Way v. United States*, 982 A.2d 1135, 1135, 1137 (D.C. 2009) ("The evidence was sufficient [for second degree sexual abuse] to show that [the complainant] engaged in sexual acts with appellant only because she had a reasonable fear of being arrested.").

[109] *Hughes v. United States*, 150 A.3d 289, 306 (D.C. 2016) (stating that the government's evidence was sufficient for second degree sexual abuse that the complainant "was in reasonable fear of being fired.").

[110] D.C. Code § 22-3007 ("Consent by the victim is a defense to a prosecution under §§ 22-3002 to 22-3006, prosecuted alone or in conjunction with charges under § 22-3018 or §§ 22-401 and 22-403.").

[111] D.C. Code § 22-3001(4).

despite the use of force[112] or the defendant reasonably believed that the complainant consented.[113] Under current case law, if the actor raises a consent defense, "evidence of consent may be relevant to the issue of whether the defendant did in fact use force to engage the complainant in sexual activity."[114] However, the DCCA has not discussed the government's burden of disproving the consent defense under the current consent defense statute.[115] With respect to limitations on the consent defense, the DCCA, relying on various indications of legislative intent, has held that persons under 16 years of age categorically cannot consent to the use of force by an adult that is at least four years older in a sexual encounter.[116] Although no case law is on point, case law on the District's

[112] *Hatch v. United States*, 35 A.3d 1115, 1116 (D.C. 2011) ("[I]f the government proves the sexual encounter was forcible, the defendant then may attempt to prove that the victim effectively consented *despite* whatever force was involved. Such consent is rare; mere submission by the victim to the use of force is not the equivalent of consent.") (emphasis in original). The DCCA has stated generally that "it is both constitutionally impermissible and logically incoherent to place the burden of persuasion with respect to consent on the defendant if the claim of consensual participation is nothing more than a denial of the use of force, an element of the offense that the government has the burden of proving." *Id.* at 1121-22.

[113] *Hatch*, 35 A.3d at 1122. ("An affirmative defense of consent to a charge of forcible sexual assault makes sense only in the unusual case in which there is evidence that the defendant's otherwise culpable use of force was excused—as where the complainant led the defendant to believe (if not correctly, then at least reasonably) that she engaged in sado-masochistic or "rough" sex willingly."). The DCCA has stated generally that "it is both constitutionally impermissible and logically incoherent to place the burden of persuasion with respect to consent on the defendant if the claim of consensual participation is nothing more than a denial of the use of force, an element of the offense that the government has the burden of proving." *Id.* at 1121-22.

[114] *Hatch*, 35 A.3d at 1116. DCCA case law makes clear that "at least when the legislature has not expressed otherwise, [the] jury should be expressly instructed that it may consider whether the government has met its burden to prove all the elements of the offense beyond a reasonable doubt." *Russell v. United States*, 698 A.2d 1007, 1015-16 (D.C. 1997).

[115] The original consent defense in the Anti-Sexual Abuse Act of 1994 required that the actor establish the complainant's consent by a preponderance of the evidence. D.C. Code § 22-3007 (1995). In 2009, due to concerns that the preponderance requirement was creating confusion allowing impermissible burden shifting, the preponderance requirement was deleted. In 1997, in *Russell v. United States*, the DCCA discussed in dicta the government's burden after the actor proved consent by a preponderance of the evidence. In *Russell*, the trial court instructed the jury that if the defendant proved consent by a preponderance of the evidence, the government must prove beyond a reasonable doubt that the complainant's consent was voluntary. *Russell v. United States*, 698 A.2d 1007, 1011 (D.C. 1997). The DCCA noted in dicta that the trial court misstated the law because voluntariness is not the standard for consent. *Russell*, 698 A.2d 1016 n.12. The court stated that the "correct standard under the new statute is whether a reasonable person would think that the complainant's 'words or overt actions indicate[d] a freely given agreement to the sexual act or sexual contact in question.'" *Id.* The court did not discuss the source of the reasonable person standard.

[116] The DCCA has held that in a prosecution under the current general sexual abuse statutes, if the complainant is a "child" under the age of 16 years "an adult defendant who is at least four years older than the complainant may not assert a "consent" defense. In such a case, the child's consent is not valid." *Davis v. United States*, 873 A.2d 1101, 1106 (D.C. 2005). "Child" is defined in D.C. Code § 22-3001 as "a person who has not yet attained the age of 16 years." D.C. Code § 22-3001(3). "Adult" is not statutorily defined in the current sex offenses, and the DCCA does not provide a definition in *Davis*. The DCCA further noted that the four-year age gap requirement in the current child sexual abuse statutes "appears [to] modify the traditional rule [that a child is legally incapable of consenting to sexual conduct with an adult] so as to allow *bona fide* consent of a child victim to be a potential defense where the defendant is less than four years older than the child." *Id.* at 1105 n.8.

assault statute[117] and dicta in one sexual abuse case[118] suggest that a person may not be able to consent to more severe harms and threats of harm.

The revised sexual assault offense's effective consent defense is generally consistent with the current consent defense and existing case law. However, the RCC definition of "effective consent" clarifies the meaning of the phrase "freely given" in the current definition of "consent" to mean consent other than consent induced by physical force, a coercive threat, or deception. The effective consent defense is limited to the two situations recognized in DCCA case law—when the complainant gave consent despite the use of force or the defendant reasonably believed that the complainant consented. The effective consent defense follows existing case law as to when evidence of effective consent may be relevant, but goes beyond current case law to clarify that if there is any evidence present at trial of the complainant's effective consent or the defendant's reasonable belief that the complainant gave effective consent, the government must prove the absence of such circumstances beyond a reasonable doubt—either that the complainant did not give effective consent or the actor's belief was not reasonable. With respect to limitations on the defense, the RCC effective consent defense does not apply if the conduct inflicts "significant bodily injury" or "serious bodily injury," as those terms are defined in RCC § 22E-701, or if the conduct involved the use of a "dangerous weapon" as that term is defined in RCC § 22E-701. In addition, the effective consent defense does not apply when a complainant is under the age of 16 years and the actor is at least four years older (subsection (e)(1)(B)(i)) (reflecting current case law), or for certain complainants under the age of 18 years (subsection (e)(1)(B)(ii)).[119] Lastly, the RCC effective consent defense deletes now unnecessary language "prosecuted alone or in conjunction with charges under § 22-3018 [attempt statute for sex offenses] or §§ 22-401 [assault with intent to commit specified offenses] and 22-403 [assault with intent to commit specified offenses]."[120] This change improves the clarity and consistency of the revised sexual assault statute.

Eleventh, the revised sexual assault penalty enhancements require that accomplices be "present" at the time of the sexual conduct. The current accomplice

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Since the revised sexual abuse of a minor statute applies to complainants under the age of 16 years when the actor is at least four years older, and the effective consent defense excludes these complainants from a consent defense.

[117] The DCCA recently held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly declined to rule on the effect of consent in other circumstances. *Woods v. U.S.*, 65 A.3d 667, 672 (D.C. 2013).

[118] *Hatch*, 35 A.3d at 1120 (noting that "consenting at gunpoint is "an absurd proposition").

[119] In addition to the specific limitations in subsection (e)(1)(B)(i) and subsection (e)(1)(B)(ii), the RCC definitions of "consent" and "effective consent" require that the complainant be generally competent to give consent. RCC § 22E-701 defines "effective consent" as "consent other than consent induced by physical force, 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."

[120] D.C. Code § 22-3007. The RCC sex offenses no longer have their own assault statute and liability for the conduct criminalized by the AWI offenses is provided through application of the general attempt statute in RCC § 22E-301 to the completed offenses. See Commentary to RCC § 22E-1202 (revised assault statute).

aggravator for the sex offense statutes requires that the "defendant was aided or abetted by 1 or more accomplices."[121] There is no DCCA case law interpreting this aggravator,[122] and it is unclear whether the aggravator would apply if an accomplice was not present at the offense. However, for the revised sexual assault penalty enhancement, the accomplices must be "present" at the time of the offense. Accomplices that are present at the time of the offense potentially increase the danger and effects of the offense in a way that other, physically absent accomplices do not. Limiting the enhancement to accomplices that are present at the time of the offense improves the proportionality of the revised offense.

Twelfth, the revised sexual assault penalty enhancement requires a "knowingly" culpable mental state for the actor acting with one or more accomplices. The current accomplice aggravator for the sex offenses requires that the "defendant was aided or abetted by 1 or more accomplices."[123] The current statute does not specify any culpable mental states and there is no DCCA case law for this issue. Instead of this ambiguity, the revised sexual assault penalty enhancement requires a "knowingly" culpable mental state for acting with "one or more accomplices present at the time of the offense."[124] The "knowingly" culpable mental state improves the clarity and consistency of the revised sexual assault statute.

Thirteenth, the revised sexual assault statute is subject to the RCC general provision enhancement for repeat offenders. The current sex offense aggravators include an aggravator if the "defendant is or has been found guilty of committing sex offenses against 2 or more victims, whether in the same or other proceedings by a court of the District of Columbia, any state, or the United States or its territories."[125] The plain language of the enhancement is unclear[126] and there is no case law clarifying the issue. In addition, current District law has general recidivist penalty enhancements applicable to sex offenses.[127] It is unclear how the multiple recidivist enhancements apply to the sex offenses, and there is no case law. Instead of overlapping recidivist enhancements, the revised sexual assault statute is subject to the RCC general recidivist penalty enhancement (RCC § 22E-606). By eliminating overlapping recidivist penalty

[121] D.C. Code § 22-3020(a)(4).

[122] However, current District law generally extends aider and abettor liability to accomplices who are not present at the time of the offense. *See, e.g., Kelly v. United States*, 639 A.2d 86, 91 (D.C. 1994) (upholding aider and abettor liability where "the jury could reasonably have found that appellant had participated in planning the robbery," and served as getaway driver, but was not physically present during the robbery) (collecting District case law).

[123] D.C. Code § 22-3020(a)(4).

[124] The revised penalty enhancement no longer uses the words "aided or abetted" that are in the current enhancement because they are surplusage. The revised penalty enhancement also no longer specifies that "[i]t is not necessary that the accomplices have been convicted for an increased punishment (or enhanced penalty) to apply" as the current penalty enhancement specifies in D.C. Code § 22-3020(a)(6).

[125] D.C. Code § 22-3020(a)(5). In addition to the specific sexual abuse aggravator, current District law has general penalty enhancements for prior convictions. D.C. Code §§ 22-1805; 22-1805a. It is unclear how the multiple recidivist penalty enhancements apply to the sex offenses, and there is no DCCA case law.

[126] One possible interpretation is that priors will only be counted if they are against different complainants. Another interpretation, not precluded by the plain language, is that for a prior to count, it must involve two or more victims—although this interpretation would exclude many prior sex offenses.

[127] D.C. Code §§ 22-1805; 22-1805a.

enhancements, the RCC improves the consistency and proportionality of the revised sexual assault statutes.

Fourteenth, by use of the phrase "in fact," the revised sexual assault penalty enhancements apply strict liability to the age of a complainant when the complainant is under 12 years or age, and to an actor being 18 years of age or older and at least four years older than the complainant. The current sex offense aggravators include when the "victim was under the age of 12 at the time of the offense."[128] The statute does not specify any culpable mental states and there is no DCCA case law on this issue. Current D.C. Code § 22-3611 also codifies a general penalty enhancement when an actor 18 years of age or older commits specified crimes against persons under 18 years of age when the actor is at least two years older than the complainant.[129] The current enhancement does not specify any culpable mental states for the age of the actor or the required age gap,[130] and there is no DCCA case law. Instead of these ambiguities as to the required culpable mental state, the revised penalty enhancement, by use of the phrase "in fact," applies strict liability to the age of a complainant under the age of 12 years and, for an actor being 18 years of age or older and at least four years older than the complainant. Strict liability for these ages and age gaps is consistent with the strict liability requirement in first degree and third degree of the revised sexual abuse of a minor statute (RCC § 22E-1302).[131] These changes improve the consistency and proportionality of the revised statutes.

Fifteenth, the revised sexual assault penalty enhancements require that the actor "recklessly disregard" the fact that the complainant was under the age of 18 and that the actor was in a position of trust with or authority over the complainant. One of the current sex offense aggravators applies when "the victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim."[132] The current sex offense aggravators statute does not specify any culpable mental states and there is no DCCA case law on this issue. Instead of this ambiguity, the revised penalty enhancement requires that the actor was reckless as to the fact that the complainant was under the age of 18 years, and the fact that the actor is in a "position of trust with or authority over" the complainant. Given that the RCC definition of a "position of trust with or authority over" the complainant includes positions where the actor may not have any prior knowledge or interaction with the complainant,[133] and that sixteen and seventeen year olds generally are able to consent to sexual encounters under current law and the RCC, requiring some degree of subjective awareness as to the special relationship

[128] D.C. Code § 22-3020(a)(1).
[129] D.C. Code §§ 22-3611(a), (c).
[130] The enhancement does have an affirmative defense for reasonable mistake of the complainant's age. D.C. Code § 22-3611(b) ("It is an affirmative defense that the accused reasonably believed that the victim was not [under the age of 18 years] at the time of the offense. This defense shall be established by a preponderance of the evidence.").
[131] The revised sexual abuse of a minor statute does not have an affirmative defense for mistake of age for complainants under the age of 12 years, unlike the remaining gradations for complainants under the age of 16 years and under the age of 18 years. RCC § 22E-1305.
[132] D.C. Code § 22-3020(a)(2).
[133] For example, a nineteen year old youth leader may be in a "position of trust with or authority over" the complainant, a participant in a large youth program, even though the youth leader and complainant have not met and are not aware of the other's involvement in the program.

is appropriate. An actor who is not at least reckless as to being in a position of trust with or authority over the complainant would still be subject to liability for sexual assault, but not this penalty enhancement. These changes improve the consistency and proportionality of the revised statutes.

Sixteenth, the revised serious bodily injury penalty enhancement requires a "recklessly" culpable mental state. The current sex offense aggravators include when the "victim sustained serious bodily injury as a result of the offense."[134] The current sex offense aggravators statute does not specify any culpable mental states and there is no DCCA case law for this issue. Instead of this ambiguity, the revised penalty enhancement requires a "recklessly" culpable mental state for causing serious bodily injury during the sexual assault, which is consistent with several gradations of the revised assault statute (RCC § 22E-1202). An actor who is not at least reckless as to causing serious bodily injury would still be subject to liability for sexual assault, but not this penalty enhancement. This change improves the consistency and proportionality of the revised offense.

Seventeenth, the revised statute specifies how penalty enhancements in the revised statute interact with other, general penalty enhancements in the RCC. Neither the current sex offense aggravators in D.C. Code § 22-3020 nor other general penalty enhancements defined in the D.C. Code specify how the enhancements interrelate—e.g., whether multiple enhancements can be applied, and to what effect. DCCA case law does not specifically address the relationship between the sex offense aggravators in D.C. Code § 22-3020 , and the D.C. Code provisions concerning repeat offender enhancements,[135] hate crime enhancements,[136] and pretrial release penalty enhancements.[137] To resolve this ambiguity, the revised statute specifies that the revised sexual assault statute's penalty enhancements apply in addition to any general penalty enhancements based on RCC § 22E-605 Limitations on Penalty Enhancements, § 22E-606 Repeat Offender Penalty Enhancements, § 22E-607 Hate Crime Penalty Enhancement, or § 22E-608 Pretrial Release Penalty Enhancements. This change improves the clarity, and may improve the proportionality of the revised statute.

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

First, rendering the complainant unconscious is not a distinct form of liability in the revised sexual assault statute. The current first degree and third degree sexual abuse statutes prohibit sexual conduct "after" the actor "render[s] that other person unconscious."[138] This provision is surplusage because the current first degree and third degree sexual abuse statutes separately prohibit both causing "injury," which would include rendering the complainant unconscious,[139] and the nonconsensual administration of an intoxicant. For clarification, the revised sexual assault statute omits an overlapping

[134] D.C. Code § 22-3020(a)(3).
[135] D.C. Code §§ 22-1804; 22-1804a.
[136] D.C. Code §§ 22-3701; 22-3702; 22-3703.
[137] D.C. Code § 23-1328.
[138] D.C. Code §§ 22-3002(a)(3); 22-3004(3).
[139] D.C. Code § 22-3001(5) (defining "force" to include "the use of such physical strength or violence as is sufficient to overcome, restrain, or injure" the complainant).

provision on sexual conduct after rendering a person unconscious. This change improves the clarity of the revised statutes.

Second, the revised sexual assault statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses. Under the statute, if the maximum term of imprisonment for the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[140] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[141] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[142] In the revised sexual assault statute, the RCC General Part's attempt provisions (RCC § 22E-301) establish the requirements to prove an attempt and applicable penalties for sexual assault, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general attempt provision provide penalties at ½ the maximum imprisonment sentence, as in current D.C. Code § 22-3018. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of revised statutes.

Third, the revised sexual assault offenses prohibit "threatening." Current first degree through fourth degree sexual abuse prohibit "threatening or placing the other person in reasonable fear."[143] DCCA case law has interpreted "placing the other person in reasonable fear" as covering implicit threats.[144] For consistency with other provisions

[140] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[141] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[142] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803. Under this general attempt penalty statute, first degree sexual abuse, second degree sexual abuse, and third degree sexual abuse are "crimes of violence" and would have a maximum term of imprisonment of five years. Fourth degree sexual abuse is not "crime of violence," however, and would have a maximum term of imprisonment of 180 days.

[143] D.C. Code §§ 22-3002(a)(2); 22-3003(1); 22-3004(2); 22-3005(1).

[144] *Way v. United States*, 982 A.2d 1135, 1137 (D.C. 2009) (finding the evidence sufficient for second degree sexual abuse that the complainant "engaged in sexual acts with appellant only because she had a reasonable fear of being arrested" and that "the jury could reasonably conclude that appellant intentionally obtained sex from [the complainant] by intimidating her with the unspoken threat of arrest.").

in the RCC that prohibit threats, the revised sexual assault statute omits "reasonable fear" and prohibits threats generally. In the RCC, threats include both explicit and implicit threats. The revised language improves the clarity and consistency of revised statutes.

Fourth, the revised intoxication provision in first degree and third degree sexual assault specifically includes "causes [an intoxicant] to be administered." The current intoxication provision in the first degree and third degree sexual abuse statutes prohibits "administering" an intoxicant.[145] It is unclear from the statute whether the defendant has to personally administer the intoxicant and there is no DCCA case law on point. For clarification, the revised intoxication provision includes the actor personally administering or causing the intoxicant to be administered. This change clarifies the revised statutes.

Fifth, by the use of the phrase "in fact," the revised weapons enhancement for the sexual assault statute applies strict liability to the fact that the object is a "dangerous weapon" or "imitation dangerous weapon." The sex offense aggravators include that the "defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon."[146] The sex offense aggravators statute does not specify any culpable mental states. There is no DCCA case law regarding the aggravator, but DCCA case law for assault with a dangerous weapon[147] and the "while armed" enhancement in D.C. Code § 22-4502[148] support applying strict liability to the fact that the object is a "dangerous weapon" or "imitation dangerous weapon." For clarification, the revised weapons enhancement uses the phrase "in fact" to establish that strict liability applies to this element. Strict liability for this element is also consistent with the weapons gradations in other RCC offenses against persons. This change clarifies the revised statutes.

Sixth, first degree and third degree of the revised sexual assault statute provide liability for sexual conduct caused by administering an intoxicant without effective consent. The current intoxication prong in first degree and third degree sexual abuse prohibits administering an intoxicant to the complainant by "force or threat of force, or

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[145] The intoxication provision in the current first degree sexual abuse and third degree sexual abuse statutes is "After administering to that other person by force or threat of force, or without the knowledge or permission of that other person, a drug, intoxicant, or other similar substance that substantially impairs the ability of that other person to appraise or control his or her conduct." D.C. Code §§ 22-3002(a)(4); 22-3004(4).

[146] D.C. Code § 22-3020(a)(6) (authorizing a possible "penalty up to 1 ½ times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse if" the "defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.").

[147] *See, e.g.*, *Perry v. United States*, 36 A.3d 799, 812 (D.C. 2011) ("[Whether the actor used the object in a dangerous manner] is an objective test, and has nothing to do with the actor's subjective intent to use the weapon dangerously."); *Powell v. United States*, 485 A.2d 596, 601 (D.C. 1984) (rejecting appellant's argument that "unless one is possessed with the specific intent to use an object offensively, it is not a dangerous weapon.").

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

without the knowledge or permission" of the complainant.[149] "Force" is statutorily defined in the current sex offenses,[150] but the other terms in the current intoxication provision are not. There is no DCCA case law on the intoxication provision. For clarification, the revised intoxication provision in first degree and third degree of the revised sexual assault statute requires the intoxicant to be administered "without the complainant's effective consent." The definition of "effective consent" in RCC § 22E-701 appears to include conduct that constitutes "force or threat of force"[151] or "without the knowledge or permission"[152] in the current intoxication provision and is a term that is used consistently throughout the RCC. This change clarifies the revised statutes.

Seventh, the revised sexual assault statutes clarify when the complainant's incapacitation is a basis for liability. The current second degree and fourth degree sexual abuse statutes contain multiple provisions detailing circumstances in which the complainant's incapacitation is a basis for liability,[153] and the current first and third degree sexual abuse statutes provide liability for the nonconsensual administration of an intoxicant that renders a complainant incapacitated.[154] The language used in these varied descriptions of incapacity is not defined by statute, and there is no DCCA case law on point. However, in discussing fourth degree sexual abuse, the DCCA stated that "once the government proves in a sexual assault case that the defendant was four or more years older than the child victim, there is a conclusive presumption that the defendant knew or should have known that the child was incapable of appraising the nature of the sexual conduct."[155]

To clarify these matters, the revised sexual assault statute makes several changes to the statutory language of the current first degree, second degree, third degree, and fourth degree sexual abuse statutes. First, the revised sexual assault statute consistently refers to the complainant's inability to appraise the nature of the "sexual act" or "sexual

[149] D.C. Code §§ 22-3002(a)(4); 22-3004(4).

[150] 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.").

[151] "Effective consent" is defined in RCC § 22E-701 as "consent other than consent induced by physical force, a coercive threat, or deception."

[152] "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception. If an actor obtains a complainant's consent to consume an intoxicant by lying about the presence of an intoxicant or without telling the complainant that an intoxicant is present, this would not be "effective consent" because it was obtained by "deception," as defined in RCC § 22E-701.

[153] D.C. Code §§ 22-3003(2) (prohibiting a "sexual act" when the actor "knows or has reason to know that the other person is: (A) Incapable of appraising the nature of the conduct; (B) Incapable of declining participation in that sexual act; or (C) Incapable of communicating unwillingness to engage in that sexual act."); 22-3005(2) (prohibiting a "sexual contact" when the actor "knows or has reason to know that the other person is: (A) Incapable of appraising the nature of the conduct; (B) Incapable of declining participation in that sexual contact; or (C) Incapable of communicating unwillingness to engage in that sexual contact.").

[154] D.C. Code §§ 22-3002(a)(4); 22-3004(a)(4) ("After administering to that person by force or threat of force, or without the knowledge or permission of that other person, a drug, intoxicant, or similar substance that substantially impairs the ability of that other person to appraise or control his or her conduct.").

[155] *In re M.S.*, 171 A.3d 155, 165 (D.C. 2017).

contact" instead of the "conduct."[156] Second, the revised sexual assault statute specifies that the complainant may be "mentally or physically" incapacitated. 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). Third, the revised sexual assault statute consistently includes a complainant that is "[a]sleep, unconscious, . . . or passing in and out of consciousness. Fourth, the revised sexual assault statute specifies that a "paralyzed" or "substantially paralyzed" complainant is included in the scope of the offense. Although paralysis may be duplicative with other types of incapacitation, including it clarifies the statute. Finally, the revised intoxication provision in first and third degree sexual assault mirrors the incapacitation requirements in second degree and fourth degree sexual assault, except that, as under current law, the intoxication provision in first and third degree sexual assault requires *substantial* impairment or paralysis. These changes clarify the revised statutes.

[156] The intoxication provision of the current first degree and third degree sexual abuse statutes also refers to the inability of the complainant to "control" his or her conduct. Subsection (a)(2)(D)(ii)(I) and subsection (c)(2)(D)(ii)(I) of the revised sexual assault statute address a complainant that is unable to control his or her conduct ("asleep, unconscious, substantially paralyzed, or passing in and out of consciousness.").

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

Explanatory Note. *The RCC sexual abuse of a minor offense prohibits specified acts of sexual penetration or sexual touching when the complainant is under the age of 18 years. The penalty gradations are primarily based on the nature of the sexual conduct, as well as the age of the complainant. The revised sexual abuse of a minor offense replaces four distinct offenses in the current D.C. Code: first degree sexual abuse of a child,[1] second degree sexual abuse of a child,[2] first degree sexual abuse of a minor,[3] and second degree sexual abuse of a minor.[4] The revised sexual abuse of a minor offense also replaces in relevant part four distinct provisions for the sexual abuse offenses: the marriage and domestic partnership defense,[5] the state of mind proof requirement,[6] the attempt statute,[7] and the aggravating sentencing factors.[8] Insofar as they are applicable to sexual abuse of a child and sexual abuse of a minor, the revised sexual abuse of a minor offense also replaces the enhancement for committing offenses while armed,[9] the enhancement for committing offenses against minors,[10] certain minimum statutory penalties,[11] and the heightened penalties and aggravating circumstances in D.C. Code § 24-403.01(b-2).*

First degree sexual abuse of a minor (subsection (a)), second degree sexual abuse of a minor (subsection (b)), and third degree sexual abuse of a minor (subsection (c)), each require that the actor cause the complainant to engage in or submit to a "sexual act." "Sexual act" is a defined term in RCC § 22E-701 that specifies types of of sexual penetration or contact between the mouth and certain body parts.

Subsection (a)(1) specifies the prohibited conduct for first degree sexual abuse of a minor—causing the complainant to engage in or submit to a "sexual act." Subsection (a)(1) specifies a culpable mental state of "knowingly" for this conduct. "Knowingly," a defined term in RCC § 22E-206 means here that the actor must be "practically certain" that his or her conduct causes the complainant to engage in or submit to a "sexual act." Subsection (a)(2) uses the phrase "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rule of construction in RCC § 22E-207, "in fact" applies to the elements in subsection (a)(2)(A) and subsection (a)(2)(B). Subsection (a)(2)(A) specifies that the complainant must be under 12 years of age and subsection (a)(2)(B) specifies that the actor must be at

[1] D.C. Code § 22-3008.
[2] D.C. Code § 22-3009.
[3] D.C. Code § 22-3009.01.
[4] D.C. Code § 22-3009.02.
[5] D.C. Code § 22-30011.
[6] D.C. Code § 22-3012.
[7] D.C. Code § 22-3018.
[8] D.C. Code § 22-3020.
[9] D.C. Code § 22-4502.
[10] D.C. Code § 22-3611.
[11] D.C. Code § 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of first or second degree sexual abuse or child sexual abuse in violation of § 22-3002, § 22-3003, or § 22-3008 through § 22-3010, shall not be less than 7 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence, as so defined.").

least four years older than the complainant. There is no culpable mental state required for either the age of the complainant or the age gap.

Subsection (b)(1) specifies the prohibited conduct for second degree sexual abuse of a minor—causing the complainant to engage in or submit to a "sexual act." Subsection (b)(1) specifies a culpable mental state of "knowingly" for this conduct. "Knowingly," a defined term in RCC § 22E-206 means here that the actor must be "practically certain" that his or her conduct causes the complainant to engage in or submit to a "sexual act." Subsection (b)(2) uses the phrase "in fact," a defined term that indicates there is no culpable mental state requirement as to a given element. Per the rule of construction in RCC § 22E-207, "in fact" applies to the elements in subsection (b)(2)(A) and subsection (b)(2)(B). Subsection (b)(2)(A) specifies that the complainant must be under 16 years of age and subsection (b)(2)(B) specifies that the actor must be at least four years older than the complainant. There is no culpable mental state required for either the age of the complainant or the age gap.

Subsection (c)(1) specifies the prohibited conduct for third degree sexual abuse of a minor—causing the complainant to engage in or submit to a "sexual act." Subsection (c)(1) specifies a culpable mental state of "knowingly" for this conduct. "Knowingly," a defined term in RCC § 22E-206 means here that the actor must be "practically certain" that his or her conduct causes the complainant to engage in or submit to a "sexual act." Subsection (c)(2) requires that the actor be in a "position of trust with or authority over the" the complainant. Per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state in subsection (c)(1) applies to this element. "Knowingly," a defined term in RCC § 22E-206, here requires that the actor be "practically certain" that he or she is in a position of trust with or authority over" the complainant. "Position of trust with or authority over" is a defined term in RCC § 22E-701 that includes individuals such as parents, siblings, school employees, and coaches. Subsection (c)(3) uses the phrase "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rule of construction in RCC § 22E-207, "in fact" applies to the elements in subsection (c)(3)(A) and subsection (c)(3)(B). Subsection (c)(3)(A) specifies that the complainant must be under 18 years of age and subsection (c)(3)(B) specifies that the actor must be at least 18 years of age and at least four years older than the complainant. There is no culpable mental state required for the age of the complainant, the age of the actor, or the age gap.

Fourth degree sexual abuse of a minor (subsection (d)), fifth degree sexual abuse of a minor (subsection (e)), and sixth degree sexual abuse of a minor (subsection (f)), are identical to first degree sexual abuse of a minor, second degree sexual abuse of a minor, and third degree sexual abuse of a minor except that they require that the actor cause the complainant to engage in or submit to "sexual contact" instead of "sexual act." "Sexual contact" is a defined term in RCC § 22E-701 that means touching the specified body parts, such as genitalia, of any person with the desire to sexually degrade, sexually arouse, or sexually gratify any person. Subsection (d)(1), subsection (e)(1), and subsection (f)(1) each specify a culpable mental state of "knowingly" for causing the complainant to engage in or submit to "sexual contact." "Knowingly," a defined term in RCC § 22E-206 means here that the actor must be "practically certain" that his or her conduct causes the complainant to engage in or submit to "sexual contact." The requirements for the complainant and the actor in subsection (e)(2), subsection (f)(2), and

subsection (g)(2) are the same as the requirements in subsection (a)(2), subsection (b)(2), and subsection (c)(2).

Subsection (g) codifies three defenses for the revised sexual abuse of a minor statute and establishes that these defenses are in addition to any other defenses otherwise applicable to the actor's conduct under District law. First, subsection (g)(1) establishes an affirmative defense for conduct involving only the actor and the complainant that the actor and the complainant were in a marriage or "domestic partnership" at the time of the offense. "Domestic partnership" is defined in RCC § 22E-701. Subsection (g)(2)(A) codifies an affirmative defense for a reasonable mistake of age for second degree sexual abuse of a minor (subsection (b)) and fifth degree sexual abuse of a minor (subsection (e)). For a valid defense, the actor must have a reasonable belief that the complainant was 16 years of age or older at the time of the offense (subsection (g)(2)(A)(i)), the reasonable belief must be supported by an oral statement by the complainant about his or her age (subsection (g)(2)(A)(ii)), and the complainant must be 14 years or older (subsection (g)(2)(A)(iii)). Subsection (g)(2)(B) codifies an affirmative defense for a reasonable mistake of age for third degree sexual abuse of a minor (subsection (c)) and sixth degree sexual abuse of a minor (subsection (f)). For a valid defense, the actor must have a reasonable belief that the complainant was 18 years of age or older at the time of the offense (subsection (g)(2)(B)(i)), the reasonable belief must be supported by an oral statement by the complainant about his or her age (subsection (g)(2)(B)(ii)), and the complainant must be 16 years or older (subsection (g)(2)(B)(iii). There is no affirmative defense for reasonable mistake of age for first degree sexual abuse of a minor (subsection (a)) or fourth degree sexual abuse of a minor (subsection (d)) when the complainant is under the age of 12 years. Per subsection (g)(3), the actor must prove each affirmative defense in subsection (g) by a preponderance of the evidence.

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

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

Relation to Current District Law. *The revised sexual abuse of a minor statute changes current District law in six main ways.*

First, the revised sexual abuse of a minor statute provides separate gradations for a complainant under the age of 12 years when the actor is at least four years older than the complainant. The current child sexual abuse statutes only require that the complainant be under the age of 16 years when the actor is at least four years older.[12] The current sex offense aggravators provide a penalty enhancement for when the complainant was "under the age of 12 years at the time of the offense."[13] In contrast,

[12] 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.").

[13] D.C. Code § 22-3020(a)(1) ("Any person who is found guilty of an offense under this subchapter may receive a penalty up to 1 1/2 times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse, if any of the following aggravating circumstances exists: (1) The victim was under the age of 12 years at the time of the offense."). First degree child sexual abuse has a maximum term of imprisonment of 30 years. D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of

first degree and fourth degree of the revised sexual abuse of a minor statute provide gradations for a complainant under the age of 12 years when the actor is at least four years older. A more serious gradation for harming a complainant under the age of 12 years is consistent with the current penalty enhancement for complainants of such an age. The four year age gap matches the age gap in the current child sexual abuse statutes[14] and the other gradations of the revised sexual abuse of a minor statute. This change improves the consistency and proportionality of the revised sexual abuse of a minor statute.

Second, third degree and sixth degree of the revised sexual abuse of a minor statute require that the actor be at least four years older than the complainant and, by use of the phrase "in fact," require strict liability for this age gap. The current sexual abuse of a minor statutes require that the complainant be under the age of 18 years and that the actor be 18 years of age or older and in a "significant relationship" with the complainant.[15] Unlike the current child sexual abuse statutes, which require at least a four year age gap between the actor and the complainant,[16] the current sexual abuse of a minor statutes do not have a required age gap. In contrast, third degree and sixth degree of the revised sexual abuse of a minor statute require at least a four year age gap between the actor and complainant and, by use of the phrase "in fact," require strict liability for this age gap. The current definition of "significant relationship"[17] and the revised definition of "position of trust with or authority over" (RCC § 22E-701) include a broad range of custodial and non-custodial relationships, and without an age gap between the complainant and the actor, otherwise consensual sexual conduct between individuals close in age would be criminal.[18] While the special relationship between the actor and the complainant may be sufficient to make such consensual sexual conduct criminal, in

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16 years."). A person convicted of first degree child sexual abuse when the child is under 12 years of age "may" face a maximum term of imprisonment of 45 years or life imprisonment without the possibility of release. Second degree child sexual abuse has a maximum term of imprisonment of 10 years. D.C. Code §§ 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years."). A person convicted of second degree child sexual abuse when the child is under 12 years of age "may" face a maximum term of imprisonment of 15 years.

[14] 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.").

[15] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

[16] 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.").

[17] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").

[18] For example, a 19 year old camp counselor who, with consent and in the context of a dating relationship, touches the buttocks of a 17 year old with "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" may be guilty of second degree sexual abuse of a minor under current District law.

some contexts, the Council has recognized that consensual sexual activity between persons close in age should not be criminal.[19] Strict liability for the age gap matches the current sexual abuse of a child statutes,[20] the other gradations of the revised sexual abuse of a minor statute (RCC § 22E-1302), and the revised sexually suggestive conduct with a minor statute (RCC § 22E-1304). This change improves the consistency and proportionality of the revised sexual assault of a minor offense.

Third, the revised sexual abuse of a minor statute provides an affirmative defense for a reasonable mistake of age in certain circumstances when the complainant is under the age of 16 years or under the age of 18 years. Current D.C. Code § 22-3012 establishes strict liability for the age of the complainant in the current child sexual abuse statutes[21] (complainant under the age of 16 years) and current D.C. Code § 22-3011 establishes strict liability for the age of the complainant in the current sexual abuse of a minor statutes[22] (complainant under the age of 18 years). In contrast, the revised sexual abuse of a minor statute codifies an affirmative defense to the equivalent gradations in the revised statute—second degree, third degree, fifth degree, and sixth degree sexual abuse of a minor. The accused must prove by a preponderance of the evidence that the accused reasonably believed that the complainant was 16 years of age or older or 18 years of age or older at the time of the offense supported by an oral statement by the complainant about his or her age, and the complainant must be 14 or 16 years of age or older. This

[19] For example, current D.C. Code § 22-3011 provides that marriage or domestic partnership between the actor and the complainant is a defense to charges under the District's current child sexual abuse, sexual abuse of a minor, sexually suggestive conduct with a minor, and enticing statutes and corresponding RCC § 22E-1302(i)(1) provides that marriage is a defense to the revised sexual abuse of a minor statute. Also, in the original Anti-Sexual Abuse Act of 1994, the Council of the District of Columbia inserted the four year age gap requirement in the current child sexual abuse statutes "recognizing, but not condoning the sexual curiousity [sic] which exists among young persons of similar ages." Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 15. The current sexual abuse of a minor statutes were enacted in 2007. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

Also, in the original Anti-Sexual Abuse Act of 1994, the Council of the District of Columbia inserted the four year age gap requirement in the current child sexual abuse statutes "recognizing, but not condoning the sexual curiousity [sic] which exists among young persons of similar ages." Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 15. The current sexual abuse of a minor statutes were enacted in 2007. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

[20] D.C. Code § 22-3012 ("In a prosecution under §§ 22-3008 to 22-010 . . . the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child."). The current child sexual abuse statutes are codified at D.C. Code § 22-3008 and D.C. Code § 22-3009, and fall within the specified range of statutes.

[21] 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.

[22] 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).

change removes liability for an otherwise consensual sexual act or contact between two people where the actor makes a reasonable mistake as to the complainant's age that is limited to one or two years and supported by the complainant's own representation as to their age. Applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts[23] and legal experts[24] for any non-regulatory crimes, although "statutory rape" laws are often an exception.[25] Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[26] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[27] An affirmative defense requiring reasonableness is akin to requiring recklessness,[28] but places the initial burden of proof on the accused. This change improves the consistency and proportionality of the revised sexual abuse of a minor offense.

Fourth, only the general penalty enhancements in subtitle I of the RCC apply to the revised sexual abuse of a minor statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes,[29] D.C. Code § 22-3611

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[23] *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).").

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

[25] *See, e.g.*, Joshua Dressler, Understanding Criminal Law § 12.03(b) (3d ed. 2001) ("A few non-public-welfare offenses are characterized as 'strict liability' because they do not require proof that the defendant possessed a *mens rea* regarding a material element of the offense. Perhaps the most common example is statutory rape, i.e., consensual intercourse by a male with an underage female.")

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

[27] *Elonis v. United States*," 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring)("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

[28] *See* RCC § 22E-208(b)(3) and accompanying commentary.

[29] 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

provides a separate penalty enhancement for committing child sexual abuse against complainants under the age of 18 years,[30] 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.[31] Current District statutes are silent as to whether or how these different penalty enhancements can each be applied to an offense, although DCCA case law suggests that the age-based sex offense aggravators and separate penalty enhancement may not apply to certain sex offenses because they overlap with elements of the offense.[32] In contrast, the revised sexual abuse of a minor statute is subject to only the general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020 and the current "while armed with" enhancement in D.C. Code § 22-4502[33] are not necessary in the revised sexual abuse of a minor statute because the offense already accounts for age and is limited to sexual conduct that occurs without the use of force, threats, or coercion. This change improves the consistency and proportionality of the revised sex offenses.

Fifth, first degree sexual assault of a minor and second degree sexual assault of a minor[34] are no longer subject to the heightened penalties and aggravating circumstances

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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.

[30] D.C. Code §§ 22-3611(a), (c); 23-1331(4) (defining "crime of violence" to include child sexual abuse).

[31] D.C. Code § 22-4502.

[32] DCCA case law in the context of the District's current assault with a dangerous weapon offense (ADW) suggests that the age-based sex offense aggravators and age-based penalty enhancements may not be applied to the current sexual abuse of a child statutes, sexual abuse of a minor statutes, misdemeanor sexual abuse of a child or minor statute, or enticing staute because they overlap with elements of these offenses. The DCCA has held that ADW may not be enhanced with the current "while armed" enhancement in D.C. Code § 22-4502(a)(1) because each provision requires the use of a "dangerous weapon." *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982) ("The government concedes that [current D.C. Code § 22-4502(a)(1)] may not apply to ADW since [ADW] provides for enhancement and is a more specific and lenient provision."); *see also Gathy v. United States*, 754 A.2d 912, 916 n.5 (D.C. 2000) ("In *McCall* we held that section [current D.C. Code § 22-4502(a)(1)] could not be applied to a charge of ADW because the use of 'a dangerous weapon' is already included as an element of *that* offense, so that 'ADW while armed'-*i.e.*, assault with a dangerous weapon while armed with a dangerous weapon-would be redundant.").

[33] However, an actor that merely possesses a dangerous weapon or a firearm while committing sexual abuse of a minor, without using or displaying it, may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-[X]) or the revised possession of a firearm during a crime of violence statute (RCC § 22E-[X]).

[34] As will be discussed, current D.C. Code § 24-403.01(b-2) authorizes enhanced penalties for first degree sexual abuse of a child and first degree sexual abuse of a child while armed, and the RCC replaces those enhanced penalties. In the RCC, however, there is no longer a first degree sexual abuse of a child "while armed" offense. First, in the RCC, the equivalent offenses to first degree sexual abuse of a child are first degree and second degree sexual assault of a minor. Second, the RCC no longer has a "while armed" version of child sexual abuse. Depending on the facts of the case, the equivalent offense would be sexual assault with an enhancement under subsection (g) of the revised sexual assault statute or sexual assault or

in current D.C. Code § 24-403.01(b-2). Current D.C. Code § 24-403.01(b-2) establishes heightened penalties for first degree sexual abuse of a child and first degree sexual abuse of a child while armed if specified procedural requirements are met[35] and "one or more aggravating circumstances exist beyond a reasonable doubt."[36] In contrast, the revised sexual abuse of a minor statute is not subject to any penalty enhancements other than the general enhancements in the RCC for repeat offenders (RCC § 22E-606), hate crimes (RCC § 22E-607), and pretrial release (§ 22E-608). Conduct that would otherwise satisfy first degree or second degree sexual abuse of a minor that involves aggravating circumstances may instead be prosecuted under the revised sexual assault statute (RCC § 22E-1301), which has its own set of enhancements based up on the use or display of a dangerous weapon or imitation weapon, the presence of accomplices, whether the complainant sustained serious bodily injury, the age of the complainant, and whether the complainant is a "vulnerable adult." As a result of this revision, the general aggravating circumstances in D.C. Code § 24-403.01(b-2) no longer apply to first degree sexual abuse of a minor and second degree sexual abuse of a minor, although several of them are covered by other provisions in the RCC.[37] The special procedures in D.C. Code § 24-

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first degree sexual abuse of a minor or second degree sexual abuse of a minor with additional liability under [RCC §§ 22E-XXXX revised PFCOV-type offense]. For clarity, the commentary for this entry refers only to first degree sexual abuse of a minor and second degree sexual abuse of a minor when discussing the relevant RCC statutes, even though the various forms of liability for committing these offenses with the use or presence of a weapon are also affected by the revision.

[35] D.C. Code § 24-403.01(b-2) ("(1) The court may impose a sentence in excess of 60 years for first degree murder or first degree murder while armed, 40 years for second degree murder or second degree murder while armed, or 30 years for armed carjacking, first degree sexual abuse, first degree sexual abuse while armed, first degree child sexual abuse or first degree child sexual abuse while armed, only if: (A) Thirty-days prior to trial or the entry of a plea of guilty, the prosecutor files an indictment or information with the clerk of the court and a copy of such indictment or information is served on the person or counsel for the person, stating in writing one or more aggravating circumstances to be relied upon; and (B) One or more aggravating circumstances exist beyond a reasonable doubt.").

[36] The aggravating circumstances that apply to first degree sexual abuse of a child are unclear. D.C. Code § 24-403.01(b-2)(2) establishes that the "[a]ggravating circumstances for first degree child sexual abuse . . . are set forth in § 22-3020," but the statute also codifies an additional set of aggravating circumstances that apply to "all offenses." It is unclear whether first degree sexual abuse of a child is included in "all offenses" and is subject to the additional set of aggravating circumstances, or if "all offenses" is limited to the offenses for which D.C. Code § 24-403.01(b-2) authorizes an enhanced penalty that do not have offense-specific aggravating circumstances. The aggravating circumstances that apply for first degree sexual abuse of a child while armed are similarly unclear. D.C. Code § 24-403.01(b-2)(2) does not specify whether first degree sexual abuse of a child while armed is included in the reference to first degree sexual abuse of a child and the aggravating circumstances in D.C. Code § 22-3020, or if it is subject only to the additional set of aggravating circumstances for "all offenses." Regardless, the revised sexual assault statute replaces the aggravating circumstances in D.C. Code § 24-403.01(b-2) insofar as they are applicable to first degree sexual abuse of a child and first degree sexual abuse of a child while armed. The revised sexual assault statute also replaces the aggravating circumstances in D.C. Code § 22-3020, which is discussed elsewhere in this commentary as a substantive change in law.

[37] The general aggravating circumstances in D.C. Code § 24-403.01(b-2)(2) are: "(A) The offense was committed because of the victim's race, color, religion, national origin, sexual orientation, or gender identity or expression (as defined in § 2-1401.02(12A); (B) The offense was committed because the victim was or had been a witness in any criminal investigation or judicial proceeding or was capable of providing or had provided assistance in any criminal investigation or judicial proceeding; (C) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

403.01(b-2) to give notice to a defendant are unnecessary because aggravating circumstances must be charged in the criminal indictment per Supreme Court case law decided after passage of the District statute.[38] This revision improves the consistency and proportionality of the revised sexual assault of a minor statute.

Sixth, the revised sexual assault statute replaces certain minimum statutory penalties for child sexual abuse in D.C. Code § 24-403.01(e).[39] These minimum statutory penalties require specified prior convictions, and it is unclear how the general recidivist statutes in the current D.C. Code[40] apply, if at all, to these provisions. There is no clear rationale for such special sentencing provisions in these offenses as compared to other offenses. In contrast, the revised sexual abuse of a minor statute is subject to a single recidivist penalty enhancement in RCC § 22E-606 that applies to all offenses in the RCC. This change improves the consistency and proportionality of the revised offense.

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

(D) The offense was especially heinous, atrocious, or cruel; (E) The offense involved a drive-by or random shooting; (F) The offense was committed after substantial planning; (G) The victim was less than 12 years old or more than 60 years old or vulnerable because of mental or physical infirmity; [and] (H) Except where death or serious bodily injury is an element of the offense, the victim sustained serious bodily injury as a result of the offense." D.C. Code § 24-403.01(b-2)(2).

In the RCC, none of these aggravating circumstances apply to first degree and second degree sexual abuse of a minor. First degree and second degree sexual abuse of a minor already grade the offense based on the age of the complainant, and recognize that these complaints are physically and mentally vulnerable. The offenses are also subject to two penalty enhancements that are substantially similar to several of the aggravating circumstances—the general penalty enhancement for hate crimes in RCC § 22E-607, and, if the conduct is prosecuted under the revised sexual assault statute, the sexual assault penalty enhancement for recklessly causing serious bodily injury to the complainant (RCC § 22E-1303(g)(3)).

The remaining aggravators in D.C. Code § 24-403.01(b-2)(2) appear better suited for the homicide offenses that are subject to enhanced penalties in the statute: "(B) The offense was committed because the victim was or had been a witness in any criminal investigation or judicial proceeding or was capable of providing or had provided assistance in any criminal investigation or judicial proceeding; (C) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (D) The offense was especially heinous, atrocious, or cruel; (E) The offense involved a drive-by or random shooting; (F) The offense was committed after substantial planning." To the extent that these aggravators would apply to first degree and second degree sexual abuse of a minor, other offenses in the RCC may cover the conduct, such as [RCC §§ 22E-XXX obstruction of justice] or are more appropriate for consideration at sentencing.

[38] The D.C. Council approved D.C. Code § 24-403(b-2) well before *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) was decided, and the statute became law shortly before *Apprendi* was decided. D.C. Code § 24-403(b-2) was approved on August 2, 2000, and became effective on June 8, 2001. The Sentencing Reform Amendment Act of 2000, 2000 District of Columbia Laws 13-302 (Act 13–406). *Apprendi* was decided on June 26, 2000. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[39] D.C. Code § 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of first or second degree sexual abuse or child sexual abuse in violation of § 22-3002, § 22-3003, or § 22-3008 through § 22-3010, shall not be less than 7 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence, as so defined.").

[40] D.C. Code §§ 22-1804; 22-1804a.

First, the revised sexual abuse of a minor statute consistently requires that the actor "causes the complainant to engage in or submit to" the sexual act or sexual contact. While all of the current sexual abuse statutes require that the actor "engages in" the sexual conduct, they vary in whether there is liability if the actor "causes" the complainant to "engage in" the sexual conduct or "causes" the complainant to "submit to" the sexual conduct.[41] This variation creates different plain language readings of the current sexual abuse statutes and suggests that the current offenses vary in scope as to the prohibited conduct and liability for involvement of a third party. There is no case law on point. However, DCCA case law addressing similar language in the District's current misdemeanor sexual abuse statute suggests that the DCCA may not construe such language variations as legally significant.[42] In addition to case law, District practice does not appear to follow the variations in statutory language.[43] Instead of these variations in language, the revised sex offenses and the revised definitions of "sexual act" and "sexual contact" consistently require that the actor "causes" the complainant to "engage in" or "submit to" the sexual conduct. Differentiating liability based on whether an actor themselves commits the sexual conduct in question, or whether the actor causes the complainant to engage in or submit to the sexual conduct, may lead to disproportionate outcomes. The revised language improves the consistency, clarity, and proportionality of the revised offenses, and reduces unnecessary gaps in liability.

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[41] First degree sexual abuse, second degree sexual abuse, and sexual abuse of a ward codify "engages in" the sexual conduct, "causes" the complainant to "engage in" the sexual conduct, and "causes" the complainant to "submit to" the sexual conduct. D.C. Code §§ 22-3002 and 22-3003; 22-3013 and 22-3014. Third and fourth degree sexual abuse, child sexual abuse, sexual abuse of a minor, and sexual abuse of a secondary education student are limited to "engages in" the sexual conduct and "causes" the complainant to "engage in" the sexual conduct. D.C. Code §§ 22-3004 and 22-3005; 22-3008 and 22-3009; 22-3009.01 and 22-3009.02. Misdemeanor sexual abuse and sexual abuse of a patient or client require only "engages in." D.C. Code §§ 22-3006; 22-3015 and 22-3016.

[42] In *Pinckney v. United States*, the DCCA held that the misdemeanor sexual abuse statute includes "conduct where a person uses another to touch intimate parts of the person's own body" even though the plain language of the statute requires "engages in a sexual act or sexual contact with another person." *Pinckney v. United States*, 906 A.2d 301, 303, 306 (D.C. 2006) (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA declined "an interpretation that would exclude such an obvious means of offensive touching," in part because the legislature intended to "'strengthen the District's laws against sexual abuse and make them more inclusive, flexible and reflective of the broad range of abusive conduct which does in fact occur.'" *Id.* (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA stated that its interpretation of the misdemeanor sexual abuse statute "as applying to the facts of this case does not require appellant to have caused the victim to engage in or submit to sexual contact" because the appellant engaged in the prohibited sexual contact by his own actions." *Id.* However, the DCCA's reliance on the legislative intent of the Anti-Sexual Abuse Act suggests that it would broadly interpret any variations in the language of the current sexual abuse statutes.

[43] The jury instructions for third degree, fourth degree, child sexual abuse, and sexual abuse of a minor include that the actor "caused" the complainant "to engage in or submit to" a sexual act or sexual contact, even though the statutory language for those offenses does not include "causes" the complainant to "submit to." *Compare* D.C. Crim. Jur. Instr. §§ 4.400 (general sexual abuse); 4.401 (child sexual abuse); 4.402 (sexual abuse of a minor) D.C. Code §§ 22-3003 and 22-3004 (third degree and fourth degree sexual abuse statutes); 22-3008 and 22-3009 (first degree and second degree child sexual abuse statutes); 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor statutes).

Second, the revised sexual abuse of a minor statute requires a "knowingly" culpable mental state for causing the complainant to engage in or submit to a sexual act or sexual contact. The current child sexual abuse statutes[44] and sexual abuse of a minor statutes[45] do not specify any culpable mental state for engaging in or submitting to a sexual act or sexual contact. Due to the statutory definition of "sexual contact,"[46] the second degree gradations of these offenses require an "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person," although the DCCA has sustained a conviction for second degree child sexual abuse when the jury instructions required that the actor "knowingly" touched the complainant and erroneously omitted the additional intent requirement.[47] There is no DCCA case law regarding commission of a "sexual act" in the current child sexual abuse statutes or the sexual abuse of a minor statutes.[48] The revised sexual abuse of a minor statute resolves these ambiguities by requiring a "knowingly" culpable mental state in each gradation for causing the complainant to engage in or submit to a sexual act or sexual contact. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[49] Requiring a "knowingly" culpable mental state may also clarify that the gradations that require "sexual contact" are lesser included offenses of the gradations that require a "sexual act," an issue which has been litigated in current DCCA case law, but remains unresolved.[50] This change improves the clarity and consistency of the revised statutes.

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[44] 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.").

[45] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

[46] D.C. Code § 22-3001(9) (defining "sexual contact.").

[47] *Green v. United States*, 948 A.2d 554, 558, 561 (D.C. 2008) (affirming appellant's conviction for second degree child sexual abuse when the jury instructions required that the appellant "knowingly" touched the complainant and omitted the "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" requirement because "no rational jury could have found that appellant touched [the complainants] in a way consistent with the trial court's jury instruction . . . without also finding the requisite intent.").

[48] The DCCA case law has characterized the current first and third degree sexual abuse statutes, which concern a sexual act, as "general intent" crimes. However, it is not clear what specific culpable mental state must be proven for such "general intent" crimes—e.g., knowledge or recklessness. See commentary to RCC § 22E-1301, Sexual assault, above, for further discussion.

[49] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[50] *In re E.H.* is a child sexual abuse case, but the court's reasoning regarding the relationship between "sexual act" and "sexual contact" may be instructive for the general sexual abuse statutes. In *In re E.H.*, the appellant was convicted of first degree child sexual abuse, but the court reversed the conviction due to insufficient evidence. *In re E.H.*, 967 A.2d 1270, 1271, 1275 (D.C. 2009). The court declined to address whether second degree child sexual abuse is a lesser included offense of first degree child sexual abuse, but did note that "[a]t oral argument, counsel for the government agreed with appellant's counsel that second-degree sexual abuse is not a lesser-included offense of first-degree sexual abuse because, at least in two instances, to prove a "sexual act" (for first-degree) it is not necessary to show the specific intent required to prove "sexual contact" (for second-degree)." *Id.* at 1276 n. 9. The DCCA further noted that "[i]n general, a crime can only be a lesser-included offense of another if its required proof contains some, but not all, of the elements of the greater offense" and "the gravamen of whether a crime is the lesser-included offense of another is legislative intent. *Id.* (internal quotation omitted).

Third, third degree and sixth degree of the revised sexual abuse of a minor statute require a "knowingly" culpable mental state for the element that actor was in a "position of trust with or authority over" the complainant. The current sexual abuse of a minor statutes require that the actor be "in a significant relationship with a minor,"[51] but they do not specify what, if any, culpable mental states apply, and there is no DCCA case law on point. Third degree and sixth degree of the revised sexual abuse of a minor statute resolve this ambiguity by requiring a "knowingly" culpable mental state for the fact that the actor is in a "position of trust with or authority over" the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[52] This change improves the clarity and consistency of the revised statutes.

Fourth, due to the RCC definition of "position of trust with or authority over" in RCC § 22E-701, the scope of the revised sexual abuse of a minor statute may differ as compared to the current sexual abuse of a minor statutes. The current sexual abuse of a minor statutes[53] require that the actor be in a "significant relationship" with the complainant and "significant relationship" is defined in D.C. Code § 22-3001.[54] The current definition of "significant relationship" is open-ended and defines "significant relationship" as "includ[ing]" the specified individuals as well as "any other person in a position of trust with or authority over" the complainant."[55] There is no DCCA case law interpreting the current definition of "significant relationship." The RCC definition of "position of trust with or authority over" is close-ended, but defines "position of trust with or authority over as "mean[ing]" specified individuals or "other person responsible under civil law for the care or supervision of the complainant." The revised definition provides a broad, flexible, objective standard for determining who is in a position of trust with or authority over another person. The RCC definition of "position of trust with or authority over" is discussed in detail in the commentary to RCC § 22E-701. This change improves the clarity and consistency of the revised statutes.

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[51] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor statute prohibiting "[w]hoever, being 18 years of age or older, is in a significant relationship with a minor, and engages in a sexual act with a minor or causes that minor to engage in a sexual act."); 22-3009.02 (second degree sexual abuse of a minor statute prohibiting "[w]hoever, being 18 years of age or older, is in a significant relationship with a minor[,] and engages in a sexual contact with that minor or causes that minor to engage in a sexual contact."); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

[52] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[53] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

[54] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").

[55] D.C. Code § 22-3001(10).

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

First, the revised sexual abuse of a minor statute categorizes all persons under the age of 18 as "minors" and defines revised offenses in terms of the specific ages of complainants. The D.C. Code currently contains two sets of offenses for sexual abuse of complainants under the age of 18—child sexual abuse, for complainants under the age of 16 years,[56] and sexual abuse of a minor, for complainants under the age of 18 years.[57] For clarification, the revised sexual abuse of a minor statute no longer distinguishes separate offenses for complainants who are a "child" or "minor" and instead organizes all offenses against minors as gradations of one "sexual abuse of a minor" statute. The text of the revised sexual abuse of a minor statute also specifies the numerical ages of relevant classes of complainants rather than using "child" or "minor" terminology. Referring to a teenager as a "child" may be misleading and leads to inconsistency with other District offenses that have different definitions of "child."[58] These changes improve the clarity and consistency of the revised sexual abuse of a minor statute.

Second, the revised sexual abuse of a minor statute, by use of the phrase "in fact," clarifies that no culpable mental state is required as to the age of the complainant, the actor's own age, or the required age gap. Neither the current sexual abuse of a child statutes[59] nor the current sexual abuse of a minor statutes[60] specify culpable mental states as to the ages of the parties or the gap in their ages. However, current D.C. Code § 22-3012 states that for child sexual abuse, the government "need not prove that the defendant knew the child's age or the age difference between himself or herself and the child"[61] and current D.C. Code § 22-3011 establishes that "mistake of age" is not a defense to prosecution under the child sexual abuse and sexual abuse of a minor statutes.[62] DCCA case law further suggests that no culpable mental state whatsoever is

[56] 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.").

[57] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years").

[58] For example, the current child cruelty statute considers a person under the age of 18 years to be a "child" (D.C. Code § 22-1101(a)), but the current contributing to the delinquency of a minor statute considers a person under the age 18 to be a "minor" (D.C. Code § 22-811(f)(2)).

[59] 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.").

[60] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

[61] 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.

[62] 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).

required as to the age of the complainant or the age gap with the actor.[63] The revised sexual abuse of a minor statute, by use of the phrase "in fact," establishes strict liability as to the age of the complainant, the age of the actor, or the relevant age gap. Codifying the strict liability requirement improves the clarity and consistency of the revised statute.

Third, the revised sexual abuse of a minor statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses.[64] Under the statute, if the maximum term of imprisonment for the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[65] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[66] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[67] In the revised sexual abuse of a minor statute, the RCC General Part's attempt provisions (RCC § 22E-301) establish the requirements to prove an attempt and applicable penalties for sexual assault, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general attempt provision provide penalties at ½ the maximum imprisonment sentence. Elimination of a separate attempt statute for sex offenses, consequently, has no

[63] *See, e.g., Green v. United States*, 948 A.2d 554, 558 (D.C. 2008) (affirming appellant's conviction for second degree child sexual abuse when the jury instruction apparently required no culpable mental state as to the complainant's age).

[64] 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).

[65] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[66] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[67] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803. Under this general attempt penalty statute, first degree sexual abuse of a child and second degree sexual abuse of a child are "crimes of violence" and would have a maximum term of imprisonment of five years. First degree and second degree sexual abuse of a minor are not "crimes of violence," however, and would have a maximum term of imprisonment of 180 days.

substantive effect on available penalties. This change improves the consistency and proportionality of the revised sexual abuse of a minor offense.

Fourth, the marriage and domestic partnership defense in the revised sexual abuse of a minor statute does not refer to other offenses. The current marriage or domestic partnership defense states that marriage or domestic partnership is a defense to sexual abuse of a minor "prosecuted alone or in conjunction with § 22-3018 [sex offense attempt statute] or § 22-403 [assault with intent to commit certain offenses]."[68] There is no DCCA case law interpreting this provision. The language is not included in the current jury instruction for the marriage or domestic partnership defense.[69] The marriage or domestic partnership defense in the revised sexual abuse of a minor statute applies only to prosecution for the revised sexual abuse of a minor offense. In the RCC, the revised sex offenses no longer have their own attempt statute, and there are no longer separate "assault with intent to" offenses, or "AWI" offenses.[70] Similarly, the revised assault statutes in the RCC no longer include separate "assault with intent to" crimes and instead provide liability through application of the general attempt statute in RCC § 22E-301 to the completed offenses.[71] Deleting the "prosecuted alone or in conjunction with language" improves the clarity of the revised sexual abuse of a minor offense.

[68] D.C. Code § 22-30011(b). The "prosecuted alone or in conjunction with" language appears in two other statutes in addition to D.C. Code § 22-3011. D.C. Code § 22-3007, which codifies defenses for first degree through fourth degree sexual abuse and misdemeanor sexual abuse, and D.C. Code § 22-3017, which codifies defenses for sexual abuse of a ward and sexual abuse of a patient or client. The "prosecuted alone or in conjunction with" language in these statutes consistently refers to D.C. Code § 22-3018, which is the current attempt statute for the sexual abuse offenses, but inconsistently refers to D.C. Code § 22-401, which prohibits assault with intent to commit specified offenses, including first degree sexual abuse, second degree sexual abuse, or child sexual abuse, and D.C. Code § 22-403 which prohibits assault with intent to commit "any other offense which may be punished by imprisonment in the penitentiary."

[69] D.C. Crim. Jur. Instr. § 9.700.

[70] See Commentary to RCC § 22E-1304 on reliance on the RCC general attempt statute.

[71] See Commentary to RCC § 22E-1202 (revised assault statute).

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

Explanatory Note. *The RCC sexual exploitation of an adult offense prohibits specified acts of sexual penetration or sexual touching with several populations of vulnerable adults. The penalty gradations are based on the nature of the sexual conduct. The revised sexual abuse of a minor offense replaces six distinct offenses in the current D.C. Code: first degree sexual abuse of a secondary education student,[1] second degree sexual abuse of a secondary education student,[2] first degree sexual abuse of a ward,[3] second degree sexual abuse of a ward,[4] first degree sexual abuse of a patient or client,[5] and second degree sexual abuse of a patient or client.[6] The RCC sexual exploitation of an adult offense also replaces in relevant part three distinct provisions for the sexual abuse offenses: the marriage and domestic partnership defense,[7] the attempt statute,[8] and the aggravating sentencing factors.[9]*

Subsection (a)(1) specifies the prohibited conduct for first degree sexual abuse of a minor—causing the complainant to engage in or submit to a "sexual act." Subsection (a)(1) specifies a culpable mental state of "knowingly" for this conduct. "Knowingly," a defined term in RCC § 22E-206 means here that the actor must be "practically certain" that his or her conduct causes the complainant to engage in or submit to a "sexual act." "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts.

Subsection (a)(2)(A) through subsection (a)(2)(D) specify the prohibited means of causing the complainant to engage in or submit to the "sexual act." Subsection (a)(2)(A) requires that the actor be a "teacher, counselor, principal, administrator, nurse, coach, or security officer[10] in a secondary school." Per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state in subsection (a)(1) applies to this element and the actor must be "practically certain" that he or she is one of these specified categories. Subsection (a)(2)(A)(i) specifies two requirements for the complainant. The complainant must either be "an enrolled student in the same secondary school" as the actor (subsection (a)(2)(A)(i)(I)) or receive services or attend programming at the same secondary school as the actor (subsection (a)(2)(A)(i)(II)).[11] Per the rule of construction in RCC § 22E-207, the "recklessly disregards" culpable mental state in subsection (a)(2)(A) applies to both of these requirements for the complainant. "Recklessly disregards" is a defined term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that the complainant is an enrolled student in the same secondary school or receive services or

[1] D.C. Code § 22-3009.03.
[2] D.C. Code § 22-3009.04.
[3] D.C. Code § 22-3013.
[4] D.C. Code § 22-3014.
[5] D.C. Code § 22-3015.
[6] D.C. Code § 22-3016.
[7] D.C. Code § 22-30017.
[8] D.C. Code § 22-3018.
[9] D.C. Code § 22-3020.
[10] The term "security officer," per its ordinary definition, includes school resource officers, school security guards, and other secondary school personnel engaged in a security role.
[11] Services and programming may include, for example, sports practices, music lessons, or a required class.

attend programming at the same secondary school. Subsection (a)(2)(A)(ii) specifies a final requirement for the complainant—that he or she is under the age of 20 years. Per the rule of construction in RCC § 22E-207, the "recklessly disregards" culpable mental state in subsection (a)(2)(A) applies to this requirement and means the actor is aware of a substantial risk that the complainant is under the age of 20 years.

Subsection (a)(2)(B) specifies that the actor must cause the complainant to engage in or submit to the sexual act by falsely representing that he or she is someone else who is personally known to the complainant. Subsection (a)(2)(B) specifies a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here requires that the actor be "practically certain" that his or her conduct falsely represents that he or she is someone else who is personally known to the complainant. The actor's false representation must cause the complainant to engage in or submit to the sexual act.

Subsection (a)(2)(C) requires that the actor be a healthcare provider, health professional, or member of the clergy, or purport to be such a person. The terms "healthcare provider" and "health professional" are defined terms in the RCC § 22E-701,[12] and include massage therapists, psychologists, and addiction counselors. Per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state in subsection (a)(2)(B) applies to this element, and per the definition of "knowingly" in RCC § 22E-206, the actor must be "practically certain" that he or she is a healthcare provider, heath professional, or member of the clergy, or purports to be a healthcare provider or member of the clergy. Subsection (a)(2)(C)(i) through subsection (a)(2)(C)(iii) specify additional requirements for an actor that is a healthcare provider, heath professional, or member of the clergy, or purports to be such. Subsection (a)(2)(C)(i) requires that the actor falsely represents that the sexual act is done for a bona fide professional purpose and subsection (a)(2)(C)(ii) requires that the actor commit the sexual act during a consultation, examination, treatment, therapy, or other provision of professional services. Per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state in subsection (a)(2)(B) applies to all the elements in subsection (a)(2)(C)(i) and subsection (a)(2)(C)(ii). Per the definition of "knowingly" in RCC § 22E-206, the actor must be "practically certain" that he or she falsely represents that the sexual act is done for a bona fide professional purpose or that he or she commits the sexual act during a consultation, examination, treatment, therapy, or other provision of professional services.

Subsection (a)(2)(C)(iii) requires that the actor commit the sexual act while the complainant is a patient or client of the actor. Per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state in subsection (a)(2)(B) applies to these elements. "Knowingly" is a defined term in RCC § 22E-206 that here means that the actor must be "practically certain" that he or she commits the sexual act while the complainant is a patient or client. Subsection (a)(2)(C)(iii) also requires that the actor "recklessly disregard" that the mental, emotional, or physical condition of the complainant is such that the complainant is impaired from declining participation in the sexual act. "Recklessly disregards" is a defined term in RCC § 22E-206 that here means

[12] RCC § 22E-701. "Healthcare provider" means a person referenced in D.C. Code § 16–2801. "Health professional" means a person required to obtain a District license, registration, or certification per D.C. Code § 3–1205.01.

that the actor must be aware of a substantial risk that the mental, emotional, or physical condition of the complainant is such that the complainant is impaired for declining participation in the sexual act.

Subsection (a)(2)(D) requires that the actor "knowingly" work at a specified institution or "knowingly" transports or is a custodian of persons at such an institution. "Knowingly" is a defined term in RCC § 22E-206 that here means that the actor must be "practically certain" that he or she works at such an institution or transports or is a custodian of persons at such an institution. Subsection (a)(2)(D) further requires that the actor "recklessly disregard" that the complainant is a ward, patient, client, or prisoner at such an institution. "Recklessly disregard" is a defined term in RCC § 22E-206 that here means that the actor must be aware of a substantial risk that the complainant is a ward, patient, client, or prisoner at such an institution.

Subsection (b) specifies the required conduct for second degree sexual exploitation of an adult. The prohibited conduct is the same as first degree sexual exploitation of an adult except it requires a "sexual contact" instead of a "sexual act." "Sexual contact" is a defined term in RCC § 22E-701 that means touching the specified body parts, such as genitalia, of any person with the desire to sexually degrade, sexually arouse, or sexually gratify any person. Subsection (b)(1) specifies a culpable mental state of "knowingly" for causing the complainant to engage in or submit to "sexual contact." "Knowingly," a defined term in RCC § 22E-206 means here that the actor must be "practically certain" that his or her conduct causes the complainant to engage in or submit to "sexual contact."

Subsection (c) codifies an affirmative defense for the RCC sexual exploitation of an adult statute and establishes that this defense is in addition to any other defenses otherwise applicable to the actor's conduct under District law. Subsection (c) establishes an affirmative defense that the actor and the complainant were in a marriage or "domestic partnership" at the time of the offense. "Domestic partnership" is defined in RCC § 22E-701. The actor must prove this defense by a preponderance of the evidence.

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

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

Relation to Current District Law. *The RCC sexual exploitation of an adult statute changes current District law in four main ways.*

First, the RCC sexual exploitation of an adult statute limits liability to an actor who is "a healthcare provider, a health professional, or a member of the clergy," or purports to be such. The current first and second degree sexual abuse of a patient or client statutes apply to any person who "purports to provide, in any manner, professional services of a medical, therapeutic, or counseling (whether legal, spiritual, or otherwise) nature" or is "otherwise in a professional relationship of trust" with the complainant.[13] There is no DCCA case law more clearly specifying included professions. "Professional relationship of trust" is not defined in the D.C. Code and there is no DCCA case law interpreting the phrase. In contrast, the RCC sexual exploitation of an adult statute limits

[13] D.C. Code §§ 22-3015 (first degree sexual abuse of a patient or client); 22-3016 (second degree sexual abuse of a patient or client).

the offense to actors that are "a healthcare provider, a health professional, or a member of the clergy," or purport to be such. "Healthcare provider" and "health professional" are defined terms in RCC § 22E-701 and the D.C. Code,[14] referring to a wide array of medical and cognate professions, including massage therapists and addiction counselors. "Member of the clergy" is intended to be interpreted broadly, using the ordinary meaning of the term which refers to Christian and non-Christian religious officials.[15] Complainants in a healthcare or spiritual setting are especially vulnerable to the conduct prohibited in the RCC sexual exploitation of an adult offense. Sexual activity in other professional settings[16] can be addressed by professional censure or civil liability. This change improves the clarity and proportionality of the sexual exploitation of an adult statute.

Second, the RCC sexual exploitation of an adult statute no longer prohibits "the actor falsely represents that he or she is licensed as a particular kind of professional." The current first and second degree sexual abuse of a patient or client statutes prohibit an actor from "represent[ing] falsely that he or she is licensed as a particular type of professional."[17] There is no DCCA case law interpreting this provision. Other provisions in the current sexual abuse of a patient or client statutes prohibit committing a sexual act or sexual contact during the "provision of professional services," when the actor "represents falsely that the sexual… [act or contact] is for a bona fide professional purpose," or when the actor "knows or has reason to know that the patient or client is impaired from declining participation."[18] In contrast, the RCC sexual 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. The RCC sexual exploitation of an adult offense continues to penalize sexual conduct when falsely representing the conduct is for a therapeutic purpose, during the provision of professional services, or when the actor disregards the possibility that the complainant is impaired. Apart from such circumstances, criminal punishment for lying about the status of one's professional licensing may be reprehensible but is not directly related to the sexual conduct. This change improves the proportionality of the revised offense.

Third, only the general penalty enhancements in subtitle I of the RCC apply 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.[19] In contrast, the revised

[14] D.C. Code §§ 3–1205.01; 16–2801

[15] *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.").

[16] For example, it is possible that "a professional relationship of trust" could be alleged to exist between a supervisor and employee, a contractor and contractee, and other common business relationships that involve a measure of trust.

[17] D.C. Code §§ 22-3015; 22-3016.

[18] D.C. Code §§ 22-3015 and 22-3016.

[19] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and

sexual exploitation of an adult statute is subject to only the general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020[20] are not necessary in the RCC sexual exploitation of an adult statute because the offense is limited to sexual conduct that occurs without the use of force, threats, or coercion. Limiting the penalty enhancements in RCC subtitle I to the RCC sexual exploitation of an adult offense improves the consistency and proportionality of the revised sex offenses. [Further discussion when the revised offenses have numerical penalties assigned].

Fourth, the RCC sexual exploitation of an adult statute completely specifies persons of authority in a secondary school that are subject to the revised statute, limiting liability to situations where the student has a substantial link to the secondary school where the actor works. The current first and second degree sexual abuse of a secondary education student statutes prohibit "[a]ny teacher, counselor, principal, coach, or other person of authority in a secondary level school" from engaging in sexual conduct with a "student under the age of 20 years enrolled in that school or school system."[21] The statute does not define the term "person of authority" and there is no case law on point. In contrast, the RCC sexual exploitation of an adult statute limits the liable persons at a secondary school to any "teacher, counselor, principal, administrator, nurse, coach, or security officer" and requires either that the complainant is enrolled at the same secondary school as the actor, or receives services or attends programming at the same secondary school as the actor. Categorical inclusion of all persons within a school system appears to be overbroad insofar as it would include persons who are not actually in a position to exert authority over the complainant, while limiting liability to persons within the school where the complainant is enrolled appears to be under-inclusive. The revised statute is tailored to inherently coercive roles at a secondary school where a student is enrolled or otherwise receives services or programming, including reference to a "security officer" that is not specified in the current statute. If the facts of a case fall outside the requirements of the revised statute, there may still be liability under second degree or fourth degree of the revised sexual assault statute (RCC § 22E-1301) for the use of a coercive threat or under third degree and sixth degree sexual abuse of a minor (RCC § 22E-1304) if the actor is still in a "position of trust with or authority over" the complainant. This change improves the clarity, completeness, and proportionality of the revised statute.

22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

[20] However, an actor that merely possesses a dangerous weapon or a firearm while committing sexually suggestive conduct with a minor, without using or displaying it, may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-[X]) or the revised possession of a firearm during a crime of violence statute (RCC § 22E-[X]).

[21] D.C. Code §§ 22-3009.03; 22-3009.04.

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

First, the RCC sexual exploitation of an adult statute consistently requires that the actor "causes the complainant to engage in or submit to" the sexual act or sexual contact. While all of the current sexual abuse statutes require that the actor "engages in" the sexual conduct, they vary in whether there is liability if the actor "causes" the complainant to "engage in" the sexual conduct or "causes" the complainant to "submit to" the sexual conduct.[22] This variation creates different plain language readings of the current sexual abuse statutes and suggests that the current offenses vary in scope as to the prohibited conduct and liability for involvement of a third party. There is no case law on point. However, DCCA case law addressing similar language in the District's current misdemeanor sexual abuse statute suggests that the DCCA may not construe such language variations as legally significant.[23] In addition to case law, District practice does not appear to follow the variations in statutory language.[24] Instead of these variations in language, the revised sex offenses and the revised definitions of "sexual act" and "sexual contact" consistently require that the actor "causes" the complainant to "engage in" or "submit to" the sexual conduct. Differentiating liability based on whether an actor themselves commits the sexual conduct in question, or whether the actor causes the complainant to engage in or submit to the sexual conduct, may lead to disproportionate

[22] First degree sexual abuse, second degree sexual abuse, and sexual abuse of a ward codify "engages in" the sexual conduct, "causes" the complainant to "engage in" the sexual conduct, and "causes" the complainant to "submit to" the sexual conduct. D.C. Code §§ 22-3002 and 22-3003; 22-3013 and 22-3014. Third and fourth degree sexual abuse, child sexual abuse, sexual abuse of a minor, and sexual abuse of a secondary education student are limited to "engages in" the sexual conduct and "causes" the complainant to "engage in" the sexual conduct. D.C. Code §§ 22-3004 and 22-3005; 22-3008 and 22-3009; 22-3009.01 and 22-3009.02. Misdemeanor sexual abuse and sexual abuse of a patient or client require only "engages in." D.C. Code §§ 22-3006; 22-3015 and 22-3016.

[23] In *Pinckney v. United States*, the DCCA held that the misdemeanor sexual abuse statute includes "conduct where a person uses another to touch intimate parts of the person's own body" even though the plain language of the statute requires "engages in a sexual act or sexual contact with another person." *Pinckney v. United States*, 906 A.2d 301, 303, 306 (D.C. 2006) (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA declined "an interpretation that would exclude such an obvious means of offensive touching," in part because the legislature intended to "'strengthen the District's laws against sexual abuse and make them more inclusive, flexible and reflective of the broad range of abusive conduct which does in fact occur.'" *Id.* (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA stated that its interpretation of the misdemeanor sexual abuse statute "as applying to the facts of this case does not require appellant to have caused the victim to engage in or submit to sexual contact" because the appellant engaged in the prohibited sexual contact by his own actions." *Id.* However, the DCCA's reliance on the legislative intent of the Anti-Sexual Abuse Act suggests that it would broadly interpret any variations in the language of the current sexual abuse statutes.

[24] The jury instructions for third degree, fourth degree, child sexual abuse, and sexual abuse of a minor include that the actor "caused" the complainant "to engage in or submit to" a sexual act or sexual contact, even though the statutory language for those offenses does not include "causes" the complainant to "submit to." *Compare* D.C. Crim. Jur. Instr. §§ 4.400 (general sexual abuse); 4.401 (child sexual abuse); 4.402 (sexual abuse of a minor) D.C. Code §§ 22-3003 and 22-3004 (third degree and fourth degree sexual abuse statutes); 22-3008 and 22-3009 (first degree and second degree child sexual abuse statutes); 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor statutes).

outcomes. The revised language improves the consistency, clarity, and proportionality of the revised offenses, and reduces unnecessary gaps in liability.

Second, the sexual exploitation of an adult statute separately prohibits a sexual act or sexual contact by "falsely represent[ting] that the actor is someone else who is personally known to the complainant." The current sexual abuse of a patient or client statutes do not contain a provision specifically addressing false identity used to engage in sexual conduct. However, the current misdemeanor sexual abuse (MSA) statute[25] prohibits engaging in a sexual act or sexual contact without the "permission" of the other person. "Permission" is not defined in the current D.C. Code and it is unclear whether or how "permission" differs from the defined term "consent."[26] In addition, the DCCA has used the terms "permission" and "consent" interchangeably in discussing the current MSA statute.[27] To the extent that the current MSA statute prohibits a sexual act or sexual contact without "consent," the current definition of "consent" appears to exclude consent that is obtained by deception because the current definition of "consent" requires that the words or actions be "freely given."[28] There is no DCCA case law on point. Instead of this ambiguity, the RCC sexual exploitation of an adult statute prohibits a specific type of deception, when the actor falsely represents that he or she is someone else who is personally known to the complainant.[29] This particular form of deception is more serious than other forms of deception that the RCC nonconsensual sexual conduct offense (RCC § 22E-1307) may prohibit. This change improves the clarity and proportionality of the revised offense.

Third, the RCC sexual exploitation of an adult statute requires a "knowingly" culpable mental state for causing the complainant to engage in or submit to a sexual act or sexual contact. The current sexual abuse statutes that comprise the RCC sexual exploitation of an adult statute[30] do not specify any culpable mental state for engaging in

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[25] D.C. Code § 22-3006.

[26] D.C. Code § 22-3001(4) ("'Consent' means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[27] *See, e.g.*, *Davis v. United States*, 973 A.2d 1101, 1104, 1106 (D.C. 2005) (noting in dicta that "permission" is "not specifically defined in the [MSA] statute, but in common usage, the word is a synonym for 'consent'" and holding that "if the complainant in a misdemeanor sexual abuse (or other general sexual assault) prosecution was a child at the time of the alleged offense, an adult defendant who is at least four years older than the complainant may not assert a 'consent' defense."); *Hailstock v. United States*, 85 A.3d 1277, 1280, 1281, (noting that "what was required to convict [the appellant] of the offense of attempted MSA was that he took the requisite overt steps at a time when he *should have known* that he did not have [the complainant's] consent for the acts he contemplated.") (emphasis in original).

[28] D.C. Code § 22-3001(4) ("'Consent' means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[29] *See, e.g.*, *People v. Morales*, 150 Cal. Rptr. 3d 920 (2013) (Defendant entered the dark bedroom of complainant after seeing her boyfriend leave late at night, and has sex with the complainant by pretending to be the boyfriend).

[30] As discussed elsewhere in this commentary as a clarificatory change to District law, the sexual exploitation of an adult statute codifies into one offense, with the same penalty, the current sexual abuse of a secondary education student statutes (D.C. Code §§ 22-3009.03 and 22-3009.04.), the current sexual abuse of a ward statutes (D.C. Code §§ 22-3013 and 22-3014), and the current sexual abuse of a patient or client statutes (D.C. Code §§ 22-3015 and 22-3016).

or submitting to a sexual act or sexual contact. Due to the statutory definition of "sexual contact,"[31] the second degree gradations of these offenses require an "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person," although the DCCA has sustained a conviction for second degree child sexual abuse when the jury instructions required that the actor "knowingly" touched the complainant and erroneously omitted the additional intent requirement.[32] There is no DCCA case law regarding commission of a "sexual act" in the current statutes that comprise the RCC sexual exploitation of an adult statute.[33] The RCC sexual exploitation of an adult statute resolves these ambiguities by requiring a "knowingly" culpable mental state in each gradation for causing the complainant to engage in or submit to a sexual act or sexual contact. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[34] Requiring a "knowingly" culpable mental state may also clarify that the gradations that require "sexual contact" are lesser included offenses of the gradations that require a "sexual act," an issue which has been litigated in current DCCA case law, but remains unresolved.[35] This change improves the clarity and consistency of the revised statute.

Fourth, the RCC sexual exploitation of an adult statute requires a "knowingly" culpable mental state for offense elements concerning the actor's own status and actions. The current sexual abuse statutes that comprise the RCC sexual exploitation of an adult statute[36] do not specify culpable mental states for the many facts regarding the actor's

[31] D.C. Code § 22-3001(9) (defining "sexual contact.").

[32] *Green v. United States*, 948 A.2d 554, 558, 561 (D.C. 2008) (affirming appellant's conviction for second degree child sexual abuse when the jury instructions required that the appellant "knowingly" touched the complainant and omitted the "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" requirement because "no rational jury could have found that appellant touched [the complainants] in a way consistent with the trial court's jury instruction . . . without also finding the requisite intent.").

[33] The DCCA case law has characterized the current first and third degree sexual abuse statutes, which concern a sexual act, as "general intent" crimes. However, it is not clear what specific culpable mental state must be proven for such "general intent" crimes—e.g., knowledge or recklessness. *See* commentary to RCC 22E-1303, Sexual assault, above, for further discussion.

[34] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[35] *In re E.H.* is a child sexual abuse case, but the court's reasoning regarding the relationship between "sexual act" and "sexual contact" may be instructive for the general sexual abuse statutes. In *In re E.H.*, the appellant was convicted of first degree child sexual abuse, but the court reversed the conviction due to insufficient evidence. *In re E.H.*, 967 A.2d 1270, 1271, 1275 (D.C. 2009). The court declined to address whether second degree child sexual abuse is a lesser included offense of first degree child sexual abuse, but did note that "[a]t oral argument, counsel for the government agreed with appellant's counsel that second-degree sexual abuse is not a lesser-included offense of first-degree sexual abuse because, at least in two instances, to prove a "sexual act" (for first-degree) it is not necessary to show the specific intent required to prove "sexual contact" (for second-degree)." *Id.* at 1276 n. 9. The DCCA further noted that "[i]n general, a crime can only be a lesser-included offense of another if its required proof contains some, but not all, of the elements of the greater offense" and "the gravamen of whether a crime is the lesser-included offense of another is legislative intent. *Id.* (internal quotation omitted).

[36] As discussed elsewhere in this commentary as a clarificatory change to District law, the sexual exploitation of an adult statute codifies into one offense, with the same penalty, the current sexual abuse of a secondary education student statutes (D.C. Code §§ 22-3009.03 and 22-3009.04.), the current sexual

status or actions that must be proven for the offenses, apart from the "intent" required for "sexual contact."[37] There is no DCCA case law on point. The RCC sexual exploitation of an adult statute resolves this ambiguity by requiring a "knowingly" culpable mental state for the many alternative facts that constitute the offense and involve the actor's own status or actions.[38] Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[39] This change improves the clarity and consistency of the revised statutes.

Fifth, the sexual exploitation of an adult statute requires a "recklessly" culpable mental state as to facts about the complainant's status. The current sexual abuse statutes that comprise the sexual exploitation of an adult statute[40] do not specify culpable mental states for the many facts that must be proven for the offenses, apart from the "intent" required by the statutory definition of "sexual contact."[41] There is no DCCA case law on point. The RCC sexual exploitation of an adult statute resolves this ambiguity by requiring a "recklessly" culpable mental state for the many alternative facts that constitute the offense and involve the complainant's status.[42] Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[43] However, a lower culpable mental state may be justified given the heightened power, responsibilities, and training of a person of authority in a secondary school, healthcare providers, clergy, and persons who work at custodial institutions. Recklessness has been upheld in some cases as a

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abuse of a ward statutes (D.C. Code §§ 22-3013 and 22-3014), and the current sexual abuse of a patient or client statutes (D.C. Code §§ 22-3015 and 22-3016).

[37] D.C. Code § 22-3001(9).

[38] Specifically, the RCC sexual exploitation of an adult offense requires a "knowingly" culpable mental state as to the following alternative elements: being a "teacher, counselor, principal, administrator, nurse, coach, or security officer in a secondary school"; falsely representing oneself to be someone else personally known to the complainant; being a healthcare provider, a health professional, or member of the clergy, or purporting to be such; falsely representing that sexual conduct is for a bona fide professional purpose; committing sexual conduct during a consultation, examination, treatment, therapy, or other provision of professional services; committing sexual conduct while the complainant is a patient or client of the actor; and being a person who works at a hospital, treatment facility, detention or correctional facility, group home, or other institution housing persons who are not free to leave at will, or transports or is a custodian to persons at such an institution.

[39] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[40] As discussed elsewhere in this commentary as a clarificatory change to District law, the sexual exploitation of an adult statute codifies into one offense, with the same penalty, the current sexual abuse of a secondary education student statutes (D.C. Code §§ 22-3009.03 and 22-3009.04.), the current sexual abuse of a ward statutes (D.C. Code §§ 22-3013 and 22-3014), and the current sexual abuse of a patient or client statutes (D.C. Code §§ 22-3015 and 22-3016).

[41] D.C. Code § 22-3001(9).

[42] Specifically, the RCC sexual exploitation of an adult offense requires a "recklessly" culpable mental state as to the following alternative elements: that the complainant is an enrolled student in the same secondary school as the actor or receives services or attends programming at the same secondary school as the actor; the secondary education student complainant is under the age of 20 years; that the complainant is "impaired from declining participation" in sexual activity; and that the complainant is a ward, patient, client, or prisoner at a specified institution.

[43] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

minimal basis for punishing morally culpable crime.[44] This change improves the clarity and consistency of the revised statutes.

Sixth, the sexual exploitation of an adult statute requires, in part, that an actor be, or purport to be, a "healthcare provider" or "health professional," and defines those terms in RCC § 22E-701. 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.[45] There is no DCCA case law interpreting the scope of this language. Instead of this ambiguity, the revised sexual exploitation of an adult statute codifies the terms "healthcare provider" and "health professional," which are defined terms in current D.C. Code civil provisions.[46] 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 change improves the clarity and completeness of the revised statute.

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

First, the RCC sexual exploitation of an adult offense combines in one offense the current sexual abuse of a secondary education student, sexual abuse of a ward, and sexual abuse of a patient or client offenses, with the same penalty. The current D.C. Code codifies as separate statutes sexual abuse of a secondary education student, sexual abuse of a ward, and sexual abuse of a patient or client, but these statutes all have the same penalties—a maximum term of imprisonment of 10 years for first degree, requiring a "sexual act"[47] and a maximum term of imprisonment of 5 years for second degree, requiring "sexual contact."[48] Having separate statutes for these various offenses is unnecessarily confusing given that their penalties are equivalent and all pertain to sexual conduct with vulnerable adult populations. This change improves the clarity and organization of the RCC sexual exploitation of an adult statute.

Second, the RCC sexual exploitation of an adult statute prohibits falsely representing that the sexual act or sexual contact "is for a bona fide professional purpose." The current sexual abuse of a patient or client statutes prohibit falsely representing that the "sexual act" or "sexual contact" is for "a bona fide medical or therapeutic purpose, or for a bona fide professional purpose for which the services are

[44] *Elonis v. United States*," 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring)("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

[45] D.C. Code §§ 22-3015; 22-3016.

[46] D.C. Code §§ 3–1205.01; 16–2801.

[47] D.C. Code §§ 22-3009.03 (first degree sexual abuse of a secondary education student); 22-3013 (first degree sexual abuse of a ward; 22-3015 (first degree sexual abuse of a patient or client).

[48] D.C. Code §§ 22-3014 (second degree sexual abuse of a ward); 22-3016 (second degree sexual abuse of a patient or client). Second degree sexual abuse of a secondary education student prohibits "sexual conduct" with a student under the age of 20 years enrolled in the same school or school system and is punishable by a maximum term of imprisonment of 5 years. D.C. Code § 22-3009.04. As is discussed elsewhere in this commentary, "sexual conduct" appears to be a typo for "sexual contact."

being provided."[49] For clarification, the sexual exploitation of an adult statute deletes "for a bona fide medical or therapeutic purpose." The "bona fide medical or therapeutic purpose" language is surplusage because it is included in a "bona fide professional purpose." This change improves the clarity of the RCC sexual exploitation of an adult statute.

Third, the RCC second degree sexual exploitation of an adult statute requires "sexual contact" with a secondary education student. The current second degree sexual abuse of a secondary education student statute prohibits engaging in "sexual conduct" with specified secondary education students under the age of 20 years or causing specified secondary education students to engage in "sexual conduct."[50] "Sexual conduct" is not defined in the current sexual abuse statutes, nor does it appear in any other sexual abuse statute. In addition, the lower gradations of all the current sexual abuse statutes require "sexual contact."[51] There is no legislative history or DCCA case law for the current sexual abuse of a secondary education student statutes. For clarification, second degree of the sexual exploitation of an adult statute codifies "sexual contact." This change improves the clarity and consistency of the RCC sexual exploitation of an adult statute.

Fourth, the revised sexual abuse of a minor statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses.[52] Under the statute, if the maximum term of imprisonment for the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[53] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[54] These attempt penalties differ from the attempt

[49] D.C. Code §§ 22-3015(a)(1); 22-3016(a)(1).

[50] D.C. Code § 22-3009.04 (second degree sexual abuse of a secondary education student prohibiting "sexual conduct" with a student under the age of 20 years enrolled in the same school or school system as any "teacher, counselor, principal, couch, or other person of authority in a secondary school and punishable by a maximum term of imprisonment of 5 years).

[51] D.C. Code §§ 22-3004 and 22-3005 (third degree and fourth degree sexual abuse requiring "sexual contact."); 22-3009 (second degree child sexual abuse requiring "sexual contact."); 22-3009.02 (second degree sexual abuse of a minor requiring "sexual contact."); 22-3014 (second degree sexual abuse of a ward requiring "sexual contact."); 22-3016(a) (second degree sexual abuse of a patient or client requiring "sexual contact.").

[52] 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).

[53] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[54] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the

penalties established under D.C. Code § 22-1803, the current general attempt statute.[55] In the revised sexual abuse of a minor statute, the RCC General Part's attempt provisions (RCC § 22E-301) establish the requirements to prove an attempt and applicable penalties for sexual assault, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general attempt provision provide penalties at ½ the maximum imprisonment sentence. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of the RCC sexual exploitation of an adult offense.

offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[55] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803. Under this general attempt penalty statute, first degree sexual abuse of a child and second degree sexual abuse of a child are "crimes of violence" and would have a maximum term of imprisonment of five years. First degree and second degree sexual abuse of a minor are not "crimes of violence," however, and would have a maximum term of imprisonment of 180 days.

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

Explanatory Note. *The RCC sexually suggestive conduct with a minor offense prohibits comparatively less serious sexual conduct with certain complainants under the age of 18 years, such as touching a complainant inside his or her clothing. The offense has a single penalty gradation. The revised sexually suggestive conduct with a minor offense replaces the current misdemeanor sexual abuse of a child or minor statute.*[1] *The revised sexually suggestive conduct with a minor statute also replaces in relevant part three distinct provisions for the sexual abuse offenses: the marriage and domestic partnership defense,*[2] *the attempt statute,*[3] *and the aggravating sentencing factors.*[4]

Subsection (a)(1) of the revised sexually suggestive conduct with a minor statute specifies a culpable mental state of "knowingly." Per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state applies to each type of prohibited conduct in the first parts of subsections (a)(1)(A) through subsections (a)(1)(D), but not including the "with intent to" culpable mental states specified in the later parts of subsection (a)(1)(A) through subsection (A)(1)(D).

"Knowingly," a defined term in RCC § 22E-206, means here that the actor was "practically certain" that his or her conduct would cause a specified result. In subsection (a)(1)(A), the "knowingly" culpable mental state requires that the actor was "practically certain" that his or her conduct would result in touching the complainant in inside his or her clothing. In subsection (a)(1)(B), the "knowingly" culpable mental state requires that the actor was "practically certain" that his or her conduct would result in touching the complainant inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks. In subsection (a)(1)(C), the "knowingly" culpable mental state requires that the actor was "practically certain" that his or her conduct would result in placing the actor's tongue in the mouth of the complainant. In subsection (a)(1)(D), the "knowingly" culpable mental state requires that the actor was "practically certain" that his or her conduct would result in touching the actor's genitalia or that of a third party in the sight of the complainant.

Subsections (a)(1)(A) through subsections (a)(1)(D) each have an additional "with intent to" culpable mental state. Subsection (a)(1)(A), subsection (a)(1)(B), and subsection (a)(1)(C) require that the prohibited conduct be done "with intent to cause the sexual arousal or sexual gratification of any person." Subsection (a)(1)(D) requires that the touching be done "with intent that the complainant's presence cause the sexual arousal or sexual gratification of any person." "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that his or her conduct would cause the sexual arousal or sexual gratification of any person or that the complainant's presence would cause the sexual arousal or sexual gratification of any person. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such an arousal or gratification

[1] D.C. Code § 22-3010.01.
[2] D.C. Code § 22-30011.
[3] D.C. Code § 22-3018.
[4] D.C. Code § 22-3020.

actually occurred, just that the defendant believed to a practical certainty that such arousal or gratification would result.

Subsection (a)(2) specifies the requirements for the age of the actor, the age of the complainant, and whether there must be a special relationship between the actor and the complainant. Subsection (a)(2) requires that the actor is "in fact" at least 18 years of age and at least four years older than the complainant. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Per the rule of construction in RCC § 22E-207, "in fact" applies to both elements in subsection (a)(2) and there is no culpable mental state requirement for the age of the actor or the age gap. Subsection (a)(2)(A) requires that the actor was "reckless" as to the fact that the complainant is under the age of 16 years. "Reckless" is a defined term in RCC § 22E-206 that here means the actor is aware of a substantial risk that the complainant is under the age of 16 years. In the alternative, subsection (a)(2)(B) requires that the actor was "reckless" as to the fact that the complainant is under the age of 18 years. "Reckless" is a defined term in RCC § 22E-206 that here means the actor is aware of a substantial risk that the complainant is under the age of 18 years. Subsection (a)(2)(B) also requires that the actor be in a "position of trust with or authority over" the complainant. "Position of trust with or authority over" is a defined term in RCC § 22E-701 that includes individuals such as parents, siblings, school employees, and coaches. Subsection (a)(2)(B) requires a "knowingly" culpable mental state for the "position of trust with or authority over" element. "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be practically certain that the he or she is in a "position of trust with or authority over" the complainant.

Subsection (b) codifies an affirmative defense for the revised sexually suggestive conduct with a minor statute and establishes that this defense is in addition to any other defenses otherwise applicable to the actor's conduct under District law. Subsection (b) establishes an affirmative defense for conduct involving only the actor and the complainant that the actor and the complainant were in a marriage or "domestic partnership" at the time of the offense. "Domestic partnership" is defined in RCC § 22E-701. The actor must prove this defense by a preponderance of the evidence.

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

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

Relation to Current District Law. *The revised sexually suggestive conduct with a minor statute changes current District law in four main ways.*

First, the revised sexually suggestive conduct with a minor statute requires "intent to cause the sexual arousal or sexual gratification of any person" (subsection (1)(A), subsection (1)(B), and subsection (1)(C)) or "intent that the complainant's presence cause the sexual arousal or sexual gratification of any person" (subsection (1)(D)). The current misdemeanor sexual abuse of a child or minor (MSACM) statute requires engaging in specified conduct "which is intended to cause or reasonably causes the sexual arousal or sexual gratification of any person."[5] There is no DCCA case law interpreting this language. In contrast, the revised sexually suggestive conduct with a minor statute

[5] D.C. Code § 22-3010.01(b).

requires "with intent to cause the sexual arousal or sexual gratification of any person" (subsection (1)(A), subsection (1)(B), and subsection (1)(C)) or "intent that the complainant's presence cause the sexual arousal or sexual gratification of any person" (subsection (1)(D)). Subsection (1)(D), requires a nexus between the sexual conduct and being in sight of the minor, so as to exclude criminal liability where the minor's viewing is incidental.[6] The current "reasonably causes" alternative language may be interpreted to mean that the current MSACM offense is a general (rather than specific) intent offense,[7] or may indicate a culpable mental state similar to negligence. However, using negligence as the basis for criminal liability is disfavored for elements that distinguish otherwise non-criminal from criminal conduct.[8] Conduct that is not intended but "reasonably causes" sexual arousal or sexual gratification may be criminalized by the offensive physical contact offense in RCC § 22E-1205.[9] This change improves the proportionality of the revised offense.

Second, the revised sexually suggestive conduct with a minor statute requires a "recklessly" culpable mental state as to the age of the complainant. Current D.C. Code § 22-3011 states that a mistake of age is not a defense to the current MSACM statute.[10] In contrast, the revised sexually suggestive conduct with a minor statute applies a "recklessly" culpable mental state to the age of complainant. Applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts[11] and legal experts[12] for any non-regulatory crimes, although "statutory rape"

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[6] For example, in a shared room or home, a sibling who masturbates or a parent who grabs another parent's crotch in the sight of a minor would not be criminally liable unless such was *intentionally done in sight of the minor* to sexually arouse or gratify anyone—the actor, the complainant, or a third party.

[7] DCCA case law has characterized the current first and third degree sexual abuse statutes, which concern a sexual act, as "general intent" crimes. However, it is not clear what specific culpable mental state must be proven for such "general intent" crimes—e.g., knowledge or recklessness. See commentary to RCC § 22E-1301, Sexual assault, above, for further discussion.

[8] *DiGiovanni v. United States*, 580 A.2d 123, 126–27 (D.C. 1990) (J. Steadman, concurring) (referencing "the principle that neither simple negligence nor naivete ordinarily forms the basis of felony liability.") (quoting *Morissette v. United States*, 342 U.S. 246, 251 (1952) ("[C]rime . . . generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand").) *See also Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L. Ed. 2d 1 (2015) (J. Alito, concurring) ("Whether negligence is morally culpable is an interesting philosophical question, but the answer is at least sufficiently debatable to justify the presumption that a serious offense against the person that lacks any clear common-law counterpart should be presumed to require more.").

[9] RCC § 22E-1205(b) (defining second degree offensive physical contact as "(1) Knowingly causes physical contact with another person; (2) With intent that the physical contact be offensive to that other person; and (3) In fact, a reasonable person in the situation of the recipient of the physical contact would regard it as offensive.").

[10] 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).

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

laws are often an exception.[13] Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[14] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[15] A "recklessly" culpable mental state in the revised sexually suggestive conduct with a minor statute is consistent with the culpable mental state required in parts of the sexual exploitation of an adult statute (RCC § 22E-1303) and the nonconsensual sexual conduct statute (RCC § 22E-1307). This change improves the consistency and proportionality of the revised offense.

Third, the revised sexually suggestive conduct with a minor statute requires at least a four-year age gap between the actor and the complainant when the complainant is under the age of 18 years, and, by the use of the phrase "in fact," requires strict liability for this age gap. The current MSACM statute requires at least a four year age gap between the actor and the complainant when the complainant is under the age of 16 years,[16] 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.[17] In contrast, the revised sexually suggestive conduct with a minor statute requires at least a four year age gap between the actor and a complainant under the age of 18 years and, by use of the phrase "in fact," requires strict liability for this age gap. The current definition of "significant relationship"[18] and the revised definition of "position of trust with or authority over"

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

[13] *See, e.g.*, Joshua Dressler, Understanding Criminal Law § 12.03(b) (3d ed. 2001) ("A few non-public-welfare offenses are characterized as 'strict liability' because they do not require proof that the defendant possessed a *mens rea* regarding a material element of the offense. Perhaps the most common example is statutory rape, i.e., consensual intercourse by a male with an underage female.")

[14] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[15] *Elonis v. United States*," 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring)("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

[16] D.C. Code §§ 22-3010.01(a) (MSACM statute); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[17] 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.").

[18] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus

(RCC § 22E-701) include a broad range of custodial and non-custodial relationships, and without an age gap between the complainant and the actor, otherwise consensual sexual conduct between individuals close in age would be criminal.[19] While the special relationship between the actor and complainant may be sufficient to make such consensual sexual conduct criminal, in some contexts, the Council has recognized that consensual sexual activity between persons close in age should not be criminal.[20] Strict liability for the age gap matches the current sexual abuse of a child statutes[21] and the revised sexual abuse of a minor statute (RCC § 22E-1302), the revised enticing a minor statute (RCC § 22E-1305), and the revised arranging for sexual conduct with a minor statute (RCC § 22E-1306). This change improves the consistency and proportionality of the revised statute.

Fourth, only the general penalty enhancements in subtitle I of the RCC apply to the revised sexually suggestive conduct with a minor statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[22] DCCA case law suggests that the age-based sex offense aggravators may not apply to certain sex

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driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").

[19] For example, a 19 year old camp counselor who, with consent and in the context of a dating relationship, touches the buttocks of a 17 year old touches the 17 year old inside his or her clothing with intent to cause the sexual arousal or sexual gratification of any person would be guilty under the current MSACM statute.

[20] For example, current D.C. Code § 22-3011 provides that marriage or domestic partnership between the actor and the complainant is a defense to charges under the District's current child sexual abuse, sexual abuse of a minor, sexually suggestive conduct with a minor, and enticing statutes and corresponding RCC § 22E-1304(d) provides that marriage is a defense to the revised sexually suggestive conduct with a minor statute. Also, in the original Anti-Sexual Abuse Act of 1994, the Council of the District of Columbia inserted the four year age gap requirement in the current child sexual abuse statutes "recognizing, but not condoning the sexual curiousity [sic] which exists among young persons of similar ages." Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 15. The current sexual abuse of a minor statutes were enacted in 2007. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

[21] D.C. Code § 22-3012 ("In a prosecution under §§ 22-3008 to 22-010 . . . the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child."). The current child sexual abuse statutes are codified at D.C. Code § 22-3008 and D.C. Code § 22-3009, and fall within the specified range of statutes.

[22] 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.

offenses because they overlap with elements of the offense.[23] In contrast, the revised sexually suggestive conduct with a minor statute is subject to only the general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020[24] are not necessary in the revised sexually suggestive conduct with a minor statute because the offense is limited to sexual conduct that occurs without the use of force, threats, or coercion. Limiting the penalty enhancements in RCC subtitle I to the revised sexually suggestive conduct with a minor statute improves the consistency and proportionality of the revised sex offenses. [Further discussion when the revised offenses have numerical penalties assigned].

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

First, the revised sexually suggestive conduct with a minor statute requires a "knowingly" culpable mental state for touching the complainant in a specified manner. The current MSACM statute requires engaging in specified conduct "which is intended to cause or reasonably causes the sexual arousal or sexual gratification of any person."[25] The current "reasonably causes" language may mean that the offense is a general (rather than specific) intent offense,[26] or may indicate a culpable mental state similar to negligence as defined in the RCC. There is no DCCA case law interpreting this language. The revised sexually suggestive conduct with a minor statute resolves any ambiguities as to the required culpable mental state for touching the complainant by requiring a "knowingly" culpable mental state for this element. Using negligence as the basis for criminal liability is disfavored for elements that distinguish otherwise non-

[23] DCCA case law in the context of the District's current assault with a dangerous weapon offense (ADW) suggests that the age-based sex offense aggravators and age-based penalty enhancements may not be applied to the current sexual abuse of a child statutes, sexual abuse of a minor statutes, misdemeanor sexual abuse of a child or minor statute, enticing statute, or arranging for sexual conduct with a real or fictitious child statute because they overlap with elements of these offenses. The DCCA has held that ADW may not be enhanced with the current "while armed" enhancement in D.C. Code § 22-4502(a)(1) because each provision requires the use of a "dangerous weapon." *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982) ("The government concedes that [current D.C. Code § 22-4502(a)(1)] may not apply to ADW since [ADW] provides for enhancement and is a more specific and lenient provision."); *see also Gathy v. United States*, 754 A.2d 912, 916 n.5 (D.C. 2000) ("In *McCall* we held that section [current D.C. Code § 22-4502(a)(1)] could not be applied to a charge of ADW because the use of 'a dangerous weapon' is already included as an element of *that* offense, so that 'ADW while armed'-*i.e.*, assault with a dangerous weapon while armed with a dangerous weapon-would be redundant.").

[24] However, an actor that merely possesses a dangerous weapon or a firearm while committing sexually suggestive conduct with a minor, without using or displaying it, may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-[X]) or the revised possession of a firearm during a crime of violence statute (RCC § 22E-[X]).

[25] D.C. Code § 22-3010.01(b).

[26] DCCA case law has characterized the current first and third degree sexual abuse statutes, which concern a sexual act, as "general intent" crimes. However, it is not clear what specific culpable mental state must be proven for such "general intent" crimes—e.g., knowledge or recklessness. *See* commentary to RCC 22E-1303, Sexual assault, above, for further discussion.

criminal from criminal conduct.[27] This change improves the proportionality of the revised offense.

Second, the revised sexually suggestive conduct with a minor statute requires a "knowingly" culpable mental state for the fact that the actor is in a position of trust with or authority over the complainant. The current MSACM statute requires that an actor 18 years of age or older be in a "significant relationship" with a complainant under the age of 18 years,[28] but it does not specify a culpable mental state and there is no DCCA case law on point. The revised sexually suggestive conduct with a minor statute resolves this ambiguity by requiring a "knowingly" culpable mental state for the fact that the actor is in a "position of trust with or authority over" the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[29] This change improves the clarity and consistency of the revised statute.

Third, due to the RCC definition of "position of trust with or authority over" in RCC § 22E-701, the scope of the revised sexually suggestive conduct with a minor statute may differ as compared to the current MSACM statute. The current MSACM statute requires that the actor be in a "significant relationship" with the complainant[30] and "significant relationship" is defined in D.C. Code § 22-3001.[31] The current definition of "significant relationship" is open-ended and defines "significant relationship" as "includ[ing]" the specified individuals as well as "any other person in a position of trust with or authority over" the complainant."[32] There is no DCCA case law interpreting the current definition of "significant relationship." The RCC definition of "position of trust with or authority over" is close-ended, but defines "position of trust with or authority over as "mean[ing]" specified individuals or "other person responsible under civil law for

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[27] *DiGiovanni v. United States*, 580 A.2d 123, 126–27 (D.C. 1990) (J. Steadman, concurring) (referencing "the principle that neither simple negligence nor naivete ordinarily forms the basis of felony liability.") (quoting *Morissette v. United States*, 342 U.S. 246, 251 (1952) ("[C]rime . . . generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand")). *See also Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L. Ed. 2d 1 (2015) (J. Alito, concurring) ("Whether negligence is morally culpable is an interesting philosophical question, but the answer is at least sufficiently debatable to justify the presumption that a serious offense against the person that lacks any clear common-law counterpart should be presumed to require more.").

[28] D.C. Code §§ 22-3010.01(a) ("Whoever . . . being 18 years of age or older and being in a significant relationship with a minor."); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

[29] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[30] D.C. Code § 22-3010.01(a).

[31] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").

[32] D.C. Code § 22-3001(10).

the care or supervision of the complainant." The revised definition provides a broad, flexible, objective standard for determining who is in a position of trust with or authority over another person. The RCC definition of "position of trust with or authority over" is discussed in detail in the commentary to RCC § 22E-701. This change improves the clarity and consistency of the revised statutes.

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

First, the revised sexually suggestive conduct with a minor statute categorizes all persons under the age of 18 as "minors" and defines revised offenses in terms of the specific ages of complainants. The D.C. Code currently contains two sets of offenses for sexual abuse of complainants under the age of 18—child sexual abuse, for complainants under the age of 16 years,[33] and sexual abuse of a minor, for complainants under the age of 18 years.[34] The current MSACM statute has the same distinction in one statute, applying to complainants under the age of 16 years[35] and complainants under the age of 18 years.[36] For clarification, the revised sexually suggestive conduct with a minor statute no longer distinguishes specifies the numerical ages of relevant classes of complainants rather than using "child" or "minor" terminology. Referring to a teenager as a "child" may be misleading and leads to inconsistency with other District offenses that have different definitions of "child."[37] These changes improve the clarity and consistency of the revised sexual abuse of a minor statute.

Second, the revised sexually suggestive conduct with a minor statute, by use of the phrase "in fact," requires no culpable mental state as to the actor's own age or the required age gap. The current MSACM statute does not specify any culpable mental states for the age of the actor or the required age gap.[38] However, current D.C. Code § 22-3011 states that a mistake of age is not a defense to the current MSACM statute.[39] For clarification, the revised sexually suggestive conduct with a minor statute uses the phrase "in fact," establishing strict liability as to the ages of the actor and the relevant age gap. It is generally recognized that a person may be held strictly liable for elements of an

[33] 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.").

[34] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years").

[35] 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.").

[36] 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.").

[37] For example, the current child cruelty statute considers a person under the age of 18 years to be a "child" (D.C. Code § 22-1101(a)), but the current contributing to the delinquency of a minor statute considers a person under the age 18 to be a "minor" (D.C. Code § 22-811(f)(2)).

[38] D.C. Code §§ 22-3010.01(a) (MSACM statute); 22-3001(3), (5A) (defining "child" as a "person who has not yet attained the age of 16 years" and "minor" as a "person who has not yet attained the age of 18 years.").

[39] 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).

offense that do not distinguish innocent from guilty conduct.[40] Strict liability for these elements also is consistent with the revised sexual abuse of a minor statute (RCC § 22E-1302). This change improves the clarity and consistency of the revised offense.

Third, the revised sexually suggestive conduct with a minor statute requires that the actor touching his or her own genitalia or that of a third person must be "in the sight of the complainant." The current MSACM statute prohibits simply "touching one's own genitalia or that of a third person" with a child or minor.[41] The only DCCA case law concerning this provision sustained an attempted MSACM conviction when the actor touched his genitalia "in front of" the complainant.[42] For clarification, the revised sexually suggestive conduct with a minor statute codifies a requirement that the actor touch his or her own genitalia or that of a third person "in the sight" of the complainant. The "in sight of" requirement clarifies the scope of the revised offense without changing current District law.

Fourth, for a complainant under the age of 16 years, the revised sexually suggestive conduct with a minor statute requires an age gap between the complainant and the actor of "at least four years." The current MSACM statute requires that an actor 18 years of age or older be "more than 4 years older" than a complainant under the age of 16 years.[43] The current child sexual abuse statutes, in contrast, are worded to require that the complainant be "at least four years older" than the complainant.[44] Consequently, there is a difference of a day in liability between the two offenses due to the different required age gaps.[45] For clarification, the revised sexually suggestive conduct with a minor statute uses the language "at least four years older," the same as in the revised sexual abuse of a minor statute (RCC § 22E-1302) for complainants that are under the age of 16 years. The change improves the consistency of the revised offense.

Fifth, the revised sexually suggestive conduct with a minor statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to

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

[41] D.C. Code § 22-3010.01(b).

[42] *Sutton v. United States*, 140 A.3d 1198, 1201, 1202 (D.C. 2016) (holding that the evidence was sufficient for attempted misdemeanor sexual abuse of a child under D.C. Code § 22-3010.01 when appellant touched his penis "in front of" the complainant).

[43] D.C. Code §§ 22-3010.01(a) ("Whoever, being 18 years of age or older and more than 4 years older than a child."); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[44] D.C. Code §§ 22-3008 (first degree child sexual abuse prohibiting "[w]hoever, being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act."); 22-3009 (second degree child sexual abuse statute prohibiting "[w]hoever, being at least 4 years older than a child, engages in sexual contact with that child or causes that child to engage in sexual contact."); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[45] For a complainant that is 15 years and 364 days old, an actor that is 19 years and 364 days old would be liable under the current child sexual abuse statutes because the complainant is under 16 years of age and the actor is "at least four years older" than the complainant. However, the actor would not be liable under the current MSACM statute because, while the actor is over the age of 18, the actor is not "more than four years older" than the complainant.

all current sexual offenses.[46] Under the statute, if the maximum term of imprisonment for the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[47] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[48] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[49] In the revised sexually suggestive conduct with a minor statute, the RCC General Part's attempt provisions (RCC § 22E-301) establish the requirements to prove an attempt and applicable penalties for sexually suggestive conduct, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general attempt provision provide penalties at ½ the maximum imprisonment sentence. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of the revised sexually suggestive conduct with a minor offense.

Sixth, the marriage and domestic partnership defense in the revised sexually suggestive conduct with a minor statute does not refer to other offenses. The current marriage or domestic partnership defense states that marriage or domestic partnership is a defense to MSACM "prosecuted alone or in conjunction with § 22-3018 [sex offense attempt statute] or § 22-403 [assault with intent to commit certain offenses]."[50] There is

[46] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). 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).

[47] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[48] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[49] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803. Under this general attempt penalty statute, the current MSACM statute would have a maximum term of imprisonment of 180 days, which is the same penalty as the completed offense.

[50] D.C. Code § 22-3011(b). The "prosecuted alone or in conjunction with" language appears in two other statutes in addition to D.C. Code § 22-3011. D.C. Code § 22-3007, which codifies defenses for first degree

no DCCA case law interpreting this provision. The language is not included in the current jury instruction for the marriage or domestic partnership defense.[51] The marriage or domestic partnership defense in the revised sexually suggestive conduct with a minor statute applies only to prosecution for the revised sexual abuse of a minor offense. In the RCC, the revised sex offenses no longer have their own attempt statute, and there are no longer separate "assault with intent to" offenses, or "AWI" offenses.[52] Similarly, the revised assault statutes in the RCC no longer include separate "assault with intent to" crimes and instead provide liability through application of the general attempt statute in RCC § 22E-301 to the completed offenses.[53] Deleting the "prosecuted alone or in conjunction with language" improves the clarity of the revised sexually suggestive conduct with a minor offense.

through fourth degree sexual abuse and misdemeanor sexual abuse, and D.C. Code § 22-3017, which codifies defenses for sexual abuse of a ward and sexual abuse of a patient or client. The "prosecuted alone or in conjunction with" language in these statutes consistently refers to D.C. Code § 22-3018, which is the current attempt statute for the sexual abuse offenses, but inconsistently refers to D.C. Code § 22-401, which prohibits assault with intent to commit specified offenses, including first degree sexual abuse, second degree sexual abuse, or child sexual abuse, and D.C. Code § 22-403 which prohibits assault with intent to commit "any other offense which may be punished by imprisonment in the penitentiary."

[51] D.C. Crim. Jur. Instr. § 9.700.

[52] See above Commentary to RCC § 22E-1304 on reliance on the RCC general attempt statute.

[53] See Commentary to RCC § 22E-1202 (revised assault statute).

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

Explanatory Note. *The RCC enticing a minor offense prohibits soliciting certain complainants under the age of 18 years to engage in sexual conduct. The revised enticing a minor offense replaces the current enticing a child statute.*[1] *The revised enticing a minor statute also replaces in relevant part four distinct provisions for the sexual abuse offenses: the marriage or domestic partnership defense,*[2] *the state of mind proof requirement,*[3] *the attempt statute,*[4] *and the aggravating sentencing factors.*[5]

Subsection (a)(1)(A) specifies one type of prohibited conduct—persuading or enticing, or attempting to persuade or entice, the complainant to engage in or submit to a "sexual act" or "sexual contact." Subsection (a)(1)(B) specifies the other type of prohibited conduct— persuading or enticing, or attempting to persuade or entice, the complainant to go to another location when the actor "plans to" cause the complainant to engage in or submit to the sexual conduct at that other location. "Sexual act" is a defined term in RCC § 22E-701 that means penetration of the anus or vulva of any person or contact between the mouth of any person and the specified body parts of any person, with the desire to sexually degrade, arouse, or gratify any person. "Sexual contact" is a defined term in RCC § 22E-701 that means touching the specified body parts, such as genitalia, of any person with the desire to sexually degrade, arouse, or gratify any person. Subsection (a)(1) specifies a culpable mental state of "knowingly" for the prohibited conduct. Per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state applies to the prohibited conduct in subsection (a)(1)(A) and (a)(1)(B). "Knowingly" is a defined term in RCC § 22E-206 that means the actor must be practically certain that his or her conduct will persuade or entice, or attempt to persuade or entice the complainant as required in subsection (a)(1)(A) and subsection (a)(1)(B).

Subsection (a)(2) requires that the actor "in fact" is at least 18 years of age. "In fact" is a defined term in RCC § 22E-207 that means no culpable mental state is required for a given element, here, the age of the actor. Subsection (a)(2)(A), subsection (a)(2)(B), and subsection (a)(2)(C) specify additional requirements for the actor and requirements for the complainant. Each subsection requires that the actor was "reckless" as to the fact of the required age or purported age of the complainant. "Reckless" is a defined term in RCC § 22E-206 that means the actor was aware of a substantial risk that the complainant was the required age or purported age. In addition, each subsection requires that the actor is, in fact, at least four years older than the complainant or the purported age of the complainant. In fact" is a defined term that means no culpable mental state is required for a given element, here, the required age difference.

For subsection (a)(2)(A), the actor must be "reckless" as to the fact that the complainant is under the age of 16 years (subsection (a)(2)(A)(i)) and the actor must, in

[1] D.C. Code § 22-3010.
[2] D.C. Code § 22-30011.
[3] D.C. Code § 22-3012.
[4] D.C. Code § 22-3018.
[5] D.C. Code § 22-3020.

fact, be at least 4 years older than the complainant (subsection (a)(2)(A)(ii)). The accused must be aware of a substantial risk that the complainant was under the age of 16 years, but there is no culpable mental state requirement for required age gap. For subsection (a)(2)(B), the actor must be "reckless" as to the fact that the complainant is under the age of 18 years (subsection (a)(2)(B)(i)). The accused must be aware of a substantial risk that the complainant was under the age of 18 years. The actor must also "know" that he or she is in a "position of trust with or authority over" the complainant (subsection (a)(2)(B)(ii)). Knowledge is a defined term in RCC § 22E-206 that means the accused must be practically certain that he or she is in a "position of trust with or authority over" the complainant. "Position of trust with or authority over" is a defined term in RCC § 22E-701 that includes individuals such as parents, siblings, school employees, and coaches. Finally, per subsection (a)(2)(B)(iii), the actor must be, in fact, at least four years older than the complainant. There is no culpable mental state requirement for the required age gap.

For subsection (a)(2)(C)(i), the complainant must, in fact, be a law enforcement officer who purports to be a person under the age of 16 years. There is no culpable mental state requirement for the fact that the complainant is a "law enforcement officer," as that term is defined in RCC § 22E-701, or that the law enforcement officer purports to be under the age of 16 years. Per subsection (a)(2)(C)(ii), the actor must be "reckless" as to the fact that the complainant purports to be a person under the age of 16 years. The accused must be aware of a substantial risk that the complainant purported to be a person under the age of 16 years. Finally, per subsection (a)(2)(C)(iii), the actor must be, in fact, at least four years older than the purported age of the complainant. There is no culpable mental state requirement for the required age gap.

Subsection (b) codifies an affirmative defense for the revised enticing a minor statute and establishes that this defense is in addition to any other defenses otherwise applicable to the actor's conduct under District law. Subsection (b) establishes an affirmative defense for conduct involving only the actor and the complainant that the actor and the complainant were in a marriage or "domestic partnership" at the time of the offense. "Domestic partnership" is defined in RCC § 22E-701. The actor must prove this defense by a preponderance of the evidence.

Subsection (c) specifies the penalty for the offense. [RESERVED]

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

Relation to Current District Law. *The revised enticing a minor statute changes current District law in seven main ways.*

First, the revised enticing statute requires a "reckless" culpable mental state for the age of the complainant. The current enticing a child statute[6] (enticing statute) does not specify any culpable mental states and there is no DCCA case law on this issue. However, current D.C. Code § 22-3012 and current D.C. § 22-3011 establish strict liability for the age of the complainant, real or fictitious, in the current enticing statute.[7]

[6] D.C. Code § 22-3010.

[7] D.C. Code § 22-3012 states that "[i]n a prosecution under §§ 22-3008 to 22-3010 . . . the government need not prove that the defendant knew the child's age." D.C. Code § 22-3012. The current enticing

In contrast, the revised enticing statute applies a "reckless" culpable mental state to the age of complainant. Applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts[8] and legal experts[9] for any non-regulatory crimes, although "statutory rape" laws are often an exception.[10] Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[11] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[12] A "reckless" culpable mental state in the revised enticing statute is consistent with the culpable mental state required in parts of the sexually suggestive conduct with a minor statute (RCC § 22E-1304), sexual exploitation of an adult statute (RCC § 22E-1303), and the nonconsensual sexual conduct statute (RCC § 22E-1307). This change improves the consistency and proportionality of the revised offense.

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statute is codified at D.C Code § 22-3010 and falls within the specified range of statutes, but D.C. Code § 22-3012 does not apply to the entire enticing statute. D.C. Code § 22-3012 and the enticing statute were part of the original 1994 Anti-Sexual Abuse Act. Crimes—Anti-Sexual Abuse Act, 1994 District of Columbia Laws 10-257 (Act 10-385). At that time, the enticing statute was limited to "real" complainants under the age of 16 years. The enticing statute was amended in 2007 to include "real" complainants under the age of 18 years when the actor is in a significant relationship with the complainant (D.C. Code § 22-3010(a)) and to include fictitious complainants (D.C. Code § 22-3010(b)). D.C. Code § 22-3012 was not amended in 2007, thus limiting its application to the original enticing statute, although this was likely a drafting error.

D.C. Code § 22-3011 states that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01." D.C. Code § 22-3011(a). Unlike D.C. Code § 22-3012, D.C. Code § 22-3011 was amended in 2007 to expand the specified range of statutes to § 22-3010.01 (the current misdemeanor sexual abuse of a child or minor statute, also enacted in 2007). Given this amendment, it likely that the entire enticing statute is included.

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

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

[10] *See, e.g.*, Joshua Dressler, Understanding Criminal Law § 12.03(b) (3d ed. 2001) ("A few non-public-welfare offenses are characterized as 'strict liability' because they do not require proof that the defendant possessed a *mens rea* regarding a material element of the offense. Perhaps the most common example is statutory rape, i.e., consensual intercourse by a male with an underage female.")

[11] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[12] *Elonis v. United States*," 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.").

Second, the revised enticing statute requires that the actor be 18 years of age or older and, by use of the phrase "in fact," requires strict lability for this element. The current enticing statute[13] does not specify any requirements for the age of the actor. DCCA case law does not address the point. In contrast, the revised enticing statute requires that the actor be 18 years of age or older and, by use of the phrase "in fact," requires strict liability for this element. Requiring the actor to be 18 years of age or older ensures that the enticing offense is reserved for adults to who engage in predatory behavior of complainants under the age of 18 years.[14] While an actor presumably will know his or her own age, it is generally recognized that a person may be held strictly liable for elements of an offense that do not distinguish innocent from guilty conduct.[15] Requiring that the actor be 18 years of age or older and applying strict liability to this element also is consistent with this element in the revised sexually suggestive contact with a minor statute (RCC § 22E-1307), third degree and sixth degree of the revised sexual abuse of a minor statute (RCC § 22E-1302), and the revised arranging for sexual conduct with a minor statute (RCC § 22E-1306). This change improves the consistency and proportionality of the revised offense.

Third, the revised enticing statute requires at least a four year age gap between the actor and the complainant when the complainant is under the age of 18 years, and, by the use of the phrase "in fact," requires strict liability for this age gap. The current enticing statute requires a four year age gap between the actor and a complainant under the age of 16 years,[16] but does not have an age gap requirement when the complainant is under the age of 18 years.[17] In contrast, the revised enticing statute requires at least a four year age gap between the actor and a complainant under the age of 18 years and, by use of the phrase "in fact," requires strict liability for this age gap. The current definition of "significant relationship"[18] and the revised definition of "position of trust with or

[13] D.C. Code §§ 22-3010(a), (b) ("Whoever, being at least four years older than a child, or being in a significant relationship with a minor" and "Whoever, being at least four years older than the purported age of a person who represents himself or herself to be a child."); 22-3001(3), (5A) (defining "child" as "a person who has not yet attained the age of 16 years" and "minor" as "a person who has not yet attained the age of 18 years.").

[14] For example, under the revised enticing statute, a 17 year old actor would not be guilty of enticing a 12 year old complainant to engage in sexual intercourse. However, depending on the facts of the case, the 17 year old could be guilty of attempted second degree sexual abuse of a minor (RCC § 22E-1304) and if sexual intercourse actually occurs, the 17 year old actor could be guilty of second degree sexual abuse of a minor unless there was a reasonable mistake of age defense.

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

[16] 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.").

[17] 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.").

[18] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto

authority over" (RCC § 22E-701) include a broad range of custodial and non-custodial relationships, and without an age gap between the complainant and the actor, otherwise consensual sexual conduct between individuals close in age would be criminal.[19] While the special relationship between the actor and complainant may be sufficient to make such consensual sexual conduct criminal, in some contexts, the Council has recognized that consensual sexual activity between persons close in age should not be criminal.[20] Strict liability for the age gap matches the current sexual abuse of a child statutes[21] and third degree and sixth degree of the revised sexual abuse of a minor statute (RCC § 22E-1302), the revised sexually suggestive conduct with a minor statute (RCC § 22E-1304), and the revised arranging for sexual conduct with a minor statute (RCC § 22E-1306). This change improves the consistency and proportionality of the revised statute.

Fourth, the revised enticing statute limits the offense to fictitious complainants that are law enforcement officers. The current enticing statute applies to any fictitious complainant,[22] while the closely-related statute for arranging sexual conduct with a real or fictitious child (current arranging statute) is limited to fictitious complainants that are law enforcement officers.[23] 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

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guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").

[19] For example, a 19 year old camp counselor who, with consent and in the context of a dating relationship, texts his 17 year old girlfriend that he wants to touch her buttocks may be guilty of enticing a minor under current District law.

[20] For example, current D.C. Code § 22-3011 provides that marriage or domestic partnership between the actor and the complainant is a defense to charges under the District's current child sexual abuse, sexual abuse of a minor, sexually suggestive conduct with a minor, and enticing statutes and corresponding RCC § 22E-1307(d) provides that marriage is a defense to the revised enticing a minor statute. Also, in the original Anti-Sexual Abuse Act of 1994, the Council of the District of Columbia inserted the four year age gap requirement in the current child sexual abuse statutes "recognizing, but not condoning the sexual curiousity [sic] which exists among young persons of similar ages." Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 15. The current sexual abuse of a minor statutes were enacted in 2007. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

[21] D.C. Code § 22-3012 ("In a prosecution under §§ 22-3008 to 22-010 . . . the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child."). The current child sexual abuse statutes are codified at D.C. Code § 22-3008 and D.C. Code § 22-3009, and fall within the specified range of statutes.

[22] D.C. Code § 22-3010(b) ("Whoever, being at least 4 years older than the purported age of a person who represents himself or herself to be a child.").

[23] 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.").

in the salacious banter)."[24] In contrast, the revised enticing statute is limited to fictitious complainants who actually are law enforcement officers. The same legislative rationales that underlie the current arranging statute's limitation to fictitious persons who are really police officers also apply to enticement-type conduct. This change improves the consistency and proportionality of the revised offense.

Fifth, the revised enticing statute is limited to persuading or enticing a child to go to another location when the actor plans to cause the complainant to engage in or submit to a sexual act or sexual contact at that location. The current enticing statute prohibits "tak[ing] that child or minor to any place for the purpose of committing any offense set forth in §§ 22-3002 to 22-3006 and §§ 22-3008 to 22-3009.02."[25] The current kidnapping statute[26] provides liability for similar conduct of "enticing" and "carrying away" a person, although DCCA case law suggests that kidnapping and enticing do not merge.[27] In contrast, the revised enticing statute omits liability for "taking" a person and is limited to persuading or enticing, or attempting to persuade or entice, the complainant. Physically taking a child somewhere without persuasion or enticement (and without appropriate consent) may still be subject to criminal charges in the RCC as a criminal restraint or kidnapping.[28] This change improves the proportionality and consistency of the revised offense.

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[24] 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)."

[25] D.C. Code § 22-3010(a)(1).

[26] D.C. Code § 22-2001 ("Whoever shall be guilty of, or of aiding or abetting in, seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever, and holding or detaining, or with the intent to hold or detain, such individual for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction thereof, be punished by imprisonment for not more than 30 years.").
If there is an exchange of value, the current enticing statute also overlaps with the enticing a child for prostitution statute, D.C. Code §§ 22-2704, and the sex trafficking of children statute. D.C. Code §§ 22-1834(a).

[27] In *Blackledge v. United States*, the DCCA held that kidnapping and enticing do not merge because "each of the two crimes requires proof of a factual element which the other does not." *Blackledge v. United States*, 871 A.2d 1193, 1197 (D.C. 2005). *Blackledge* was decided in 2005, and the enticing statute that appellant was prosecuted under has since been repealed. *Blackledge*, 871 A.2d at 1195. However, the repealed enticing statute is substantively identical to part of subsection (a) of the current enticing statute. D.C. Code § 22-4110 (1981) (repl.) ("Whoever, being at least 4 years older than a child, takes that child to any place, or entices, allures, or persuades a child to go to any place for the purpose of committing any offense set forth in §§ 22–4102 to 22–4106 and §§ 22–4108 and 22–4109 shall be imprisoned for not more than 5 years and, in addition, may be fined in an amount not to exceed $50,000."). It seems likely that *Blackledge* may still be applicable to the parts of subsection (a) of the current enticing statute that are identical to the repealed statute. For the remainder of the current enticing statute, including subsection (b) dealing with fictitious complainants, the DCCA's reasoning in *Blackledge* appears to still apply. The court in *Blackledge* noted that under an elements test, the repealed enticing statute "requires proof of three separate elements" which kidnapping does not—the age of the complainant, the age gap, and that the actor took the complainant "with the specific intent of committing a sexual offense." *Blackledge*, 871 A.2d at 1197. The current enticing statute continues to require elements that are not required in kidnapping, and it seems likely that the DCCA would continue to hold that the offenses do not merge.

[28] See RCC §§ 22E-1401 – 22E-1404 and accompanying commentary.

Sixth, only the general penalty enhancements in subtitle I of the RCC apply to the revised enticing statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[29] DCCA case law suggests that the age-based sex offense aggravators may not apply to certain sex offenses because they overlap with elements of the offense.[30] In contrast, the revised enticing statute is subject to only the general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020[31] are not necessary in the revised enticing statute because the offense is limited to sexual conduct that occurs without the use of force, threats, or coercion. This change improves the consistency and proportionality of the revised sex offenses. [Further discussion when the revised offenses have numerical penalties assigned].

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

First, the revised enticing statute requires a "knowingly" culpable mental state for persuading or enticing, or attempting to persuade or entice. The current enticing statute does not specify any culpable mental states, and there is no DCCA case law on this issue. The revised enticing statute resolves these ambiguities by requiring a "knowingly" culpable mental state in each gradation for persuading or enticing, or attempting to

[29] 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.

[30] DCCA case law in the context of the District's current assault with a dangerous weapon offense (ADW) suggests that the age-based sex offense aggravators and age-based penalty enhancements may not be applied to the current sexual abuse of a child statutes, sexual abuse of a minor statutes, misdemeanor sexual abuse of a child or minor statute, enticing statute, or arranging statute because they overlap with elements of these offenses. The DCCA has held that ADW may not be enhanced with the current "while armed" enhancement in D.C. Code § 22-4502(a)(1) because each provision requires the use of a "dangerous weapon." *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982) ("The government concedes that [current D.C. Code § 22-4502(a)(1)] may not apply to ADW since [ADW] provides for enhancement and is a more specific and lenient provision."); *see also Gathy v. United States*, 754 A.2d 912, 916 n.5 (D.C. 2000) ("In *McCall* we held that section [current D.C. Code § 22-4502(a)(1)] could not be applied to a charge of ADW because the use of 'a dangerous weapon' is already included as an element of *that* offense, so that 'ADW while armed'-*i.e.*, assault with a dangerous weapon while armed with a dangerous weapon-would be redundant.").

[31] However, an actor that merely possesses a dangerous weapon or a firearm while committing sexually suggestive conduct with a minor, without using or displaying it, may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-[X]) or the revised possession of a firearm during a crime of violence statute (RCC § 22E-[X]).

persuade or entice. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[32] This change improves the clarity and consistency of the revised statutes.

Second, the revised enticing statute consistently requires that the actor persuade or entice, or attempt to persuade or entice, the complainant "to engage in or submit to a sexual act or sexual contact." While all of the current sexual abuse statutes require that the actor "engages in" the sexual conduct, they vary in whether there is liability if the actor "causes" the complainant to "engage in" the sexual conduct or "causes" the complainant to "submit to" the sexual conduct.[33] This variation creates different plain language readings of the current sexual abuse statutes and suggests that the current offenses vary in scope as to the prohibited conduct and liability for involvement of a third party. There is no case law on point. However, DCCA case law addressing similar language in the District's current misdemeanor sexual abuse statute suggests that the DCCA may not construe such language variations as legally significant.[34] In addition to case law, District practice does not appear to follow the variations in statutory language.[35] Instead of these variations in language, the revised sex offenses and the revised definitions of "sexual act" and "sexual contact" consistently require that the actor "causes" the complainant to "engage in" or "submit to" the sexual conduct. Given the

[32] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[33] First degree sexual abuse, second degree sexual abuse, and sexual abuse of a ward codify "engages in" the sexual conduct, "causes" the complainant to "engage in" the sexual conduct, and "causes" the complainant to "submit to" the sexual conduct. D.C. Code §§ 22-3002 and 22-3003; 22-3013 and 22-3014. Third and fourth degree sexual abuse, child sexual abuse, sexual abuse of a minor, and sexual abuse of a secondary education student are limited to "engages in" the sexual conduct and "causes" the complainant to "engage in" the sexual conduct. D.C. Code §§ 22-3004 and 22-3005; 22-3008 and 22-3009; 22-3009.01 and 22-3009.02. Misdemeanor sexual abuse and sexual abuse of a patient or client require only "engages in." D.C. Code §§ 22-3006; 22-3015 and 22-3016.

[34] In *Pinckney v. United States*, the DCCA held that the misdemeanor sexual abuse statute includes "conduct where a person uses another to touch intimate parts of the person's own body" even though the plain language of the statute requires "engages in a sexual act or sexual contact with another person." *Pinckney v. United States*, 906 A.2d 301, 303, 306 (D.C. 2006) (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA declined "an interpretation that would exclude such an obvious means of offensive touching," in part because the legislature intended to "'strengthen the District's laws against sexual abuse and make them more inclusive, flexible and reflective of the broad range of abusive conduct which does in fact occur.'" *Id.* (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA stated that its interpretation of the misdemeanor sexual abuse statute "as applying to the facts of this case does not require appellant to have caused the victim to engage in or submit to sexual contact" because the appellant engaged in the prohibited sexual contact by his own actions." *Id.* However, the DCCA's reliance on the legislative intent of the Anti-Sexual Abuse Act suggests that it would broadly interpret any variations in the language of the current sexual abuse statutes.

[35] The jury instructions for third degree, fourth degree, child sexual abuse, and sexual abuse of a minor include that the actor "caused" the complainant "to engage in or submit to" a sexual act or sexual contact, even though the statutory language for those offenses does not include "causes" the complainant to "submit to." *Compare* D.C. Crim. Jur. Instr. §§ 4.400 (general sexual abuse); 4.401 (child sexual abuse); 4.402 (sexual abuse of a minor) D.C. Code §§ 22-3003 and 22-3004 (third degree and fourth degree sexual abuse statutes); 22-3008 and 22-3009 (first degree and second degree child sexual abuse statutes); 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor statutes).

unique requirements of the revised enticing statute, it requires either that the actor entice the complainant "to engage in or submit to" the sexual conduct or that the actor entices the complainant and "plans to cause the complainant to engage in or submit to a sexual act or sexual contact." The language clearly establishes that the actor is liable for soliciting the complainant to engage in or submit to a sexual act or sexual contact with the actor, with a third party, or with the complainant, or planning to do so. Differentiating liability based on whether an actor themselves commits the sexual conduct in question, or whether the actor causes the complainant to engage in or submit to the sexual conduct, may lead to disproportionate outcomes. The revised language improves the consistency, clarity, and proportionality of the revised offenses, and reduces unnecessary gaps in liability.

Third, the revised enticing statute requires a "knowingly" culpable mental state for the fact that the actor is in a "position of trust with or authority over" the complainant. The current enticing statute requires that the actor be "in a significant relationship with a minor,"[36] but it does not specify a culpable mental state and there is no DCCA case law for this issue. The revised enticing statute resolves this ambiguity by requiring a "knowingly" culpable mental state for the fact that the actor is in a "position of trust with or authority over" the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[37] This change improves the clarity and consistency of the revised statute.

Fourth, due to the RCC definition of "position of trust with or authority over" in RCC § 22E-701, the scope of the revised enticing statute may differ as compared to the current enticing statute. The current enticing statute requires that the actor be in a "significant relationship" with the complainant[38] and "significant relationship" is defined in D.C. Code § 22-3001.[39] The current definition of "significant relationship" is open-ended and defines "significant relationship" as "includ[ing]" the specified individuals as well as "any other person in a position of trust with or authority over" the complainant."[40] There is no DCCA case law interpreting the current definition of "significant relationship." The RCC definition of "position of trust with or authority over" is close-ended, but defines "position of trust with or authority over as "mean[ing]" specified individuals or "other person responsible under civil law for the care or supervision of the

[36] D.C. Code §§ 22-3010; 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").
[37] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).
[38] D.C. Code § 22-3010.01(a).
[39] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").
[40] D.C. Code § 22-3001(10).

complainant." The revised definition provides a broad, flexible, objective standard for determining who is in a position of trust with or authority over another person. The RCC definition of "position of trust with or authority over" is discussed in detail in the commentary to RCC § 22E-701. This change improves the clarity and consistency of the revised statutes.

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

First, the revised enticing statute categorizes all persons under the age of 18 as "minors" and defines revised offenses in terms of the specific ages of complainants. The D.C. Code currently contains two sets of offenses for sexual abuse of complainants under the age of 18—child sexual abuse, for complainants under the age of 16 years,[41] and sexual abuse of a minor, for complainants under the age of 18 years.[42] The current enticing statute[43] makes the same distinctions. For clarification, the revised enticing statute specifies the numerical ages of relevant classes of complainants rather than using "child" or "minor" terminology. Referring to a teenager as a "child" may be misleading and leads to inconsistency with other District offenses that have different definitions of "child."[44] These changes improve the clarity and consistency of the revised sexual abuse of a minor statute.

Second, the revised enticing statute, by use of the phrase "in fact," requires strict liability for the age gap between the actor and complainants under the age of 16 years, or the purported age gap between the actor and a complainant that is a law enforcement officer. Current D.C. Code § 22-3012 and current D.C. § 22-3011 establish strict liability for the required age gap between the actor and a complainant, real or fictitious, under the age of 16 years in the current enticing statute.[45] For clarification, the revised enticing

[41] D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").
[42] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years").
[43] D.C. Code § 22-3010.
[44] For example, the current child cruelty statute considers a person under the age of 18 years to be a "child" (D.C. Code § 22-1101(a)), but the current contributing to the delinquency of a minor statute considers a person under the age 18 to be a "minor" (D.C. Code § 22-811(f)(2)).
[45] D.C. Code § 22-3012 states that "[i]n a prosecution under §§ 22-3008 to 22-3010 . . . the government need not prove that the defendant knew the child's age." D.C. Code § 22-3012. The current enticing statute is codified at D.C Code § 22-3010 and falls within the specified range of statutes, but D.C. Code § 22-3012 does not apply to the entire enticing statute. D.C. Code § 22-3012 and the enticing statute were part of the original 1994 Anti-Sexual Abuse Act. Crimes—Anti-Sexual Abuse Act, 1994 District of Columbia Laws 10-257 (Act 10-385). At that time, the enticing statute was limited to "real" complainants under the age of 16 years. The enticing statute was amended in 2007 to include "real" complainants under the age of 18 years when the actor is in a significant relationship with the complainant (D.C. Code § 22-3010(a)) and to include fictitious complainants (D.C. Code § 22-3010(b)). D.C. Code § 22-3012 was not amended in 2007, thus limiting its application to the original enticing statute, although this was likely a drafting error. However, D.C. Code § 22-3011 states that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01." D.C. Code § 22-3011(a). Unlike D.C. Code § 22-3012, D.C. Code § 22-3011 was amended in 2007 to expand the specified range of statutes to § 22-3010.01 (the current misdemeanor sexual abuse of a child or minor statute, also enacted in 2007). Given this amendment, it likely that the entire enticing statute was meant to be included in D.C. Code § 22-3011.

statute uses the phrase "in fact," establishing strict liability as to the relevant age gap. It is generally recognized that a person may be held strictly liable for elements of an offense that do not distinguish innocent from guilty conduct.[46] Strict liability for the required age gap also is consistent with the revised sexual abuse of a minor statute (RCC § 22E-1302), the revised sexually suggestive conduct with a minor statute (RCC § 22E-1304), and the revised arranging for sexual conduct with a minor statute (RCC § 22E-1306). This change improves the clarity and consistency of the revised offense.

Third, the revised enticing statute requires that the actor "persuade" or "entice" or attempt to "persuade" or "entice." The current enticing statute uses differing verbs to convey the prohibited conduct—"seduce," "entice," "allure," "convince," persuade" and "seduce."[47] For clarification, the revised enticing statute consistently requires that the actor "persuade[s] or entice[s]" or "attempt[s] to persuade or "entice" the complainant. The other verbs, "seduce," "allure," "convince," and "seduce" appear to convey the same meaning and are surplusage. This change improves the clarity of the revised statute.

Fourth, the revised enticing statute relies on the general attempt statute to define what conduct constitutes an attempt and set the punishment for an attempt. The current enticing statute explicitly includes an attempt in part of the offense definition,[48] treating a person who attempts to commit that element of enticing the same as a person who completes that element. The current enticing offense does not describe the elements necessary to prove an attempt for this element, however, and there is no case law on point. More generally, current D.C. Code § 22-3018 provides an attempt penalty applicable to all current sexual offenses, including enticing, but does not specify the elements necessary to prove an attempt,[49] and there is no case law on point. To clarify the meaning of an attempt in the revised enticing a minor into sexual conduct statute, the RCC relies on the General Part's attempt provision (RCC § 22E-301) to describe the requirements to prove an attempt to persuade or entice in subsections (a)(1)(A) and (a)(1)(B), and the requirements to prove an attempt to commit the offense as a whole.[50]

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

[47] D.C. Code § 22-3010(a)(2) requires "seduces, entices, allures, convinces, or persuades" or attempts to do so. D.C. Code § 22-3010(b)(1) requires "attempts" to "seduce, entice, allure, convince, or persuade." D.C. Code § 22-3010(b)(2) requires "attempts" to "entice, allure, convince, or persuade."

[48] D.C. Code § 22-3010.

[49] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[50] In subsections (a)(1)(A) and (a)(1)(B) of the revised enticing statute, the phrase "attempts to persuade or entice" requires that, per RCC § 22E-301(a)(3), the actor is either "dangerously close" to committing that element of the offense or, "would be dangerously close" to committing that element of the offense if the situation was as the person perceived it, provided that the person's conduct is reasonably adapted to commission of that offense. For attempt liability as to the whole offense of the revised enticing statute, all the elements of an attempt described in RCC § 22E-301(a) and (b) must be met. An example of a possible attempt as to the whole offense may be based on facts where a 30-year old actor composes and sends a long email to a person met online who he believes to be 14 years old to convince the recipient to engage in a

While it is unusual in the RCC to include in a particular offense liability for attempting to complete an element, such liability is justified by the uniquely inchoate nature of the offense and the "persuades or entices" element,[51] and is consistent with the meaning of an attempt in current District law and the RCC. The proportionate penalties for am attempt—½ the maximum imprisonment sentence–are unchanged through application of RCC § 22E-301(c), and amount to half the revised enticing a minor into sexual conduct statute. This change improves the consistency and completeness of the revised sexual abuse of a minor offense.

Fifth, the marriage and domestic partnership defense in the revised enticing statute does not refer to other offenses. The current marriage or domestic partnership defense states that marriage or domestic partnership is a defense to enticing "prosecuted alone or in conjunction with § 22-3018 [sex offense attempt statute] or § 22-403 [assault with intent to commit certain offenses]."[52] There is no DCCA case law interpreting this provision. The language is not included in the current jury instruction for the marriage or domestic partnership defense.[53] The marriage or domestic partnership defense in the revised enticing statute applies only to prosecution for the revised enticing offense. In the RCC, the revised sex offenses no longer have their own attempt statute, and there are no longer separate "assault with intent to" offenses, or "AWI" offenses.[54] Similarly, the revised assault statutes in the RCC no longer include separate "assault with intent to" crimes and instead provide liability through application of the general attempt statute in RCC § 22E-301 to the completed offenses.[55] Deleting the "prosecuted alone or in conjunction with language" improves the clarity of the revised enticing offense.

Sixth, the revised enticing statute prohibits persuading or enticing, or attempting to persuade or entice, the complainant to go to another location when the actor "plans to cause the complainant to engage in or submit to a sexual act or sexual contact at that

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sexual act, but the person online actually is actually an adult (who is not a law-enforcement officer or the actor's spouse). See generally the commentary to RCC § 22E-301 for further explanation of the requirements of the general attempt statute.

[51] The entire enticing a minor into sexual conduct statute is directed at inchoate (incomplete) sexual misconduct, and so the inclusion of liability for "attempts to persuade or entice" in the elements in subsections (a)(1)(A) and (a)(1)(B) of the revised offense supports the focus of the offense on criminalizing early-stage misconduct that could lead to a serious harm (a sexual act or sexual contact that would constitute sexual abuse of a minor). Whether the minor was completely persuaded or enticed to engage in or submit to a sexual act need not be proven. All that must be proven was that the minor was dangerously close to being so persuaded or enticed, or the minor would have been dangerously close to being so persuaded if the situation was as the actor perceived it.

[52] D.C. Code § 22-3011(b). The "prosecuted alone or in conjunction with" language appears in two other statutes in addition to D.C. Code § 22-3011. D.C. Code § 22-3007, which codifies defenses for first degree through fourth degree sexual abuse and misdemeanor sexual abuse, and D.C. Code § 22-3017, which codifies defenses for sexual abuse of a ward and sexual abuse of a patient or client. The "prosecuted alone or in conjunction with" language in these statutes consistently refers to D.C. Code § 22-3018, which is the current attempt statute for the sexual abuse offenses, but inconsistently refers to D.C. Code § 22-401, which prohibits assault with intent to commit specified offenses, including first degree sexual abuse, second degree sexual abuse, or child sexual abuse, and D.C. Code § 22-403 which prohibits assault with intent to commit "any other offense which may be punished by imprisonment in the penitentiary."

[53] D.C. Crim. Jur. Instr. § 9.700.

[54] *See* above Commentary to RCC § 22E-1304 on reliance on the RCC general attempt statute)

[55] *See* Commentary to RCC § 22E-1202 (revised assault statute).

location." The current enticing statute prohibits "tak[ing] that child or minor to any place for the purpose of committing any offense set forth in §§ 22-3002 to 22-3006 and §§ 22-3008 to 22-3009.02."[56] "For the purpose of" is not defined in the current enticing statute, nor is there a generally applicable definition in the D.C. Code. There is no case law on point. However, "for the purpose of" is a defined culpable mental state in RCC § 22E-701. Instead of using a defined culpable mental state, the revised enticing statute requires that the actor "plans to" cause the complainant to engage in or submit to the sexual conduct at the other location. This revision clarifies the revised statute.

[56] D.C. Code § 22-3010(a)(1).

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

Explanatory Note. *The RCC arranging for sexual conduct with a minor offense prohibits an actor from arranging for sexual conduct between the actor and certain complainants under the age of 18 years or between a third party and certain complainants under the age of 18 years. The offense has a single penalty gradation. The revised arranging for sexual conduct with a minor offense replaces the current arranging for a sexual contact with a real or fictitious child statute.*[1] *The revised arranging for sexual conduct with a minor offense also replaces in relevant part two distinct provisions for the sexual abuse offenses: the attempt statute*[2] *and the aggravating sentencing factors.*[3]

Subsection (a)(1)(A) specifies part of the prohibited conduct—arranging for a "sexual act" or "sexual contact." "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts. "Sexual contact" is a defined term in RCC § 22E-701 that means touching the specified body parts, such as genitalia, of any person with the desire to sexually degrade, sexually arouse, or sexually gratify any person. Per subsection (a)(1)(A) and subsection (a)(1)(B), the actor must arrange for the sexual act or sexual contact between the actor and the complainant or between a third person and the complainant. Subsection (a)(1) specifies a culpable mental state of "knowingly" for the prohibited conduct. Per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state applies to the prohibited conduct in subsection (a)(1)(A) and subsection (a)(1)(B). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be practically certain that his or her conduct will arrange for a "sexual act" or "sexual contact" between the actor and the complainant or between the actor and a third person.

Subsection (a)(2) requires that the actor or the third person, if applicable, are "in fact" at least 18 years of age and at least four years older than the complainant. "In fact" is a defined term in RCC § 22E-207 that means no culpable mental state is required for a given element. Per the rule of construction in RCC § 22E-207, "in fact" applies to both the age of the actor, the age of the third person, and the four year age gap. There is no culpable mental state required for any of these elements.

Subsection (a)(2)(A) and subsection (a)(2)(B) specify requirements for the complainant. Each subsection requires that the actor was "reckless" as to the required age of the complainant. "Reckless" is a defined term in RCC § 22E-206 that here means the actor was aware of a substantial risk that the complainant was the required age. For subsection (a)(2)(A), the actor must be aware of a substantial risk that the complainant is under the age of 16 years. In the alternative, for subsection (a)(2)(B)(i), the actor must be aware of a substantial risk that the complainant is under the age of 18 years. Subsection (a)(2)(B)(ii) also requires that the actor be in a "position of trust with or authority over" the complainant when the complainant is under the age of 18 years. "Position of trust with or authority over" is a defined term in RCC § 22E-701 that includes individuals such as parents, siblings, school employees, and coaches.

[1] D.C. Code § 22-3010.02.
[2] D.C. Code § 22-3018.
[3] D.C. Code § 22-3020.

Subsection (a)(2)(B)(ii) requires a "knowingly" culpable mental state for the "position of trust with or authority over" element. "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be practically certain that the he or she is in a "position of trust with or authority over" the complainant.

Subsection (a)(3) specifies the requirements for the complainant when the complainant is a law enforcement officer. Subsection (a)(3) has the same requirements for the actor and the third party, if any, as subsection (a)(2), except that the required age gap is with the "purported age" of the complainant. Subsection (a)(3)(A) requires that the complainant must, "in fact," be a law enforcement officer who purports to be a person under the age of 16 years. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here that the complainant is a "law enforcement officer," as that term is defined in RCC § 22E-701, that purports to be under the age of 16 years. Subsection (a)(3)(B) requires that the actor must be "reckless" as to the fact that the complainant purports to be a person under the age of 16 years. "Reckless" is a defined term in RCC § 22E-206 that here means the actor was aware of a substantial risk that the complainant purported to be the required age.

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

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

Relation to Current District Law. *The revised arranging for sexual conduct with a minor statute changes current District law in five main ways.*

First, the revised arranging for sexual conduct with a minor statute includes sexual conduct with "real" (i.e., not fictitious) complainants under the age of 18 years. The current, closely-related enticing a child statute includes "real" complainants under the age of 18 years when the actor is in a "significant relationship" with the complainant,[4] but the current arranging for a sexual contact with a real or fictitious child statute (current arranging statute) is limited to complainants under the age of 16 years.[5] In contrast, the revised arranging for sexual conduct with a minor statute (revised arranging statute) includes "real" complainants under the age of 18 years when the actor is at least four years older than the complainant and in a "position of trust with or authority over" the complainant. There is no apparent reason to criminalize enticing complainants under the age of 18 years to whom one has a special obligation, but to not criminalize arranging a sexual act or sexual contact with these complainants. This change improves the consistency of and reduces an unnecessary gap in the revised offense.

Second, the revised arranging statute requires a "knowingly" culpable mental state for the element "position of trust with or authority over." The current arranging statute is limited to complainants under the age of 16 years,[6] and does not specify a culpable mental state as to that age. In contrast, the revised arranging statute requires a "knowingly" culpable mental state for the new element "position of trust with or

[4] D.C. Code §§ 22-3010(a); 22-3001(5A) (defining "minor" as "a person who has not yet attained the age of 18 years.").
[5] D.C. Code § 22-3010.02.
[6] D.C. Code § 22-3010.02.

authority over." As noted immediately above, there is no apparent reason to criminalize enticing complainants under the age of 18 years to whom one has a special obligation, but to not criminalize arranging a sexual act or sexual contact with these complainants. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle[7] and it is consistent with the revised sexual abuse of a minor statute (RCC § 22E-1302), the revised sexually suggestive conduct with a minor statute (RCC § 22E-1304), and the revised enticing a minor statute (RCC § 22E-1305). This change improves the clarity and consistency of the revised offense.

Third, the revised arranging statute applies a culpable mental state of "reckless" as to the age of the complainant. The current arranging statute does not specify any culpable mental states[8] and there is no DCCA case law on this issue. Applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts[9] and legal experts[10] for any non-regulatory crimes, although "statutory rape" laws are often an exception.[11] Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[12] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[13] In contrast, the revised arranging statute applies a "reckless" culpable mental state to the age of complainants. A "reckless" culpable mental state in the revised arranging statute is consistent with the culpable mental state required in parts of the sexual exploitation of an adult statute (RCC § 22E-1303), the sexually suggestive conduct with a minor statute (RCC § 22E-1305), and the nonconsensual sexual conduct statute (RCC § 22E-1307). This change improves the consistency and proportionality of the revised offense.

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[7] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[8] D.C. Code § 22-3010.02.

[9] *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).").

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

[11] *See, e.g.*, Joshua Dressler, Understanding Criminal Law § 12.03(b) (3d ed. 2001) ("A few non-public-welfare offenses are characterized as 'strict liability' because they do not require proof that the defendant possessed a *mens rea* regarding a material element of the offense. Perhaps the most common example is statutory rape, i.e., consensual intercourse by a male with an underage female.")

[12] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[13] *Elonis v. United States*," 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.").

Fourth, the revised arranging statute requires that the actor be 18 years of age or older and, by use of the phrase "in fact," requires strict lability for this element. The current arranging statute[14] does not specify any requirements for the age of the actor. DCCA case law does not address the point. In contrast, the revised arranging statute requires that the actor be 18 years of age or older and, by use of the phrase "in fact," requires strict liability for this element. Requiring the actor to be 18 years of age or older ensures that the arranging offense is reserved for adults who engage in predatory behavior of complainants under the age of 18 years.[15] While an actor presumably will know his or her own age, it is generally recognized that a person may be held strictly liable for elements of an offense that do not distinguish innocent from guilty conduct.[16] Requiring that the actor be 18 years of age or older and applying strict liability to this element also is consistent with the revised sexually suggestive contact with a minor statute (RCC § 22E-1304), third degree and sixth degree of the revised sexual abuse of a minor statute (RCC § 22E-1302), and the revised enticing a minor statute (RCC § 22E-1305). This change improves the consistency and proportionality of the revised offense.

Fifth, only the general penalty enhancements in subtitle I of the RCC apply to the revised arranging statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[17] DCCA case law suggests that the age-based sex offense aggravators may not apply to certain sex offenses because they overlap with elements of the offense.[18] In contrast, the revised arranging statute is subject to only the

[14] D.C. Code § 22-3010.02(a).

[15] For example, under the revised arranging statute, a 17 year old actor would not be guilty of arranging sexual intercourse between a 12 year old complainant and a 16 year old third party, or between a 12 year old complainant and a significantly older third party, such as a 30 year old. However, depending on the facts of the case, the 17 year old could be guilty of attempted first degree sexual abuse of a minor (RCC § 22E-1304) and if sexual intercourse actually occurs, the 17 year old actor could be guilty of first degree sexual abuse of a minor.

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

[17] 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.

[18] DCCA case law in the context of the District's current assault with a dangerous weapon offense (ADW) suggests that the age-based sex offense aggravators and age-based penalty enhancements may not be applied to the current sexual abuse of a child statutes, sexual abuse of a minor statutes, misdemeanor sexual

general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020[19] are not necessary in the arranging statute because the offense is limited to sexual conduct that occurs without the use of force, threats, or coercion. This change improves the consistency and proportionality of the revised sex offenses. [Further discussion when the revised offenses have numerical penalties assigned].

Beyond these five substantive changes to current District law, three other aspects of the revised arranging statute may be viewed as a substantive change of law.

First, the revised arranging statute requires a four year age gap between the actor and the complainant and between any third person and the complainant. It is unclear in the current arranging statute whether a four year age gap is required between the actor and the complainant, as well as between the complainant and any third party with whom the sexual conduct is arranged.[20] There is no DCCA case law on this issue. The revised arranging statute resolves this ambiguity by requiring a four year age gap between both the actor and the complainant and, when a third person is involved, between the third person and the complainant. The age gap requirement matches the requirement in the revised sexual abuse of a minor statute (RCC § 22E-1302) and revised sexually suggestive conduct with a minor statute (RCC § 22E-1304) and ensures that the offense is reserved for adults who engage in predatory behavior of complainants under the age of 18 years.[21] Accomplice or attempt liability for other RCC sex offenses may exist where the

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abuse of a child or minor statute, enticing statute, or arranging statute because they overlap with elements of these offenses. The DCCA has held that ADW may not be enhanced with the current "while armed" enhancement in D.C. Code § 22-4502(a)(1) because each provision requires the use of a "dangerous weapon." *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982) ("The government concedes that [current D.C. Code § 22-4502(a)(1)] may not apply to ADW since [ADW] provides for enhancement and is a more specific and lenient provision."); *see also Gathy v. United States*, 754 A.2d 912, 916 n.5 (D.C. 2000) ("In *McCall* we held that section [current D.C. Code § 22-4502(a)(1)] could not be applied to a charge of ADW because the use of 'a dangerous weapon' is already included as an element of *that* offense, so that 'ADW while armed'-*i.e.*, assault with a dangerous weapon while armed with a dangerous weapon-would be redundant.").

[19] However, an actor that merely possesses a dangerous weapon or a firearm while committing sexually suggestive conduct with a minor, without using or displaying it, may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-XXXX) or the revised possession of a firearm during a crime of violence statute (RCC § 22E-XXXX).

[20] The ambiguity arises from the multiple references to a "person" in the current arranging statute. D.C. Code § 22-3010.02(a) ("It is unlawful *for a person* to arrange to engage in a sexual act or sexual contact with an individual (whether real or fictitious) who is or who is represented to be a child at least 4 years younger than the person, or to arrange for another person to engage in a sexual act or sexual contact with an individual (whether real or fictitious) who is or who is represented to be a child of at least 4 years younger *than the person*.") (emphasis added).

[21] The four year age gap precludes liability when the sexual encounter that is being arranged is legal. For example, under the revised sexual abuse of a minor statute (RCC § 22E-1302), it is legal for a 19 year old actor to engage in consensual sexual intercourse with a 15 year old complainant. Under the revised arranging statute, it is also legal for the 19 year actor to arrange for consensual sexual intercourse with a 15 year old complainant. In the case of an actor who arranges for a sexual encounter between a complainant under the age of 18 years and a third party, the same principle applies. For example, a 20 year old actor that arranges for a sexual encounter between two consenting 15 year olds. The encounter is legal under the

actor arranges for a sexual encounter, but there is force, fraud, coercion, or other similar behavior. This change improves the clarity and consistency of the offense.

Second, the revised arranging statute, by use of the phrase "in fact," requires strict liability for the age gap between the actor and complainant. The current arranging statute[22] does not specify any culpable mental state requirements for the required age gap between the actor and the complainant. There is no DCCA case law on this issue. Instead of this ambiguity, the revised arranging statute, by use of the phrase "in fact," requires strict liability for this age gap. It is generally recognized that a person may be held strictly liable for elements of an offense that do not distinguish innocent from guilty conduct.[23] Strict liability for this element also is consistent with the revised sexual abuse of a minor statute (RCC § 22E-1302), revised sexually suggestive conduct with a minor statute (RCC § 22E-1304), and revised enticing statute (RCC § 22E-1305). This change improves the clarity and consistency of the revised offense.

Third, the revised arranging statute requires a "knowingly" culpable mental state for causing the complainant to engage in or submit to a sexual act or sexual contact. The current arranging statute does not specify any culpable mental state for arranging the sexual conduct[24] and there is no DCCA case law on this issue. The revised sexual abuse of a minor statute resolves this ambiguity by requiring a "knowingly" culpable mental state for arranging the sexual conduct. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[25] This change improves the clarity and consistency of the revised statutes.

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

First, the revised arranging statute requires that the actor be "at least four years older" than the complainant. The current arranging statute phrases the required age gap as "at least 4 years younger,"[26] whereas the current sexual abuse of a child statutes[27] and current enticing statute phrase the required age gap as "at least 4 years older."[28] Despite the different wording, the current enticing statute and the current arranging statute appear

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revised sexual abuse of a minor statute (RCC § 22E-1304) and absent force, fraud, coercion, or similar behavior, is legal under the other RCC sex offenses as well.

[22] D.C. Code § 22-3012(a).

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

[24] 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.").

[25] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[26] D.C. Code § 22-3010.02(a).

[27] 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.").

[28] D.C. Code § 22-3010(a), (b).

to require the same age gap.[29] For clarification, the revised arranging statute consistently requires that the actor be "at least four years older" than the complainant. Consistently wording the age gap requirement improves the clarity and consistency of the revised offense without changing current District law.

Second, the revised arranging statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses.[30] Under the statute, if the maximum term of imprisonment for the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[31] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[32] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[33] In the revised enticing statute, the RCC General Part's attempt provisions (RCC § 22E-301) establish the requirements to prove an attempt and applicable penalties for the arranging offense, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general attempt provision provide penalties at ½ the maximum imprisonment sentence. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of the revised arranging offense.

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[29] For example, if a complainant is 15 years and 364 days old, and an actor is 19 years and 364 days old, the actor is at least four years older than the complainant (required in the current enticing statute) and the complainant is at least four years younger than the actor (required in the current arranging statute).

[30] 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).

[31] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[32] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[33] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803. Under this general attempt penalty statute, the current arranging statute would have a maximum term of imprisonment of 180 days.

RCC § 22E-1307. Nonconsensual Sexual Conduct.

Explanatory Note. *The RCC nonconsensual sexual conduct offense prohibits causing a complainant to engage in or submit to a sexual act or sexual contact without the complainant's effective consent. The penalty gradations are based on the nature of the sexual conduct. The revised nonconsensual sexual conduct offense replaces the current misdemeanor sexual abuse statute.[1] The revised nonconsensual sexual conduct offense also replaces in relevant part three distinct provisions for the sexual abuse offenses: the consent defense,[2] the attempt statute,[3] and the aggravating sentencing factors.[4]*

Subsection (a) specifies the prohibited conduct for first degree nonconsensual sexual conduct. The actor must "recklessly" cause the complainant to engage in or submit to a "sexual act" without the complainant's effective consent. Per the rule of construction in RCC § 22E-207, the "recklessly" culpable mental state applies to each element in subsection (a). "Recklessly" is a defined term in RCC § 22E-206 that here means the actor must be aware of a substantial risk that the actor's conduct will result in a "sexual act" without the complainant's effective consent. "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception."

Subsection (b) specifies the prohibited conduct for second degree nonconsensual sexual conduct. The actor must "recklessly" cause the complainant to engage in or submit to a "sexual contact" without the complainant's effective consent. Per the rule of construction in RCC § 22E-207, the "recklessly" culpable mental state applies to each element in subsection (b). "Recklessly" is a defined term in RCC § 22E-206 that here means the actor must be aware of a substantial risk that the actor's conduct will result in "sexual contact" without the complainant's effective consent. "Sexual contact" is a defined term in RCC § 22E-701 that means touching specified body parts, such as genitalia, of any person with the desire to sexually degrade, arouse, or gratify any person. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception."

Subsection (c) excludes from liability for nonconsensual sexual conduct an actor's use of deception to induce[5] the complainant to consent, notwithstanding the fact that such deception may otherwise negate the complainant's effective consent. However, subsection (c) also specifies that the use of deception as to the nature[6] of the sexual act or

[1] D.C. Code § 22-3006.
[2] D.C. Code § 22-3007.
[3] D.C. Code § 22-3018.
[4] D.C. Code § 22-3020.
[5] Examples of deception to induce a sexual act or sexual contact include: a false statement about one's feelings for the complainant; a false assertion that one is a celebrity; and a false promise to perform a future action in return for the sexual conduct.
[6] Examples of deception as to the nature of the sexual act or sexual contact include deceptions as to: the object or body part that is used to penetrate the other person; a person's current use of birth control (e.g. use of a condom or IUD); and a person's health status (e.g. having a sexually transmitted disease). In addition

sexual contact may constitute a deception that negates the complainant's effective consent and subject's the actor to liability.

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

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

Relation to Current District Law. *The revised nonconsensual sexual conduct statute changes current District law in seven main ways.*

First, the revised nonconsensual sexual conduct statute is comprised of two gradations, based on whether a "sexual act" or "sexual contact" was committed. The current misdemeanor sexual abuse (MSA) statute prohibits committing either a "sexual act" or "sexual contact" without distinction in penalty, with both types of conduct subject to the same maximum imprisonment of 180 days.[7] In contrast, first degree of the nonconsensual sexual conduct statute prohibits a "sexual act" without effective consent and second degree prohibits "sexual contact" without effective consent. Differentiating the penalties for a "sexual act" and "sexual contact" is consistent with the grading in other current D.C. Code and RCC sex offenses.[8] This change improves the consistency and proportionality of the revised offense.

Second, second degree of the revised nonconsensual sexual conduct statute generally replaces non-violent sexual touching forms of assault. The District's current assault offense, D.C. Code § 22-404, does not specifically refer to sexual touching. However the DCCA has held that a simple assault per D.C. Code § 22-404(a)(1) includes non-violent sexual touching,[9] and that such an assault is a lesser included offense of the current MSA statute.[10] DCCA case law also suggests that a simple assault in D.C. Code

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to the RCC nonconsensual sexual conduct offense, the RCC sexual exploitation of an adult statute (RCC § 22E-1303) specifically prohibits a sexual act or sexual contact when the actor falsely represents that he or she is someone else who is personally known to the complainant. This particular form of deception is more serious than other forms of deception that the RCC nonconsensual sexual conduct offense may prohibit.

[7] D.C. Code § 22-3006.

[8] The other current sexual abuse statutes grade offenses involving a "sexual act" more severely than offense involving a "sexual contact." *Compare* D.C. Code §§ 22-3002, 22-3003, 22-3008, 22-3009.01, 22-3013, 22-3015 (first degree sexual abuse offenses prohibiting a "sexual act") *with* §§ 22-3004, 22-3006, 22-3009, 22-3009.02, 22-3014, 22-3016 (second degree sexual abuse offenses prohibiting "sexual contact.").

[9] The District's current assault statute does not state the elements of the offense. D.C. Code § 22-404(a)(1) ("Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 180 days, or both."). DCCA case law, however, recognizes that assault includes non-violent touching. *See, e.g., Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001) ("Non-violent sexual touching assault . . . is committed by the voluntary touching of another in a sexually sensitive or private area without consent. Sexual touching need only consist of a touching that could offend a person of reasonable sensibility.") (quotations and citations omitted).

[10] In *Mungo v. United States*, the DCCA held that non-violent sexual touching assault is a lesser included offense of MSA. *Mungo*, 772 A.2d at 246. The DCCA stated that the *actus reus* of non-violent sexual touching assault can be "less intimate" than the conduct the MSA prohibits, but "the fundamental difference" between the offenses is the culpable mental state requirement. *Id.* ("Misdemeanor sexual abuse requires an intent to do the acts; in addition, in this case, it requires an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. Simple assault requires only an intent to do the proscribed act."). However, the sexual conduct at issue in *Mungo* was a "sexual contact." *Mungo*, 772 A.2d at 242. Consequently, the *Mungo* decision that non-consensual sexual touching forms of assault are a

§ 22-404(a)(1) also likely requires a culpable mental state of recklessness.[11] In contrast, in the RCC, second degree nonconsensual sexual conduct generally replaces liability for the non-violent sexual touching form of assault. RCC § 22E-1205, the offensive physical contact offense, provides even more general liability for offensive touching (regardless whether there is an intent to sexually degrade, sexually arouse, or sexually gratify),[12] and in some circumstances a non-consensual sexual touching may satisfy the elements of more serious RCC sex offenses.[13] However, in general, second degree nonconsensual sexual conduct is the crime in the RCC which covers non-consensual sexual touching. This change reduces unnecessary overlap between offenses and improves the proportionality and consistency of the revised offense.

Third, the revised nonconsensual sexual conduct offense requires a culpable mental state of "recklessly" as to engaging in the sexual act or contact. The current MSA statute does not specify any culpable mental state for engaging in a sexual act or sexual contact, although the current statutory definition of "sexual contact" requires an "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[14]

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lesser included of MSA may only be *dicta* with respect to sexual acts, even though the DCCA's holding in *Mungo* did not differentiate between an MSA conviction based on a "sexual act" and an MSA conviction based on "sexual contact." *Id.* at 246 ("[W]e conclude that non-violent sexual touching assault is a lesser included offense" of MSA). Instead, the court was focused on the parts of the current definitions of "sexual act" and "sexual contact" that require an extra intent to gratify or arouse that simple assault does not. *Id.* ("When prosecuting MSA based on an alleged sexual contact or an alleged sexual act [based on subsection (C) of the current definition], the government must therefore prove an element of intent, i.e., the intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

[11] Simple assault is a lesser included offense of offenses such as ADW, assault with significant bodily injury, and aggravated assault. *See Williams v. United States*, 106 A.3d 1063, 1065 & n.5 (D.C. 2015) (referring to simple assault as a lesser included offense of ADW); *Woods v. United States*, 65 A.3d 667, 668 (D.C. 2013) (referring to simple assault as a lesser included offense of assault with significant bodily injury); *McCloud v. United States*, 781 A.2d 744, 746 (D.C. 2001) (referring to simple assault as a lesser included of aggravated assault). The lesser included offense relationship between simple assault and ADW and simple assault and aggravated assault suggests that recklessness should suffice for simple assault because proof of recklessness or extreme recklessness satisfies these greater offenses. *See Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), *as amended* (Sept. 19, 2013) ("[I]t is clear that a conviction for ADW can be sustained by proof of reckless conduct alone."). However, the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient. *Vines v. United States*, 70 A.3d 1170, 1181 (D.C. 2013), *as amended* (Sept. 19, 2013).

[12] However, the general merger provision in RCC § 22E-214 would likely prohibit an actor from receiving a conviction for both offensive physical contact and nonconsensual sexual conduct based on the same course of conduct, which would be consistent with current case law on assault and MSA. *See, e.g.*, *Mattete v. United States*, 902 A.2d 113, 117-18 (agreeing with appellant and the government that appellant's assault conviction merges into the conviction for MSA and remanding the case to the trial court for the purpose of vacating the assault conviction).

[13] For example, a non-consensual sexual touching of a person who is unconscious may constitute fourth degree sexual assault in the RCC.

[14] D.C. Code § 22-3001(9) (defining "sexual contact."). Despite this additional intent element the definition of "sexual contact" requires, the DCCA has sustained a conviction for second degree child sexual abuse when the jury instructions required that the actor "knowingly" touched the complainant and erroneously omitted "with intent to abuse, humiliate, harass, degrade, or arouse or gratify." *Green v. United States*, 948 A.2d 554, 558, 561 (D.C. 2008) (affirming appellant's conviction for second degree child sexual abuse when the jury instructions required that the appellant "knowingly" touched the complainant and omitted the "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual

The DCCA has characterized the current first degree and third degree sexual abuse statutes, which concern a "sexual act," as "general intent" crimes. However, it is not clear what specific culpable mental state must be proven for such "general intent" crimes—e.g., knowledge or recklessness.[15] In contrast, the revised nonconsensual sexual conduct statute requires a "recklessly" culpable mental state in each gradation for causing the complainant to engage in or submit to a sexual act or sexual contact. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[16] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[17] In addition, the current assault statute,[18] which has been interpreted by the DCCA to include liability for nonconsensual sexual touching,[19] also likely requires a culpable mental state of recklessness.[20] This change improves the clarity and consistency of the revised offense.

Fourth, the revised nonconsensual sexual conduct offense requires a culpable mental state of "recklessly" as to the fact that the actor lacked effective consent from the complainant. The current MSA statute requires that an actor "should have knowledge or reason to know that the act was committed without that other person's permission."[21]

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desire of any person" requirement because "no rational jury could have found that appellant touched [the complainants] in a way consistent with the trial court's jury instruction . . . without also finding the requisite intent.").

[15] See commentary to RCC § 22E-1301, Sexual assault, for further discussion.

[16] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[17] *Elonis v. United States*," 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.).

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

[19] In *Mungo v. United States*, the DCCA held that non-violent sexual touching assault is a lesser included offense of MSA. *Mungo*, 772 A.2d at 246. The DCCA stated that the *actus reus* of non-violent sexual touching assault can be "less intimate" than the conduct the MSA prohibits, but "the fundamental difference" between the offenses is the culpable mental state requirement. *Id.* ("Misdemeanor sexual abuse requires an intent to do the acts; in addition, in this case, it requires an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. Simple assault requires only an intent to do the proscribed act.").

[20] Simple assault is a lesser included offense of offenses such as ADW, assault with significant bodily injury, and aggravated assault. *See Williams v. United States*, 106 A.3d 1063, 1065 & n.5 (D.C. 2015) (referring to simple assault as a lesser included offense of ADW); *Woods v. United States*, 65 A.3d 667, 668 (D.C. 2013) (referring to simple assault as a lesser included offense of assault with significant bodily injury); *McCloud v. United States*, 781 A.2d 744, 746 (D.C. 2001) (referring to simple assault as a lesser included of aggravated assault). The lesser included offense relationship between simple assault and ADW and simple assault and aggravated assault suggests that recklessness should suffice for simple assault because proof of recklessness or extreme recklessness satisfies these greater offenses. *See Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), *as amended* (Sept. 19, 2013) ("[I]t is clear that a conviction for ADW can be sustained by proof of reckless conduct alone."). However, the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient. *Vines v. United States*, 70 A.3d 1170, 1181 (D.C. 2013), *as amended* (Sept. 19, 2013).

[21] D.C. Code § 22-3006.

There is no case law describing the meaning of these mental state terms.[22] However, District case law[23] and District practice[24] have consistently construed the culpable mental state regarding the lack of permission in the current MSA statute as "know or should have known," without discussion of the discrepancy with the statutory language. In contrast, the RCC nonconsensual sexual conduct offense requires a "recklessly" culpable mental state as to the lack of effective consent. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[25] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[26] The current assault statute[27] that has been interpreted by the DCCA to include liability for nonconsensual sexual touching[28] also likely requires a culpable mental state of

[22] The current "should have knowledge or reason to know" language may suggest a culpable mental state akin to negligence. However, negligence is disfavored as a basis for criminal liability. *DiGiovanni v. United States*, 580 A.2d 123, 126–27 (D.C. 1990) (J. Steadman, concurring) (referencing "the principle that neither simple negligence nor naivete ordinarily forms the basis of felony liability.") (quoting *Morissette v. United States*, 342 U.S. 246, 251 (1952) ("[C]rime . . . generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand"). In addition, with respect to the similar phrase "knowing or having reason to believe" in the District's current receiving stolen property offense, D.C. Code § 22-3232, the DCCA held that the culpable mental state still required a subjective awareness by the defendant as to the offense element. *See Owens v. United States*, 90 A.3d 1118, 1123 (D.C. 2014) (noting that jury instructions "improperly focused on what a reasonable person would have believed without emphasizing the jury's duty to determine appellant's subjective knowledge").

[23] *See, e.g.*, *Mungo v. United States*, 772 A.2d 240, 244-45 (D.C. 2001) (stating that the "essential elements" of MSA are "(1) that the defendant committed a 'sexual act' or 'sexual contact' . . . and (2) that the defendant knew or should have known that he or she did not have the complainant's permission to engage in the sexual act or sexual contact.") (citing the Criminal Jury Instructions for the District of Columbia, No. 460A (4th ed. 1993 & Supp. 1996)); *Harkins v. United States*, 810 A.2d 895, 900 (D.C. 2002) (stating that MSA "occurs when an individual 'engages in a sexual act or sexual contact with another person and who should have knowledge or reason to know that the act was committed without that other person's permission," citing the MSA statute, but also stating that "there are two essential elements to [MSA]: "'(1) that the defendant committed a 'sexual act' or 'sexual contact' . . . and (2) that the defendant knew or should have known that he or she did not have the complainant's permission to engage in the sexual act or sexual contact." (quoting *Mungo v. United States*, 772 A.2d 240, 244-45 (D.C. 2001)).

[24] D.C. Crim. Jur. Instr.§ 4.400 at 4-116 (jury instruction stating the culpable mental state in the MSA statute as "knew or should have known.")

[25] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[26] *Elonis v. United States*," 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.").

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

[28] In *Mungo v. United States*, the DCCA held that non-violent sexual touching assault is a lesser included offense of MSA. *Mungo*, 772 A.2d at 246. The DCCA stated that the *actus reus* of non-violent sexual touching assault can be "less intimate" than the conduct the MSA prohibits, but "the fundamental difference" between the offenses is the culpable mental state requirement. *Id.* ("Misdemeanor sexual abuse requires an intent to do the acts; in addition, in this case, it requires an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. Simple assault requires only an intent to do the proscribed act.").

recklessness.[29] This change improves the clarity and consistency of the revised sexual assault statute.

Fifth, the revised nonconsensual sexual conduct offense requires proof that the actor lacked effective consent and does not provide for a separate consent defense. The current MSA statute requires that the sexual act or sexual contact occur without the complainant's "permission."[30] "Permission," unlike "consent,"[31] is undefined in the current sexual abuse statutes. DCCA case law has not specifically addressed the definition of "permission," although it has used the terms "permission" and "consent" interchangeably in discussing the MSA statute.[32] The current MSA statute, however, is subject to the same consent defense applicable to other sexual abuse statutes.[33] In contrast, the nonconsensual sexual conduct offense requires proof of lack of "effective consent" and eliminates the consent defense for the MSA statute. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception." The RCC definition of "effective consent" appears to be consistent with the current definition of "consent" for sex abuse offenses.[34] Elimination of a separate consent defense to the RCC nonconsensual sexual conduct offense does not change the scope of the statute because if a complainant gives effective consent, that negates an element of the offense, and the actor is not guilty. The elimination of a consent defense, moreover, avoids unconstitutionally shifting the burden

[29] Simple assault is a lesser included offense of offenses such as ADW, assault with significant bodily injury, and aggravated assault. *See Williams v. United States*, 106 A.3d 1063, 1065 & n.5 (D.C. 2015) (referring to simple assault as a lesser included offense of ADW); *Woods v. United States*, 65 A.3d 667, 668 (D.C. 2013) (referring to simple assault as a lesser included offense of assault with significant bodily injury); *McCloud v. United States*, 781 A.2d 744, 746 (D.C. 2001) (referring to simple assault as a lesser included of aggravated assault). The lesser included offense relationship between simple assault and ADW and simple assault and aggravated assault suggests that recklessness should suffice for simple assault because proof of recklessness or extreme recklessness satisfies these greater offenses. *See Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), *as amended* (Sept. 19, 2013) ("[I]t is clear that a conviction for ADW can be sustained by proof of reckless conduct alone."). However, the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient. *Vines v. United States*, 70 A.3d 1170, 1181 (D.C. 2013), *as amended* (Sept. 19, 2013).

[30] D.C. Code § 22-3006.

[31] 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.").

[32] *See, e.g.*, *Davis v. United States*, 973 A.2d 1101, 1104, 1106 (D.C. 2005) (noting in dicta that "permission" is "not specifically defined in the [MSA] statute, but in common usage, the word is a synonym for 'consent'" and holding that "if the complainant in a misdemeanor sexual abuse (or other general sexual assault) prosecution was a child at the time of the alleged offense, an adult defendant who is at least four years older than the complainant may not assert a 'consent' defense."); *Hailstock v. United States*, 85 A.3d 1277, 1280, 1281, (noting that "what was required to convict [the appellant] of the offense of attempted MSA was that he took the requisite overt steps at a time when he *should have known* that he did not have [the complainant's] consent for the acts he contemplated.") (emphasis in original).

[33] D.C. Code § 22-3007.

[34] D.C. Code § 22-3001(4), defining consent, requires that there be "words or overt actions indicating a *freely* given agreement" (emphasis added). There is no DCCA case law interpreting the "freely given" requirement in the current definition of "consent." However, the RCC definition of "effective consent" in RCC § 22E-701 appears to cover this requirement insofar as it requires consent that is obtained by means other than physical force, a coercive threat, or deception.

of proof for an element of the offense to the actor.[35] These changes improve the clarity, consistency and legality of the revised offense.

Sixth, only the general penalty enhancements in subtitle I of the RCC apply to the revised nonconsensual sexual conduct statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[36] In contrast, the revised nonconsensual sexual conduct statute is subject to only the general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020[37] are not necessary in the revised nonconsensual sexual conduct statute because the offense is limited to sexual conduct that occurs without the use of force, threats, or coercion. Limiting the penalty enhancements in RCC subtitle I to the revised nonconsensual sexual conduct statute improves the consistency and proportionality of the revised sex offenses. [Further discussion when the revised offenses have numerical penalties assigned].

Seventh, to the extent that the protection of District public officials statute,[38] various offense-specific penalty enhancements,[39] and certain statutory minimum penalties[40] apply to the current assault statute and related assault offenses, the RCC

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[35] *In re Winship*, 397 U.S. 358, 364 (1970) ("[The] Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). To the extent that "permission" in the current MSA statute is the same as "consent," (see commentary above) the current consent defense may unconstitutionally shift the burden of proof to the defendant.

[36] 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.

[37] However, an actor that merely possesses a dangerous weapon or a firearm while committing sexually suggestive conduct with a minor, without using or displaying it, may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-XXXX) or the revised possession of a firearm during a crime of violence statute (RCC § 22E-XXXX).

[38] D.C. Code § 22-851.

[39] The enhancement for committing an offense while armed (D.C. Code § 22-4502); the enhancement for senior citizens (D.C. Code § 22-3601); the enhancement for citizen patrols (D.C. Code § 22-3602); the enhancement for minors (D.C. Code § 22-3611); the enhancement for taxicab drivers (D.C. Code §§ 22-3751; 22-3752); and the enhancement for transit operators and Metrorail station managers (D.C. Code §§ 22-3751.01; 22-3752).

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

second degree nonconsensual sexual conduct offense partially replaces them. These statutes are silent as to whether the provisions are intended to apply to low-level assaultive conduct and there is no DCCA case law on the issue. In contrast, in the RCC, low-level assaultive conduct is no longer subject to these enhancements and provisions. For the RCC second degree nonconsensual sexual conduct offense specifically, non-violent sexual touching is no longer subject to these provisions.[41] This change improves the proportionality of the revised offense.[42]

Beyond these eight substantive changes to current District law, two other aspects of the revised nonconsensual sexual conduct statute may be viewed as a substantive change of law.

First, the revised nonconsensual sexual conduct statute consistently requires that the actor "causes the complainant to engage in or submit to" the sexual act or sexual contact. While all of the current sexual abuse statutes require that the actor "engages in" the sexual conduct, they vary in whether there is liability if the actor "causes" the complainant to "engage in" the sexual conduct or "causes" the complainant to "submit to" the sexual conduct.[43] This variation creates different plain language readings of the current sexual abuse statutes and suggests that the current offenses vary in scope as to the prohibited conduct and liability for involvement of a third party. There is no case law on point. However, DCCA case law addressing similar language in the District's current MSA statute suggests that the DCCA may not construe such language variations as

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

[41] As discussed in the commentary to the revised assault statute (RCC § 22E-1202), in addition to non-violent sexual touching, current District law includes in assault: 1) unwanted touchings that do not cause pain or impairment to the complainant; and 2) intent-to-frighten assaults that do not result in physical contact with the complainant's body. In the RCC, this conduct is no longer covered by the revised assault statute, but may be covered by attempted assault under the general attempt provision (RCC § 22E-301), or by menacing (RCC § 22E-1203), criminal threats (RCC § 22E-1204), or second degree nonconsensual sexual conduct (RCC § 22E-1307(b)). As with the RCC second degree nonconsensual sexual conduct offense, menacing (RCC § 22E-1203), criminal threats (RCC § 22E-1204), and offensive physical contact (RCC § 22E-1205) are no longer subject to the protection of District public officials statute and these offense-specific penalty enhancements and statutory minimums, which is discussed further in the commentaries to these RCC statutes. The commentary to the RCC assault statute discusses the scope of the revised offense as it pertains to these provisions.

[42] For further discussion of how these enhancements and provisions apply to the District's current assault statutes, see the commentary to the revised assault statute (RCC § 22E-1202).

[43] First degree sexual abuse, second degree sexual abuse, and sexual abuse of a ward codify "engages in" the sexual conduct, "causes" the complainant to "engage in" the sexual conduct, and "causes" the complainant to "submit to" the sexual conduct. D.C. Code §§ 22-3002 and 22-3003; 22-3013 and 22-3014. Third and fourth degree sexual abuse, child sexual abuse, sexual abuse of a minor, and sexual abuse of a secondary education student are limited to "engages in" the sexual conduct and "causes" the complainant to "engage in" the sexual conduct. D.C. Code §§ 22-3004 and 22-3005; 22-3008 and 22-3009; 22-3009.01 and 22-3009.02. Misdemeanor sexual abuse and sexual abuse of a patient or client require only "engages in." D.C. Code §§ 22-3006; 22-3015 and 22-3016.

legally significant.[44] In addition to case law, District practice does not appear to follow the variations in statutory language.[45] Instead of these variations in language, the revised sex offenses and the revised definitions of "sexual act" and "sexual contact" consistently require that the actor "causes" the complainant to "engage in" or "submit to" the sexual conduct. Differentiating liability based on whether an actor themselves commits the sexual conduct in question, or whether the actor causes the complainant to engage in or submit to the sexual conduct, may lead to disproportionate outcomes. The revised language improves the consistency, clarity, and proportionality of the revised offenses, and reduces unnecessary gaps in liability.

Second, notwithstanding the requirement that the defendant lack "effective consent," subsection (c) of the RCC nonconsensual sexual conduct statute excludes from liability the use of deception to induce the sexual conduct. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception." As discussed earlier in this commentary, the RCC definition of "effective consent" appears to be consistent with the current definition of "consent" for sex offenses, which requires that the agreement be "freely given."[46] However, there is no DCCA case law interpreting the current definition of "consent" for the sex offense statutes and it is not clear whether deception, or what kind of deception, prevents consent from being "freely given." To resolve this ambiguity, the RCC excludes from liability deception as to the inducement of sexual conduct. The use of deception to induce sexual conduct is not of the same gravity as deception as to the nature of the sexual conduct. Criminalizing sexual conduct by deception is largely

[44] In *Pinckney v. United States*, the DCCA held that the misdemeanor sexual abuse statute includes "conduct where a person uses another to touch intimate parts of the person's own body" even though the plain language of the statute requires "engages in a sexual act or sexual contact with another person." *Pinckney v. United States*, 906 A.2d 301, 303, 306 (D.C. 2006) (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA declined "an interpretation that would exclude such an obvious means of offensive touching," in part because the legislature intended to "'strengthen the District's laws against sexual abuse and make them more inclusive, flexible and reflective of the broad range of abusive conduct which does in fact occur.'" *Id.* (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA stated that its interpretation of the misdemeanor sexual abuse statute "as applying to the facts of this case does not require appellant to have caused the victim to engage in or submit to sexual contact" because the appellant engaged in the prohibited sexual contact by his own actions." *Id.* However, the DCCA's reliance on the legislative intent of the Anti-Sexual Abuse Act suggests that it would broadly interpret any variations in the language of the current sexual abuse statutes.

[45] The jury instructions for third degree, fourth degree, child sexual abuse, and sexual abuse of a minor include that the actor "caused" the complainant "to engage in or submit to" a sexual act or sexual contact, even though the statutory language for those offenses does not include "causes" the complainant to "submit to." *Compare* D.C. Crim. Jur. Instr. §§ 4.400 (general sexual abuse); 4.401 (child sexual abuse); 4.402 (sexual abuse of a minor) D.C. Code §§ 22-3003 and 22-3004 (third degree and fourth degree sexual abuse statutes); 22-3008 and 22-3009 (first degree and second degree child sexual abuse statutes); 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor statutes).

[46] D.C. Code § 22-3001(4), defining consent, requires that there be "words or overt actions indicating a *freely* given agreement" (emphasis added). There is no DCCA case law interpreting the "freely given" requirement in the current definition of "consent." However, the RCC definition of "effective consent" in RCC § 22E-701 appears to cover this requirement insofar as it requires consent that is obtained by means other than physical force, a coercive threat, or deception.

disfavored in current American criminal law,[47] with the exceptions of falsely represented medical procedures and impersonation of a woman's husband.[48] This change improves the consistency and proportionality of the revised statute.

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

The revised nonconsensual sexual conduct statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses.[49] Under the statute, if the maximum term of imprisonment for the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[50] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[51] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[52] In the revised nonconsensual sexual conduct statute, the RCC General Part's attempt provisions (RCC § 22E-301) establish the requirements to prove an attempt and applicable penalties, consistent with other offenses. While a separate attempt statute for

[47] *See, e.g.*, Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 Yale L.J. 1372, 1372, (2013) (stating that "[r]ape-by-deception" is almost universally rejected in American criminal law.").

[48] *See, e.g.*, Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 Yale L.J. 1372, 1397 (2013) (noting that "sex falsely represented as a medical procedure, and impersonation of a woman's husband--have been for over a hundred years the only generally recognized situations in which Anglo-American courts convict for rape-by-deception.") (citing Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 Brook. L. Rev. 39, 119 (1998).

[49] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01).

[50] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[51] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[52] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803. Under this general attempt penalty statute, the current MSA statute would have a maximum term of imprisonment of 180 days, which is the same as the current penalty for the completed offense. D.C. Code § 22-3010.01.

sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general attempt provision provide penalties at ½ the maximum imprisonment sentence. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of the revised nonconsensual sexual conduct offense.

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

Explanatory Note. *RCC § 22E-1308 establishes a limitation on liability for specified sex offenses in RCC Chapter 13 for persons under the age of 12 years.*

RCC § 22E-1308 establishes that persons under the age of 12 years are not subject to liability for any offense in RCC Chapter 13 except for RCC § 22E-1303(a), first degree sexual assault, and RCC § 22E-1303(c), third degree sexual assault.

Relation to Current District Law. *The limitations on liability for RCC Chapter 13 offenses statute changes existing District law in one main way.*

The limitations on liability for RCC Chapter 13 offenses statute (limitations on liability statute) prohibits liability for RCC Chapter 13 sex offenses for defendants under the age of 12 years except for first degree sexual assault and third degree sexual assault. The current District sex offense statutes[1] do not have a general statutory provision that addresses the age at which a person is liable for the sexual abuse offenses, and the DCCA has not discussed an age limit for liability. In contrast, the RCC prohibits a person under the age of 12 years from being convicted of RCC sex offenses except for RCC § 22E-1303(a), first degree sexual assault, and RCC § 22E-1303(c), third degree sexual assault.[2] Limiting liability for a person under 12 years of age to first degree and third degree sexual assault ensures that the RCC sex offenses are reserved for predatory behavior targeting young complainants.[3] First degree sexual assault and third degree sexual

[1] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01), the attempt statute (D.C. Code § 22-3018), the consent defense statute for first degree through fourth degree sexual abuse and misdemeanor sexual abuse (D.C. Code § 22-3007), the defense statute for child sexual abuse, sexual abuse of a minor, sexual abuse of a secondary education student, and misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3011), the defense statute for sexual abuse of a ward and sexual abuse of a patient or client (D.C. Code § 22-3017), and the aggravating circumstances statute (D.C. Code § 22-3020).

[2] The RCC sex offenses from which a person under the age of 12 years is exempt when there would otherwise be liability are: second degree sexual assault (RCC § 22E-1301(b)), fourth degree sexual assault (RCC § 22E-1301(d), sexual abuse of a minor (RCC § 22E-1302), and nonconsensual sexual conduct (RCC § 22E-1307). The remaining sex offenses require that the actor be at least 18 year of age (RCC §§ 22E-1304 (sexually suggestive conduct with a minor); 22E-1305 (enticing a minor); 22E-1306 (arranging for sexual conduct with a minor) or typically involve adult actors (RCC § 22E-1303 (sexual exploitation of an adult).

[3] The American Law Institute has recently undertaken a review of the MPC's sexual assault offenses, and exempts persons under the age of 12 years for liability for sex offenses other than those that involve the use of aggravated force or restraint, a deadly weapon, or infliction of serious bodily injury. Model Penal Code: Sexual Assault and Related Offenses § 213.0(6)(h) (Tentative Draft No. 9, September 14, 2018). The commentary notes that the "revised Code rests this judgment on the concern that 'physical force' . . . could too easily be read to include the kind of tussling among very young children that is far removed from the force appropriately associated with the offense of rape." Model Penal Code: Sexual Assault and Related Offenses § 213.0(6)(h) (Tentative Draft No. 9, September 14, 2018) cmt. at 51.

assault involve the use of physical force, weapons, serious threats, or involuntary intoxication of the complainant. This change improves the proportionality of the revised statutes.

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

Explanatory Note. *The RCC duty to report a sex crime involving a person under 16 years of age statute (revised duty to report statute) establishes a duty for persons 18 years of age or older to report known or suspected specified sex crimes involving persons under 16 years of age. The revised duty to report statute also establishes several exclusions from the duty to report, as well as immunity from liability and employment discrimination for good-faith reports made pursuant to this statute. Along with the civil infraction for failure to report a sex crime involving a person under 16 years of age statute,[1] the revised duty to report statute replaces five distinct provisions in the current D.C. Code: the child sexual abuse reporting requirements and privileges statute,[2] the defense to non-reporting statute,[3] the penalties for failing to report statute,[4] immunity from liability for good-faith reporting statute,[5] and definitions for these provisions.[6]*

Subsection (a) of the revised duty to report statute requires a person 18 year of age or older who is aware of a substantial risk that a person under the age of 16 years of age is being, or has been subjected to, a "predicate crime" to report such information or belief in specified ways. Subsection (e) of the revised duty to report statute defines "predicate crime" as specified sex offenses in the current D.C. Code and in the RCC.

Subsection (b) establishes several exclusions from the duty to report established in subsection (a).

Subsection (c) establishes that RCC § 22E-1309 does not alter the mandatory reporting requirements for certain individuals, such as teachers, that are required in D.C. Code § 4-1321.02(b).

Subsection (d) establishes immunity for persons who make good-faith reports pursuant to this statute. In particular, subsection (d)(1) is specific to immunity from civil or criminal liability with respect to making the report or any participation in any judicial proceeding involving the report. In all relevant civil or criminal proceedings, subsection (d)(1) establishes that good faith shall be presumed unless rebutted. Subsection (d)(2) states that in the event of employment discrimination due to a good-faith report made pursuant to this statute, a person may commence a civil action for appropriate relief and a court may grant appropriate relief. Subsection (d)(2) also states that the District may intervene in any action commenced under subsection (d)(2).

Subsection (e) cross-references applicable definitions located elsewhere in the RCC and also provides a definition of "predicate crime" applicable to this statute.

Relation to Current District Law. *The revised duty to report statute changes current District law in one main way.*

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[1] RCC § 22E-1310.
[2] D.C. Code § 22-3020.52.
[3] D.C. Code § 22-3020.53.
[4] D.C. Code § 22-3020.54.
[5] D.C. Code § 22-3020.55.
[6] D.C. Code § 22-3020.51.

First, the scope of the predicate crimes that give rise to the duty to report differ as compared to current law. The current duty to report statute applies to "sexual abuse,"[7] which is defined as a violation of: 1) D.C. Code § 22-1834 (sex trafficking of children); 2) D.C. Code § 22-2704 (abducting or enticing a child from his or her home for the purposes of prostitution; harboring such child); 3) Chapter 30 of Title 22 of the D.C. Code (sexual abuse offenses); and 4) D.C. Code § 22-3102 (sexual performance using minors).[8] In contrast, the predicate crimes in the revised reporting statute differ in scope as compared to current law.[9] As the revised offenses may differ in scope somewhat as compared to corresponding statutes under current law, the duty to report known or suspected instances of child sexual abuse will vary as well. This change improves the consistency of the revised duty to report statute.

Beyond this one substantive change to current District law, two aspects of the revised duty to report statute may be viewed as substantive changes of law.

First, the revised duty to report statute requires that a person 18 years of age or older be "aware of a substantial risk" that a person under 16 years of age is being, or has been subjected to, specified sex crimes. The current reporting statute requires such a person "knows" or "has reasonable cause to believe."[10] There is no DCCA case law interpreting these culpable mental state terms in the current statute. To resolve these ambiguities, the revised duty to report statute requires the person to be "aware of a substantial risk." This language requires that the person have subjective awareness of a substantial risk (as opposed to negligence—that the person merely should have known that there was a substantial risk of abuse). An objective (negligence) standard that applies even when a person had no subjective awareness of misconduct would be inconsistent with the Council's stated intent to encourage persons to report behavior.[11] This change improves the clarity and completeness of the revised statute.

Second, the revised duty to report statute applies to situations where a person is aware of a substantial risk that a person under 16 years of age "is being," currently, or "has been subjected to," in the past, specified sexual crimes. The current reporting statute applies to a child that "is a victim" of specified sexual crimes. "Victim" is defined for the current reporting statute and all of Chapter 30 of Title 22 of the D.C. Code as "a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter [Chapter 30].[12] However, as applied in the reporting statute, this definition of

[7] D.C. Code § 22-3020.52(a).

[8] D.C. Code § 22-3020.51(4) (defining "sexual abuse" as "any act that is a violation of: (A) Section 22-1834; (B) Section 22-2704; (C) This chapter; or (D) Section 22-3102.").

[9] [To date, the RCC has revised D.C. Code § 22-1834 (now RCC § 22E-1605, sex trafficking of minors) and the sex offenses in Chapter 30 of Title 22 of the D.C. Code (now RCC Chapter 13). Additional statutes may be added to this list of predicate crimes as they are revised.]

[10] D.C. Code § 22-3020.52(a).

[11] *See, e.g.*, Committee on the Judiciary, *Report on Bill 19-647, "Child Sexual Abuse Reporting Amendment Act of 2012,"* (October 9, 2012) at 6 ("Requiring everyone to report simplifies the reporting requirement, eliminates the need to analyze whether one is a mandatory reporter, and may overcome the reluctance of many . . . to get involved.").

[12] D.C. Code § 22-3001 defines terms for Chapter 30, Sexual Abuse, of Title 22 of the current D.C. Code. D.C. Code § 22-3001 states that "[f]or the purposes of this chapter . . . 'victim' means a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter." D.C. Code §

"victim" conflicts with the definition of "sexual abuse," which includes sex crimes that are not in Chapter 30 of Title 22 of the D.C. Code.[13] Moreover, it is unclear whether the current reporting statute includes both current and past instances of known or suspected sexual abuse, or if it is limited to current instances. There is no DCCA case law interpreting the scope of the current statute and the legislative history is ambiguous.[14] To resolve this ambiguity, the revised duty to report statute applies to a child under 16 years of age that is being, or has been subjected to, a predicate crime. This requirement is consistent with the scope of the mandatory reporters statute in D.C. Code § 4-1321.02.[15] This change improves the clarity, completeness, and consistency of the revised statute.

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

The revised reporting statute revises and deletes the separate definitions for "child," "person," and "police" that apply to the current reporting statute and related provisions.[16] Instead of having separate defined terms, the revised definitions are incorporated directly into RCC § 22E-1309. The revised definitions are intended to be clarificatory and not change current District law.[17]

22-3001(11). The current reporting statute is codified in D.C. Code § 22-3020.52 and is included in Chapter 30. The definition of "victim" in D.C. Code § 22-3001(11) applies to the current reporting statute.

[13] *See* D.C. Code §§ 22-3020.51(4) (defining "sexual abuse" to include D.C. Code § 22-1834, § 22-2704, and § 22-3102, as well as all offenses in Chapter 30 of Title 22); 22-3020.52(a) ("Any person who knows, or has reasonable cause to believe, that a child is a victim of sexual abuse shall immediately report…").

[14] The Committee Report for the current reporting statute frequently refers to a child that "is a victim of sexual abuse," which raises the same ambiguity that is in the statute. *See, e.g.*, Committee on the Judiciary, *Report on Bill 19-647, "Child Sexual Abuse Reporting Amendment Act of 2012,"* (October 9, 2012) at 1, 6. There are at least two references to "is being sexually abused," which may indicate a legislative intent to limit the reporting statute to current sexual abuse. Committee on the Judiciary, *Report on Bill 19-647, "Child Sexual Abuse Reporting Amendment Act of 2012,"* (October 9, 2012) at 4, 13. However, there is no discussion in the legislative history regarding the required time frame or the meaning of the term "victim."

[15] D.C. Code § 4-1321.02(a) ("Notwithstanding § 14-307, any person specified in subsection (b) of this section who knows or has reasonable cause to suspect that a child known to him or her in his or her professional or official capacity *has been or is in immediate danger of* being a mentally or physically abused or neglected child, as defined in § 16-2301(9), shall immediately report or have a report made of such knowledge or suspicion to either the Metropolitan Police Department of the District of Columbia or the Child and Family Services Agency.") (emphasis added).

[16] D.C. Code § 22-3020.51(1), (2), (3) ("For the purposes of this subchapter, the term: (1) "Child" means an individual who has not yet attained the age of 16 years. (2) "Person" means an individual 18 years of age or older. (3) "Police" means the Metropolitan Police Department.").

[17] D.C. Code § 22-3020.51 currently defines "child" as "an individual who has not yet attained the age of 16 years." D.C. Code § 22-3020.51(1). Consistent with other RCC offenses and provisions, RCC § 22E-1309 instead codifies "a person under 16 years of age" as necessary instead of referring to a separate definition. D.C. Code § 22-3020.51 currently defines "person" as "an individual 18 years of age or older." D.C. Code § 22-3020.51(2). Consistent with other RCC offenses and provisions, RCC § 22E-1309 refers to "a person 18 years of age or older" as necessary instead of referring to a separate definition. D.C. Code § 22-3020.51 defines "police" as "the Metropolitan Police Department." RCC § 22-1309 refers to "the Metropolitan Police Department" as necessary.

The current definitions of "child" and "person" in D.C. Code § 22-3020.51 refer to an "individual," whereas RCC § 22E-1309 refers to a "person."

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

Explanatory Note. *The RCC civil infraction for failure to report a sex crime involving a person under 16 years of age statute (revised civil infraction statute) establishes a civil infraction for failing to report a predicate sexual crime involving a person under 16 years of age pursuant to RCC § 22E-1309(a). The civil infraction has a single penalty gradation. Along with the revised duty to report a sex crime involving a person under 16 years of age statute,[1] the revised duty to report statute replaces five distinct provisions in the current D.C. Code: the child sexual abuse reporting requirements and privileges statute,[2] the defense to non-reporting statute,[3] the penalties for failing to report statute,[4] immunity from liability for good-faith reporting statute,[5] and definitions for these provisions.[6]*

Subsection (a) establishes the requirements for the civil infraction. First, per subsection (a)(1), the person must "know" that he or she has a duty to report the predicate crime involving a person under 16 years of age as required by RCC § 22E-1309(a). By referring specifically to RCC § 22E-1309(a), subsection (a)(1) incorporates the requirements of the duty to report established in RCC § 22E-1309(a), including that the person with the duty to report must be 18 years of age or older, and the definition of "predicate crime" in RCC § 22E-1309(e). "Knows" is a defined term in RCC § 22E-206 that here means the person must be practically certain that he or she has a duty to report as required by RCC § 22E-1309(a).

Subsection (a)(2) requires that the person fails to carry out his or her duty to report as required by RCC § 22E-1309(a). Per the rule of construction in RCC § 22E-207, the knowledge mental state in subsection (a)(1) applies to the elements in subsection (a)(2). "Knows" is a defined term in RCC § 22E-206 that here means the person must be practically certain that his or her conduct will result in failing to carry out his or her duty to report pursuant to RCC § 22E-1309(a).

Subsection (b) establishes a defense to the failure to report civil infraction. The defense is in addition to any other defenses applicable under District law. The defense applies if the person's failure to report the known or suspected child sexual abuse is "because" the person is a survivor of either intimate partner violence, as defined in D.C. Code § 16-1001(17), or intrafamily violence, as defined in D.C. Code § 16-1001(9).

Subsection (c) establishes that the penalty for the failure to report civil infraction is a $300 fine.

Subsection (d) establishes that the Office of Administrative Hearings has jurisdiction to adjudicate civil infractions under this statute, pursuant to D.C. Code § 2-1831.03(b-6).

[1] RCC § 22E-1309.
[2] D.C. Code § 22-3020.52.
[3] D.C. Code § 22-3020.53.
[4] D.C. Code § 22-3020.54.
[5] D.C. Code § 22-3020.55.
[6] D.C. Code § 22-3020.51.

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

Relation to Current District Law. *The revised civil infraction statute makes three possible substantive changes to current District law.*

First, the revised civil infraction statute requires that a person "knows" that he or she has a duty to report a known or suspected specified sexual crime pursuant to RCC § 22E-1309(a). The current civil infraction statute prohibits "willfully fail[ing]" to make the required report.[7] "Willfully" is not defined in the current civil infraction statute and there is no DCCA case law for this statute. It is unclear whether "willfully" requires that a person know that he or she has a duty to report as required by D.C. Code § 22-3020.52. Instead of this ambiguity, the revised civil infraction statute requires that a person "knows" that he or she has a duty to report pursuant to RCC § 22E-1309(a). Supreme Court case law commonly interprets "willfully" in a criminal statute as requiring that the defendant act with a purpose to disobey or disregard the law,[8] and in the case of highly complex laws such as federal tax laws, may require that the defendant know of the specific law that his or her conduct is violating.[9] In addition, Supreme Court case law recognizes due process limits on criminal convictions for the mere failure to act if there is no reason for the person to believe he or she had a legal duty to act or that his or her failure to act was blameworthy. [10] This case law supports requiring at least a "knowing"

[7] D.C. Code § 22-3020.54(a) ("Any person required to make a report under this subchapter who willfully fails to make such a report shall be subject to a civil fine of $300.").

[8] *See, e.g.*, *Bryan v. United States*, 524 U.S. 184, 191–92 (1998) ("The word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears. Most obviously it differentiates between deliberate and unwitting conduct, but in the criminal law it also typically refers to a culpable state of mind. As we explained in *United States v. Murdock*, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381 (1933), a variety of phrases have been used to describe that concept. As a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' In other words, in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'") (internal citations and footnotes omitted); *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994) (holding that "[t]o establish that a defendant willfully violated the antistructuring law, the Government must prove that the defendant acted with knowledge that his conduct was unlawful.").

[9] *See, e.g.*, *Bryan v. United States*, 524 U.S. 184, 194 (1991) ("In certain cases involving willful violations of the tax laws, we have concluded that the jury must find that the defendant was aware of the specific provision of the tax code that he was charged with violating. See, *e.g.*, *Cheek v. United States*, 498 U.S. 192, 201, 111 S.Ct. 604, 610, 112 L.Ed.2d 617 (1991).").

[10] Former D.C. Code § 22-2511 stated in relevant part, "It is unlawful for a person to be voluntarily in a motor vehicle if that person knows that a firearm is in the vehicle, unless the firearm is being lawfully carried or lawfully transported." D.C. Code § 22-2511(a) (Repl. 2015). The statute was repealed in 2015. Prior to its repeal, however, the DCCA in *Conley v. United States* held that the statute was unconstitutional for two reasons. Pertinent to the present discussion, the second reason was that:

> [I]t is incompatible with due process to convict a person of a crime based on the failure to take a legally required action—a crime of omission—if he had no reason to believe he had a legal duty to act, or even that his failure to act was blameworthy. The fundamental constitutional vice of § 22–2511 is that it criminalizes entirely innocent behavior—merely remaining in the vicinity of a firearm in a vehicle, which the average citizen would not suppose to be wrongful (let alone felonious)—without requiring the

culpable mental state for the duty to report as required in RCC § 22E-1309(a). This change improves the clarity and completeness of the revised infraction.

Second, the revised civil infraction statute requires that the person knowingly fail to carry out his or her duty to report specified sex crimes to the authorities per RCC § 22E-1309(a). The current civil infraction statute prohibits "willfully fail[ing]" to make the required report.[11] It is unclear what is required for a person to "willfully" fail to make the required report and there is no DCCA case law on this issue. To resolve this ambiguity, the revised civil infraction statute requires a "knowingly" culpable mental state for failing "to carry out his or her duty to report" as required by RCC § 22E-1309(a). The current and revised duty to report statutes have specific reporting requirements. Requiring a "knowing" culpable mental state for the duty to report in RCC § 22E-1309(a) is proportional to the specificity of these requirements. This change improves the clarity and completeness of the revised infraction.

Third, the defense to the revised civil infraction statute for survivors of domestic violence requires that the survivor fail to report the known or suspected sexual abuse as required by RCC § 22E-1309(a) "because" he or she is a survivor of intimate partner violence, as defined in D.C. Code § 16-1001(7), or intrafamily violence, as defined in D.C. Code § 16-1001(9). The current defense states that "[a]ny survivor of [intimate partner violence, as defined in D.C. Code § 16-1001(7), or intrafamily violence, as defined in D.C. Code § 16-1001(9)] may use such . . . violence as a defense to his or her failure to report."[12] The current defense does not appear to require any causal link between the violence and the failure to report, meaning that the specified types of violence are a defense even if they are unrelated to the known or suspected child sexual abuse or the failure to report is part of a purposeful criminal scheme. However, the

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> government to prove that the defendant had notice of any legal duty to behave otherwise."

Conley v. United States, 79 A.3d 270, 273 (D.C. 2013) (citing *Lambert v. California*, 355 U.S. 225 (1957)).

The DCCA acknowledged that *Lambert* "applies only when an unusual statute is 'triggered in circumstances so commonplace, that an average citizen would have no reason to regard the triggering event as calling for a heightened awareness of one's legal obligations.'" *Conley*, 79 A.3d at 283 (quoting *Texaco, Inc. v. Short*, 454 U.S. 516, 547 (1982) (Brennan, J., dissenting)). The DCCA stated that courts have typically rejected *Lambert* challenges for "public welfare offenses" that involve dangerous articles like drugs and dangerous weapons and for statutes "imposing legal obligations on persons with other particular reasons to be on notice of them, as in prosecutions for violating [statutes that prohibit the possession of firearms by persons who have been convicted of misdemeanor domestic violence offenses or who are subject to a judicial anti-harassment or anti-stalking order] and for failing to register as required by the Sex Offender Registration and Notification Act." *Conley*, 79 A.3d at 283-84.

However, despite these limitations, the DCCA found that D.C. Code § 22-2511 was similar to the statute held unconstitutional in *Lambert* because it criminalized mere presence and did not require proof of any conduct "that would traditionally and foreseeably subject a person to criminal sanction, such as handling or concealing the firearm, constructively possessing it, or aiding and abetting someone else's possession or use of it." *Id*. at 285. In addition, the statute targeted individuals "who are not engaged in [firearm ownership, possession, transportation, or dealing] and who therefore have no reason to be familiar with the firearms laws or to investigate whether those laws impose any duties on *them*." *Id.* at 286 (emphasis in original).

[11] D.C. Code § 22-3020.54(a) ("Any person required to make a report under this subchapter who willfully fails to make such a report shall be subject to a civil fine of $300.").

[12] D.C. Code § 22-3020.53(a).

legislative history for the current reporting statute and related provisions suggests that a causal link was intended.[13] To resolve this ambiguity, the defense in the revised civil infraction statute requires that the failure to report be "because" the person is a survivor of intimate partner violence or intrafamily violence. This change improves the clarity and completeness of the revised statute.

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

The revised civil infraction statute revises and deletes the separate definitions for "child," "person," and "police" that apply to the current reporting statute and related provisions.[14] Instead of having separate defined terms, the revised definitions are incorporated directly into RCC § 22E-1309. The revised definitions are intended to be clarificatory and not change current District law.[15]

[13] Committee on the Judiciary, *Report on Bill 19-647, "Child Sexual Abuse Reporting Amendment Act of 2012,"* (October 9, 2012) at 4-5 (stating that the legislation "[p]rovides a defense to any survivor of domestic violence who, due to the domestic violence, failed to report as required by this bill."). In addition, the legislative history indicates that the defense should be narrowly interpreted:

> Although victims will now have an opportunity to reach safety before reporting, the defense should not be used as a reason to never notify authorities about the known or suspected sexual abuse. Once a victim and his or her family are safely away from their abuser, the Committee intends that authorities be notified in order to report the abuse and to ensure that the abuser is not able to prey upon other children.

Committee on the Judiciary, *Report on Bill 19-647, "Child Sexual Abuse Reporting Amendment Act of 2012,"* (October 9, 2012) at 11.

[14] D.C. Code § 22-3020.51(1), (2), (3) ("For the purposes of this subchapter, the term: (1) "Child" means an individual who has not yet attained the age of 16 years. (2) "Person" means an individual 18 years of age or older. (3) "Police" means the Metropolitan Police Department.").

[15] D.C. Code § 22-3020.51 currently defines "child" as "an individual who has not yet attained the age of 16 years." D.C. Code § 22-3020.51(1). Consistent with other RCC offenses and provisions, RCC § 22E-1309 instead codifies "a person under 16 years of age" as necessary instead of referring to a separate definition. D.C. Code § 22-3020.51 currently defines "person" as "an individual 18 years of age or older." D.C. Code § 22-3020.51(2). Consistent with other RCC offenses and provisions, RCC § 22E-1309 refers to "a person 18 years of age or older" as necessary instead of referring to a separate definition. D.C. Code § 22-3020.51 defines "police" as "the Metropolitan Police Department." RCC § 22-1309 refers to "the Metropolitan Police Department" as necessary.

The current definitions of "child" and "person" in D.C. Code § 22-3020.51 refer to an "individual," whereas RCC § 22E-1309 refers to a "person."

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

Explanatory Note. *The RCC admission of evidence in sexual assault and related cases statute (revised admission of evidence statute) establishes limitations on the use of evidence pertaining to a complainant's past sexual behavior in criminal cases for sex offenses under RCC Chapter 13. The revised admission of evidence statute replaces four distinct provisions in the current D.C. Code: the statute prohibiting the use of reputation or opinion evidence of a complainant's past sexual behavior,[1] the statute governing admissibility of other evidence of a complainant's past sexual behavior,[2] the prompt reporting statute,[3] and the statute prohibiting privilege between spouses or domestic partners.[4]*

Subsection (a) states that notwithstanding any other provision of law, in a criminal case under RCC Chapter 13, reputation or opinion evidence of the past sexual behavior of the complainant is not admissible. Subsection (e) defines "past sexual behavior" for this statute.

Subsection (b) governs the admissibility of evidence of a complainant's past sexual behavior, other than reputation or opinion evidence, in criminal cases under RCC Chapter 13. Paragraph (1) states the standards for when such evidence is admissible. Paragraph (2) establishes the procedural requirements an actor must follow if the actor intends to offer such evidence. Paragraph (3) and paragraph (4) establish court procedures for determining the admissibility, as well as the use of such evidence.

Subsection (c) states that evidence of delay in reporting an offense under RCC Chapter 13 to a public authority shall not raise any presumption concerning the credibility or veracity of a charge under RCC Chapter 13.

Subsection (d) states that laws attaching a privilege against disclosure of communications between spouses or domestic partners are inapplicable in prosecutions under RCC Chapter 13 in specified situations.

Subsection (e) cross-references applicable definitions located elsewhere in the RCC and also provides a definition of "past sexual behavior" applicable to this statute.

Relation to Current District Law. *The changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.*

First, the revised admission of evidence statute refers to a "complainant" instead of "victim" or "alleged victim." "Victim" is defined for the current admissibility of evidence statutes and related provisions as "a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter [Chapter 30].[5] RCC § 22E-701

[1] D.C. Code § 22-3021.
[2] D.C. Code § 22-3022.
[3] D.C. Code § 22-3023.
[4] D.C. Code § 22-3024.
[5] D.C. Code § 22-3001 defines terms for Chapter 30, Sexual Abuse, of Title 22 of the current D.C. Code. D.C. Code § 22-3001 states that "[f]or the purposes of this chapter . . . 'victim' means a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter." D.C. Code § 22-3001(11). The current admissibility of evidence statutes and related provisions are codified in D.C. Code §§ 22-3021 through 22-3024 and are included in Chapter 30. The definition of "victim" in D.C. Code § 22-3001(11) applies to these statutes.

defines "complainant" as "person who is alleged to have been subjected to a criminal offense." Consistently using the defined term "complainant" instead of "victim" or "alleged victim" improves the clarity and consistency of the revised admission of evidence statute.

Second, the revised admission of evidence statute refers to the "actor" instead of the "person accused of an offense under subchapter II of this chapter,"[6] the "accused"[7] or the "defendant."[8] RCC § 22E-701 defines "actor" as "person accused of a criminal offense." Consistently using the defined term "actor" improves the clarity and consistency of the revised admission of evidence statute.

Third, subsection (b)(1)(B)(ii) refers to the "effective consent" of the complainant. The current admission of evidence statute refers to the "consent" of the complainant.[9] "Consent" is currently defined, in part, as "words or overt actions indicating a freely given agreement to the sexual act or contact in question."[10] The RCC breaks the current sex offense definition of "consent" into two terms. The RCC definition of "consent" in RCC § 22E-701 refers to the bare fact of an agreement between parties obtained by any means, while the RCC definition of "effective consent" in RCC § 22E-701 refers to "consent other than consent induced by physical force, a coercive threat, or deception." RCC sex offenses refer to "effective consent" instead of "consent," but they continue to incorporate the concept of "consent," as defined by RCC § 22E-701. The revised admission of evidence statute refers to "effective consent" to match the terminology of the RCC sex offenses. As is discussed in the commentaries to the definitions of "consent" and "effective consent," these terms may substantively change parts of current District law for the sex offenses to which they apply. However, the use of these terms in the revised admission of evidence statute is not intended to affect the procedures established in current D.C. Code § 22-3022. This change improves the clarity and consistency of the revised statute.

Fourth, the revised admission of evidence statute incorporates the RCC definitions of "domestic partner" and "bodily injury" in RCC § 22E-701. The RCC definition of "domestic partner" is the same as it is for the current admission of evidence statute.[11] As is discussed to the commentary for the revised definition of "bodily injury" in RCC § 22E-701, the RCC definition of "bodily injury" is changed from the definition that applies to the current admission of evidence statute.[12] Although the revised

[6] *See*, *e.g.*, D.C. Code §§ 22-3021(a); 22-3022(a).
[7] *See*, *e.g.*, D. C. Code § 22-3022(a)(2)(A), (b)(1).
[8] D.C. Code § 22-3024.
[9] D.C. Code § 22-3022(a)(2)(B) ("Past sexual behavior with the accused where consent of the alleged victim is at issue and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which such offense is alleged.").
[10] D.C. Code § 22-3001(4).
[11] D.C. Code § 22-3001 defines terms for Chapter 30, Sexual Abuse, of Title 22 of the current D.C. Code. D.C. Code § 22-3001 states that "[f]or the purposes of this chapter . . . 'domestic partner' shall have the same meaning as provided in § 32-701(3)." D.C. Code § 22-3001(4A). The current admissibility of evidence statutes and related provisions are codified in D.C. Code §§ 22-3021 through 22-3024 and are included in Chapter 30. The definition of "domestic partner" in D.C. Code § 22-3001(4A) applies to these statutes and is unchanged in RCC § 22E-701.
[12] D.C. Code § 22-3001 defines terms for Chapter 30, Sexual Abuse, of Title 22 of the current D.C. Code. D.C. Code § 22-3001 states that "[f]or the purposes of this chapter . . . 'bodily injury' means injury

definition may substantively change parts of current District law for the sex offenses to which they apply, the use of these terms in the revised admission of evidence statute is not intended to affect the procedures established in current D.C. Code § 22-3022. This change improves the clarity and consistency of the revised statute.

involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain." D.C. Code § 22-3001(2). The current admissibility of evidence statutes and related provisions are codified in D.C. Code §§ 22-3021 through 22-3024 and are included in Chapter 30. The definition of "bodily injury" in D.C. Code § 22-3001(2) applies to these statutes.

RCC § 22E-1401. Kidnapping.

Explanatory Note. *This subsection establishes the kidnapping offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly interfering with another person's freedom of movement, and with intent: to hold that person for ransom; to hold that person as a hostage or shield; to facilitate commission of any felony or flight thereafter; to inflict bodily injury or commit a sexual assault; to cause any person to believe that the complainant will not be released without suffering significant bodily injury, or a sex offense; or to permanently deprive a parent who is responsible for the general care and supervision of the complainant, or a court appointed guardian, of custody of the complainant. Along with criminal restraint statute,[1] the revised kidnapping statute replaces the kidnapping[2] statute in the current D.C. Code. The statute also includes an aggravated form of the offense, which requires that the accused commits kidnapping with recklessness as to the fact that the complainant is a protected person; with the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public safety employee, or public official; or by knowingly displaying or using a dangerous weapon or imitation dangerous weapon.*

Subsection (a) specifies the elements of aggravated kidnapping. Paragraph (a)(1) specifies that aggravated kidnapping requires the actor knowingly and substantially confines or moves another person. The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the actor was practically certain that he or she would confine or move another person. Moving another person can include either moving a person against his or her will, such as by tying up and carrying away a person, or by causing the person to move by means of a threat or deception. Confining a person requires causing that person to remain in a location when that person would not have done so absent the actor's intervention. Confining or moving a person need not involve force, threats, or other forms of coercion.

Paragraph (a)(1) also requires that the actor must *substantially* confine or move the complainant. This paragraph clarifies that momentary or trivial[3] confinement or movement is insufficient. Per the rule of construction under RCC § 22E-207, the "knowingly" mental state also applies to this element. The actor must be practically certain that the confinement or movement was substantial.

Paragraph (a)(2) specifies two means of committing aggravated kidnapping. Subparagraph (a)(2)(A) requires that the actor is, in fact, over the age of 18, and confines or moves a person, with recklessness as to the fact that the complainant is under the age of 12 and that a person with legal authority over the complainant would not give effective consent to the movement or confinement, regardless of whether the complainant does so.[4] "In fact" a defined term specifies that there is no culpable mental

[1] RCC § 22E-1404.
[2] D.C. Code § 22-2001.
[3] Confinement or movement may be trivial even if they are of significant duration. For example, if a person barricades a door to prevent another from leaving a building, but there is an alternate exit that is easily accessible, the interference would not be substantial regardless of how long the door remains barricaded.
[4] For example, a person can commit kidnapping by carrying away a child without the parent's consent, even if the child wants to be carried away.

state required as to the actor's age. "Person with legal authority over the complainant" is a defined under RCC § 22E-701.[5] This subparagraph requires that the actor was reckless as to the fact that the complainant was under the age of 12, and that a person with legal authority over the complainant would not give effective consent to the confinement or movement. This element can be satisfied if the person with legal authority over the complainant is unaware of the confinement or movement, as long as the actor is reckless as to whether the person with authority would not have given effective consent had he or she been informed.[6] The subparagraph specifies that a "reckless" culpable mental state defined in RCC § 22E-206, which requires here that the accused consciously disregarded a substantial risk that the complainant was under the age of 12, and that a person with legal authority would not have consented to the interference.[7]

Subparagraph (a)(2)(B) requires that the actor move or confine the complainant without effective consent of the complainant. The term "effective consent" is defined under RCC § 22E-701 as "consent other than consent induced by physical force, a coercive threat, or deception." Per the rule of construction under RCC § 22E-207, the "knowingly" mental state also applies to this element. The actor must be practically certain the he or she lacked effective consent to confine or move the complainant.

Subparagraph (a)(2)(B) also requires that the actor satisfies at least one of the elements in (a)(2)(B)(i)-(iii). Sub-subparagraph (a)(2)(B)(i) requires that the actor was reckless as to the complainant being a protected person. The term "protected person" is defined under RCC § 22E-701, which includes a person who is "under 18 years of age, when, in fact the actor is 18 years of age or older and at least 4 years older than the other person," "65 years or older, when, in fact, the actor is under 65 years of age," "a vulnerable adult," "a law enforcement officer, while in the course of official duties", "public safety employee, while in the course of official duties," "transportation worker, while in the course of official duties," or "a District official." Under sub-subparagraph (a)(2)(B)(i), the actor must have been reckless as to the complainant being a protected person, a culpable mental state defined in RCC § 22E-206, meaning the accused must consciously disregard a substantial risk that the complainant is a "protected person," and that disregard of that risk is clearly blameworthy.

Sub-subparagraph (a)(2)(B)(ii) requires that the actor has the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public

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[5] "Person with legal authority over the complainant" means:

(A) When the complainant is under 18 years of age, the parent, or a person acting in the place of a parent per civil law, who is responsible for the general care and supervision of the complainant, or someone acting with the effective consent of such a parent or person;

(B) When the complainant is an incapacitated individual, the court-appointed guardian to the complainant engaging in conduct permitted under civil law controlling the actor's guardianship, or someone acting with the effective consent of such a guardian.

[6] The determination of whether the actor was reckless as to whether the person with authority over the complainant would have given effective consent is a fact-specific inquiry. The complainant's age, the nature and purpose of the interference, and any other relevant circumstances may be taken into account.

[7] Whether there was a substantial risk that a person with authority would not have consented, and whether the actor's conduct grossly deviated from the ordinary standard of care is a fact based analysis that may take into account the complainant's age, the nature and purpose of the interference, or any other relevant facts.

safety employee, or public official. This requires that the accused acted with "purpose," a term defined at RCC § 22E-206, which means that the actor must consciously desire to harm that person because of his or her status as a law enforcement officer, public safety employee, or District official.[8] Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes.[9] "Law enforcement officer," "public safety employee," and "public official" are all defined terms in RCC § 22E-701. Per RCC § 22E-205, the object of the phrase "with the purpose" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Here, it is not necessary to prove that the complainant who was harmed was a law enforcement officer, public safety employee, or District official, only that the actor believed to a practical certainty that the complainant that he or she would harm a person of such a status.

Sub-subparagraph (a)(2)(B)(iii) requires that the accused commits kidnapping by knowingly displaying or using a dangerous weapon or imitation weapon. The phrase "by displaying or using a dangerous weapon or imitation dangerous weapon" should be broadly construed to include kidnappings in which the accused only momentarily displays such a weapon, or slightly touches the complainant with such a weapon.[10] The term "use" is intended to include making physical contact with the weapon, and conduct other than oral or written language, symbols, or gestures, that indicates the presence of a weapon.[11] The terms "dangerous weapon" or "imitation weapon," are defined in RCC § 22E-701. Sub-subparagraph (a)(2)(B)(iii) specifies that a "knowing" culpable mental state applies to this element, which requires that the actor was practically certain that he or she would display or use a dangerous weapon or imitation weapon. However, the sub-subparagraph also uses the term "in fact,"[12] to specify that no culpable mental state required as to whether the implement used or displayed was a dangerous weapon or imitation dangerous weapon.

Paragraph (a)(3) specifies that the accused must confine or move another person "with intent to" accomplish one of the goals listed in subparagraphs (a)(3)(A)-(G). "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that his or her conduct would cause one of the goals listed in subparagraphs (a)(3)(A)-(G). Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that one

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

[9] For example, confining or moving a person without consent may constitute harm, even if no bodily injury occurs, because it is an interference with the person's freedom of movement.

[10] For example, assuming the other elements of the offense are proven, rearranging one's coat to provide a momentary glimpse of part of a knife, or holding a sharp object to someone's back without actually causing injury, may be sufficient for liability under paragraph (a)(3).

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

[12] RCC § 22E-207.

of the goals actually occurred, just that the defendant believed to a practical certainty that one of the goals would occur.[13]

Subparagraph (a)(3)(A) specifies that kidnapping includes acting "with intent to" hold the complainant for ransom or reward. Holding a person for ransom or reward requires demanding anything of value in exchange for release of the complainant.

Subparagraph (a)(3)(B) specifies that kidnapping includes acting "with intent to" use the complainant as a shield or hostage. Holding a person as a shield or for hostage requires using the person's body as defense against potential attack, or to demand fulfillment of any condition in exchange for the person's release.

Subparagraph (a)(3)(C) specifies that kidnapping includes acting "with intent to" facilitate the commission of a felony or the flight thereafter. The confinement or movement of the person must aid the commission or flight from the felony.[14] Many offenses, such as robbery or sexual assaults, often involve confining or moving a person with intent to facilitate that offense. Although confinement or movement in the course of another offense may satisfy the elements of kidnapping per subparagraph (a)(3)(C), liability in these cases is limited by subsection (e), discussed below.

Subparagraph (a)(3)(D) specifies that kidnapping includes acting "with intent to" inflict bodily injury. "Bodily injury" is a defined term under RCC § 22E-701.

Subparagraph (a)(3)(E) specifies that kidnapping includes acting "with intent to" commit a sexual offense, as defined under Chapter 13 of Title 22E, against the complainant.[15]

Subparagraph (a)(3)(F) specifies that kidnapping includes acting "with intent to" cause any person to believe that the complainant will not be released without suffering significant bodily injury[16] or a sex offense as defined in Chapter 13 of Title 22E. This element may be satisfied if any person believes the complainant will not be released at all, or will only be released after having suffered significant physical injury or being subjected to a sex offense. This element does not require that the actor actually intends to inflict significant bodily injury or to commit a sex offense.

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[13] For example, an actor who confines another with intent to commit a sexual offense against that person may be convicted of kidnapping even if the actor does not actually commit the sexual offense.

[14] For example, a bank robber who seizes and drives off with a security guard to prevent the guard from calling for help may be convicted of kidnapping.

[15] There is some overlap between subsection (b)(4)(C) and subsection (b)(4)(E). For example, a defendant who interferes with another person's freedom of movement in order to commit a felony sexual offense could be prosecuted for kidnapping under both subsections. However, subsection (b)(4)(E) is both broader and narrower than subsection (b)(4)(C). It is broader in that intent to facilitate misdemeanor assault or sexual assaults would not suffice under (a)(3)(C). It is narrower however in that it requires intent to commit a sexual offense, but other means of facilitating misdemeanor assaults or sexual assaults would not be covered.

[16] The seeming discrepancy between subsection (a)(3)(C) which requires intent to cause bodily injury and subsection (a)(3)(D) which requires intent to cause a person to believe the complainant will not be released without having suffered *significant* bodily injury is due to the different interests addressed in each subsection. Subsection (a)(3)(C) criminalizes cases in which the defendant had intent to inflict actual injury, whereas subsection (a)(3)(D) criminalizes cases in which the defendant merely had intent to *put another person in fear*, regardless of whether the defendant actually intended to inflict any injury on the complainant. Since subsection (a)(3)(D) only requires intent to cause another to be in fear, a more stringent requirement of intent to cause a person to believe the complainant will not be released without having suffered *significant* bodily injury is appropriate.

Subparagraph (a)(3)(G) specifies that kidnapping includes acting "with intent to" permanently deprive a deprive a person with legal authority over the complainant of custody of the complainant.[17] The term "person with legal authority over the complainant" is defined in RCC § 22E-701. Intent to temporarily interfere with lawful custody is insufficient.

Subsection (b) defines the elements of kidnapping. Paragraph (b)(1) specifies that kidnapping requires the actor knowingly and substantially confines or moves another person. The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the actor was practically certain that he or she would confine or move another person. Moving a person requires causing that person to move to another location when that person would not have done so absent the actor's intervention. Confining a person requires causing that person to remain in a location when that person would not have done so absent the actor's intervention. Confining or moving a person per this subsection need not involve force, threats, or other forms of coercion.[18]

Paragraph (b)(1) also requires that the actor must *substantially* confine or move the complainant. This paragraph clarifies that momentary or trivial[19] confinement or movement is insufficient. Per the rule of construction under RCC § 22E-207, the "knowingly" mental state also applies to this element. The actor must be practically certain that the confinement or movement was substantial. The element under (b)(1) is identical to the element under paragraph (a)(1).

Paragraph (b)(2) specifies three means of committing kidnapping. Subparagraph (b)(2)(A) requires that the actor move or confine the complainant without effective consent of the complainant. The term "effective consent" is defined under RCC § 22E-701 as "consent other than consent induced by physical force, a coercive threat, or deception." Per the rule of construction under RCC § 22E-207, the "knowingly" mental state also applies to this element. The actor must be practically certain the he or she lacked effective consent to confine or move the complainant.

Subparagraph (b)(2)(B) requires that the actor was reckless as to the complainant being an incapacitated individual, and that a person with legal authority over the complainant would not give effective consent to the confinement or movement,

[17] The seeming discrepancy between subsection (a)(3)(C) which requires intent to cause bodily injury and subsection (a)(3)(D) which requires intent to cause a person to believe the complainant will not be released without having suffered *significant* bodily injury is due to the different interests addressed in each subsection. Subsection (a)(3)(C) criminalizes cases in which the defendant had intent to inflict actual injury, whereas subsection (a)(3)(D) criminalizes cases in which the defendant merely had intent to *put another person in fear*, regardless of whether the defendant actually intended to inflict any injury on the complainant. Since subsection (a)(3)(D) only requires intent to cause another to be in fear, a more stringent requirement of intent to cause a person to believe the complainant will not be released without having suffered *significant* bodily injury is appropriate.

[18] For example, a person who invites a guest to his home for dinner has "moved" and "confined" the guest, as the guest would not have gone to and remained at the person's home absent the dinner invitation. However, this would not constitute kidnapping, as the movement and confinement were consensual.

[19] Confinement or movement may be trivial even if they are of significant duration. For example, if a person barricades a door to prevent another from leaving a building, but there is an alternate exit that is easily accessible, the interference would not be substantial regardless of how long the door remains barricaded.

regardless of whether the complainant does so.[20] "Person with authority over the complainant" is a defined term in RCC § 22E-701 which means, in relevant part, "[w]hen the complainant is incapacitated, the court-appointed guardian to the complainant engaging in conduct permitted under civil law controlling the actor's guardianship, or someone acting with the effective consent of such a guardian."[21] This element can be satisfied if the person with authority over the complainant is unaware of the interference, as long as the actor is reckless as to whether the person with authority would not have given effective consent had he or she been informed.[22] The subparagraph specifies that a "reckless" culpable mental state applies to this element, which requires that the accused consciously disregarded a substantial risk that the complainant is incapacitated, and that a person with authority would not have consented to the interference, and that the actor's conduct was clearly blameworthy.[23]

Subparagraph (b)(3)(B) requires that the actor is 18 years or older, and acts with recklessness that the complainant is under the age of 16, and at least 4 years younger than the actor, and that a person with authority over the complainant would not give effective consent to the interference, regardless of whether the complainant does so.[24] "In fact" a defined term specifies that there is no culpable mental state required as to the actor's age. "Person with authority over the complainant" is a defined under RCC § 22E-701, which means in relevant part "[w]hen the complainant is under 18 years of age, the parent, or a person acting in the place of a parent per civil law, who is responsible for the general care and supervision of the complainant, or someone acting with the effective consent of such a parent or person."[25] This element can be satisfied if the person with authority over the complainant is unaware of the interference, as long as the actor is reckless as to whether the person with authority would not have given effective consent had he or she been informed.[26] The subparagraph specifies that a "reckless" culpable mental state applies to this element, which requires that the accused disregarded a substantial risk that the complainant was under the age of 16, and 4 years younger than the actor, and that a person with authority would not have consented to the interference.[27]

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[20] For example, a person can commit kidnapping by leading away an incapacitated person, without his or her guardian's consent, even if the incapacitated person wants to be led away.

[21] RCC § 22E-701.

[22] The determination of whether the actor was reckless as to whether the person with authority over the complainant would have given effective consent is a fact-specific inquiry. The complainant's age, the nature and purpose of the interference, and any other relevant circumstances may be taken into account.

[23] Whether there was a substantial risk that a person with authority would not have consented, and whether the actor's conduct grossly deviated from the ordinary standard of care is a fact based analysis that may take into account the complainant's age, the nature and purpose of the interference, or any other relevant facts.

[24] For example, a person can commit kidnapping by leading away a child without the parent's consent, even if the child wants to be led away, provided the actor is at least 18 years of age, and at least 4 years older than the complainant.

[25] RCC § 22E-701.

[26] The determination of whether the actor was reckless as to whether the person with authority over the complainant would have given effective consent is a fact-specific inquiry. The complainant's age, the nature and purpose of the interference, and any other relevant circumstances may be taken into account.

[27] Whether there was a substantial risk that a person with authority would not have consented, and whether the actor's conduct grossly deviated from the ordinary standard of care is a fact based analysis that may

Paragraph (b)(3) specifies that the accused must confine or move another person "with intent to" accomplish one of the goals listed in subparagraphs (b)(3)(A)-(G). "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that his or her conduct would cause one of the goals listed in subparagraphs (b)(3)(A)-(G). Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that one of the goals actually occurred, just that the defendant believed to a practical certainty that one of the goals would occur.[28] The elements under sub-paragraphs (b)(3)(A)-(G) are identical to those under sub-paragraphs (a)(3)(A)-(G) as required for aggravated kidnapping.

Subsection (c) provides an exception to liability for aggravated kidnapping under subparagraph (a)(3)(G) or kidnapping under subparagraph (b)(3)(G) when the actor is a "close relative" of the complainant, acted with intent[29] 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. The term "close relative" is defined in RCC §22E-701 to mean the complainant's parents, grandparents, siblings, children, cousins, aunts, or uncles. More distant relatives are not included within the definition, and cannot rely on this exception to liability.

Subsection (d) specifies relevant penalties for kidnapping and aggravated kidnapping.

Subsection (e) provides that a person may not be convicted of kidnapping or aggravated kidnapping and a separate offense if the confinement or movement was incidental to the commission of the other offense. Confinement or movement is incidental to another offense when the actor's primary purpose in confining or moving the other person was to commit the other offense, provided that the movement or confinement did not exceed what is normally associated with the other offense.[30] The

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take into account the complainant's age, the nature and purpose of the interference, or any other relevant facts.

[28] For example, an actor who confines another with intent to commit a sexual offense against that person may be convicted of kidnapping even if the actor does not actually commit the sexual offense.

[29] "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain he or she would assume full responsibility for the care and supervision of the complainant. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor assumed full responsibility for the care and supervision of the complainant, only that he or she believed to a practical certainty that he or she would do so.

Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase.

[30] This provision is intended to re-instate D.C. Court of Appeals (DCCA) case law prior to *Parker v. United States*, 692 A.2d 913 (D.C. 1997). Prior to *Parker*, District courts employed a fact-based inquiry to determine whether convictions for kidnapping and other offenses that arise from a single act or course of conduct should merge. In *Parker*, the DCCA held that instead of a fact-based inquiry, courts should only use a *Blockburger* elements test to determine if convictions for kidnapping and separate offenses should merge. The restraint need not be necessarily associated with commission of the other offense. For example, a person who commits robbery by forcing a person to walk into an adjacent room to locate valuables would not be guilty of kidnapping because the movement was incidental to the robbery. However, a person who confines another for a full day in order to facilitate commission of a robbery may

subsection specifies that, consistent with RCC § 22E-214, multiple convictions are barred only after the time for judgment for appeal has expired, or after the judgment appealed from has been affirmed.

Subsection (f) cross-references definitions found elsewhere in the RCC.

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

First, the revised kidnapping offense requires that the actor confines or moves another person with intent to hold the person for ransom, inflict bodily injury, or commit other particularly harmful or dangerous acts. The current kidnapping statute requires that the defendant hold a person "for ransom, reward, *or otherwise*[.]"[31] The D.C. Court of Appeals (DCCA) has interpreted the "or otherwise" language broadly and held that "[t]he motive behind the kidnapping is unimportant, so long as the act was done with the expectation of benefit to the transgressor."[32] By contrast, the RCC divides the current kidnapping offense into two primary offenses, with criminal constraint providing liability for confining or moving a person, while the revised kidnapping requires an added wrongful intent that makes the confinement or movement especially dangerous, harmful, or terrifying. Under the revised kidnapping statute, confining or moving another with intent to enact revenge or to seek companionship, or other purpose would not constitute kidnapping, unless the actor had with intent to achieve one of the goals listed in subparagraphs (a)(3)(A)-(G) or (b)(3)(A)-(G).[33] Codifying a new kidnapping offense based on the actor's intent improves the proportionality of the RCC by separately labeling and penalizing more harmful and dangerous forms confinement or movement.[34]

Second, the RCC kidnapping offense provides an exception to liability under subsection (c) if the actor is a "close relative" of a complainant, had intent to assume full responsibility for the care and supervision of the complainant, and did not cause or threaten to cause bodily injury to the complainant. The current kidnapping statute provides an exception to liability if the victim is a minor, and the defendant is the

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still be convicted of kidnapping because the duration of the confinement far exceeded what would normally be associated with a robbery. *See e.g., Sinclair v. United States*, 388 A.2d 1201 (D.C. 1978) (kidnapping was not incidental to robbery when the defendant held a person at gunpoint in a car and drove 25 blocks away); *Robinson v. United States*, 388 A.2d 1210, 1211–12 (D.C. 1978) (holding that when defendant dragged a person 63 paces over the course of a few moments in order to commit a sexual assault, the "seizure and asportation was clearly incidental to the crime of assault with intent to rape" and that the conduct should not constitute two separate crimes.).

[31] D.C. Code § 22-2001;

[32] *Walker v. United States*, 617 A.2d 525, 527 (D.C. 1992) (quoting *United States v. Wolford*, 144 U.S.App.D.C. 1, 5-6, 444 F.2d 876, 880-81 (1971) (internal quotations omitted). For example, restraining another person in order to enact revenge, or out of a desire for companionship could sustain a kidnapping conviction under current law. *See Walker*, 617 A.2d at 527.

[33] For example, a person who confines another with intent to enact revenge may have intent to cause bodily injury, or intent to cause another person to believe that the complainant will not be released without suffering significant bodily injury.

[34] For example, a person who in the heat of the moment blocks a door to prevent his significant other to leave in the midst of an argument may be guilty of kidnapping under current law, and subject to the same penalty as a person who, after substantial planning, forcibly seizes a person, transports them to another location, and holds them for ransom on fear of death. Under the RCC, these two types of conduct would be penalized differently, as a criminal restraint and kidnapping.

victim's parent. However, the current statute does not specify any further conditions for the exception, and it is unclear whether the current statute's parental exception applies in all kidnapping cases or is inapplicable if the parent uses force or threats to restrain the child. Case law has not resolved this ambiguity.[35] By contrast, the revised kidnapping statute's exception applies to close relatives[36] not just parents of the complainant. However, the exception requires that the actor had intent to assume full responsibility for the care and supervision of the complainant and that the actor did not cause bodily injury or threaten to cause bodily injury. The exception does not apply if the actor confined or moved another person without that person's consent, by causing or threatening to cause bodily injury.[37] The exception also does not apply if the actor had any intent other than to assume full responsibility for the care and supervision of the complainant.[38] The exception under subsection (c) recognizes the diminished culpability and risk to the complainant in cases where the actor is related to the complainant, and no force or threats were used.[39] However, the District's parental kidnapping statute[40] may still provide liability in such conduct by a relative. Changing the parental exception to include a broader array of relatives but limiting the defense to cases in which the actor did not cause bodily injury or threaten to cause bodily injury, improves the proportionality of the revised offenses.

Third, the RCC kidnapping statute bars sentencing for the kidnapping or aggravated kidnapping if the confinement or movement was incidental to the commission of any other offense.[41] Under current DCCA case law a defendant may be convicted of both kidnapping and another offense that arise from the same act or course of conduct, as long as kidnapping and the other offense each include "at least one element which the other one does not."[42] By contrast, the RCC kidnapping statute reinstates the fact-based test applied by the DCCA prior to *Parker v. United States*,[43] which required courts to

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[35] In *Byrd v. United States*, 705 A.2d 629, 633 (D.C. 1997), the DCCA held that a person acting *in loco parentis* may not rely on the parental exception if "the defendant has engaged in separate felonious conduct during the kidnapping which exposes the child to a serious risk of death or bodily injury." However, the DCCA explicitly declined to decide "whether a biological parent may similarly forfeit the protection of the exception." *Id*. at 634 n. 7.

[36] As defined in RCC § 22E-701, which includes a parent, grandparent, sibling, child cousin, aunt, or uncle.

[37] For example, a non-custodial parent that uses force to restrain a child with intent to assume custody of that child may still be convicted of kidnapping under the revised statute.

[38] For example, a parent who holds his own child for ransom may still be convicted of kidnapping under the revised statute.

[39] *See*, *Byrd*, 705 A.2d at 633 (noting that the current kidnapping statute was with the intent that "a parent who kidnapped a child, however misguidedly, out of affection and disagreement over custody should not be prosecuted for that act alone").

[40] D.C. Code § 16-1022.

[41] By barring sentences for kidnapping, the revised statute allows for the possibility that convictions for kidnapping and the other offense may be entered for purposes of appeal. If the conviction for the other offense is reversed on appeal, the appellate court may order a lower court to sentence the defendant for the surviving kidnapping conviction.

[42] *Malloy v. United States*, 797 A.2d 687, 691 (D.C. 2002)

[43] 692 A.2d 913 (D.C. 1997). In *Parker*, the DCCA applied a new test for how to determine, in the absence of legislative intent, whether charged offenses should merge. The *Parker* ruling applied the new "elements" test the DCCA first adopted in *Byrd v. United States*, 598 A.2d 386 (D.C.1991) (en banc) because there was no legislative intent discernible as to whether kidnapping should merge with murder.

make a determination in each case as to whether the kidnapping was merely incidental to another offense.[44] Where, as is common,[45] the confinement or movement is incidental to another offense,[46] the authorized punishment for the other offense is sufficient. The RCC kidnapping sentencing provision improves the proportionality of the offense.

Fourth, the RCC aggravated kidnapping offense incorporates multiple penalty enhancements based on the status of the complainant, and the use of a dangerous weapon or imitation dangerous weapon, into a new kidnapping gradation, capping the effect of these enhancements. The D.C. Code currently provides multiple penalty enhancements for the commission of a kidnapping offense,[47] without specifying whether or how these enhancements may be combined or "stacked" when multiple enhancements are applicable to a single charge. DCCA case law has not addressed whether most combinations of these penalty enhancements can be combined, but the combination of at least some of these enhancements has been upheld.[48] By contrast, under the aggravated kidnapping offense, the penalty for kidnapping cannot be enhanced more than once based on any of the listed aggravating factors.[49] While multiple aggravating factors may be charged, proof of just one is sufficient for an aggravated kidnapping conviction and proof of others does not change the maximum statutory penalty for the crime.[50] Capping the effect of penalty enhancements improves the proportionality of the District law by preventing aggravated forms of the offense from being penalized the same as much more serious offenses.[51]

Fifth, the RCC aggravated kidnapping offense provides new, heightened penalties based on recklessness as to the status of the complainant as a protected person, which

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[44] *E.g., West v. United States*, 599 A.2d 788, 793 (D.C. 1991); *Vines v. United States*, 540 A.2d 1107, 1109 (D.C. 1988); *Robinson v. United States*, 388 A.2d 1210, 1211–12 (D.C. 1978).

[45] Many offenses against persons commonly involve some type of significant, non-consensual confinement or movement. For example, victims of robberies, assaults, sexual assaults, and homicides are frequently subjected to threats or physical restraint that prevent them from fleeing. Under current District law, such offenses against persons typically would provide the basis for a kidnapping charge. In practice, however, kidnapping charges are not typically brought in cases with such offenses against persons.

[46] *E.g.*, *Robinson*, 388 A.2d at 1212–13 (holding that when defendant dragged a person 63 paces over the course of a few moments in order to commit a sexual assault, the "seizure and asportation was clearly incidental to the crime of assault with intent to rape" and that the conduct should not constitute two separate crimes.).

[47] *See*, e.g., D.C. Code § 22-3602 (providing an enhanced penalty for kidnapping committed against "a member of a citizen patrol ("member") while that member is participating in a citizen patrol, or because of the member's participation in a citizen patrol"); D.C. Code § 22-851 (District official or employee while in the course of their duties or on account of those duties, or actions against a family member of a District official or employee); D.C. Code § 22-4502 (enhanced penalty for committing kidnapping "while armed" or with a dangerous weapon "readily available").

[48] Convictions have been upheld applying multiple enhancements. *C.f. Forte v. United States*, 856 A.2d 567 (D.C. 2004) (holding that "double enhancement" under senior citizen penalty enhancement statute and repeat offender statute was proper).

[49] For instance, the status of the complainant and the defendant's use of a weapon.

[50] The existence of more than one aggravating factors may be a significant factor in sentencing, however.

[51] For example, under current law the unarmed kidnapping of a 65 year old taxi cab driver is subject to two penalty enhancements under D.C. Code § 22-3601, and § 22-3751, each of which permits a sentence 1 ½ times the maximum sentence otherwise allowed. Kidnapping ordinarily carries a maximum sentence of 30 years. If these enhancements are both applied, kidnapping a 65 year old taxi driver would be subject to a maximum 60 year sentence, the same as first degree murder. D.C. Code § 22-2104.

includes on-duty law enforcement officers, on-duty public safety employee, on-duty transportation workers. The current kidnapping statute has no gradations and does not reference the status of the complainant, but multiple statutes in the current D.C. Code authorize enhanced penalties for kidnapping committed against certain groups of persons.[52] Currently, the D.C. Code does not enhance crimes based on the status of the complainant as an on-duty law enforcement officer, public safety employee, or on-duty transportation workers. By contrast, through its use of the term "protected person," the RCC aggravated kidnapping offense authorizes heightened penalties if the accused is reckless as to the fact the complainant is an on-duty law enforcement officer, on duty public safety employee, or on-duty transportation worker. Such penalties are consistent with enhancements for assault-type,[53] robbery[54], and homicide offenses,[55] and reflect some unique vulnerabilities of such complainants.[56] Requiring a reckless culpable mental state is also consistent with many current statutes that authorize enhanced penalties based on the complainant's status.[57] Including recklessness as to the complainant being an on-duty law enforcement officer, public safety employee, a vulnerable adult, or on-duty transportation worker as an element of aggravated kidnapping removes a possible gap in current law, and improves the consistency and proportionality of the revised code.

Sixth, the aggravated kidnapping offense provides new, heightened penalties based on the offense being committed for the purpose of harming the complainant because of his or her status as a law enforcement officer, public safety employee, or District official. The current kidnapping statute has no gradations and does not reference a purpose of harming the complainant because of the status of the complainant, although multiple statutes in the current D.C. Code authorize enhanced penalties for kidnapping committed against certain groups of persons.[58] By contrast, the aggravated kidnapping

[52] D.C. Code § 22-851 (District official or employee while in the course of their duties or on account of those duties, or actions against a family member of a District official or employee); D.C. Code § 22-3611 (minors); D.C. Code § 22-3601 (persons over 65 years of age); D.C. Code §§ 22-3751; 22-3752 (taxicab drivers); and D.C. Code §§ 22-3751.01; 22-3752 (transit operators and Metrorail station managers); and D.C. Code § 22-3602 (members of a citizen patrol).

[53] RCC § 22E-1202

[54] RCC § 22E-1201.

[55] RCC §§ 22E-1101 - 1102.

[56] For example, on-duty law enforcement and public safety officers performing investigative duties and private vehicle-for-hire services drivers may often enter situations where they are isolated with persons in enclosed places and more susceptible to unwanted interference with their personal movements; vulnerable adults may be targeted due to their limited ability to evade interference with their freedom of movement.

[57] Under current District law it is a defense to the senior citizen complainant enhancement that "the accused knew or reasonably believed the complainant was not 65 years old or older at the time of the offense, or could not have known or determined the age of the complainant because of the manner in which the offense was committed." D.C. Code § 22-3601(c). Similarly, under the current minor complainant enhancement, it is a defense that "the accused reasonably believed that the complainant was not a minor [person less than 18 years old] at the time of the offense." D.C. Code § 22-3611(b). The current assault of a law enforcement officer offense requires that the defendant was

[58] D.C. Code § 22-3602 (providing an enhanced penalty for kidnapping committed against "a member of a citizen patrol ("member") while that member is participating in a citizen patrol, or because of the member's participation in a citizen patrol"); D.C. Code § 22-851 (District official or employee while in the course of

offense includes as an element committing kidnapping for the purpose of harming another person due to that person's status as a law enforcement officer, public safety employee, or District official. In practice, this change only affects law enforcement officers and public safety employees who are not District employees, as kidnapping of any District employee is subject to more severe statutory penalties under current District law.[59] Authorizing heightened penalties for committing kidnapping with the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public safety employee, or District official removes a possible gap in current law, and improves the consistency and proportionality of penalties.

Seventh, the aggravated kidnapping offense incorporates penalty enhancements for "displaying or using" a dangerous weapon or imitation dangerous weapon. Current D.C. Code § 22-4502 provides enhanced penalties for committing kidnapping "while armed" or "having readily available" a dangerous weapon. District case law on D.C. Code § 22-4502 holds that the penalty enhancements are authorized if the accused either had "actual physical possession of [a weapon]";[60] or if the weapon was merely in "close proximity or easily accessible during the commission of the underlying [offense],"[61] provided that the accused also constructively possessed the weapon.[62] There is no requirement under D.C. Code § 22-4502 that the accused actually used the weapon to commit kidnapping.[63] By contrast, the revised aggravated kidnapping statute requires that the actor actually displayed or used[64] a dangerous weapon or imitation dangerous weapon. Merely possessing or having a weapon or imitation weapon readily available is insufficient to satisfy the element under sub-subparagraph (a)(2)(B)(iii) for aggravated kidnapping, although such conduct is criminalized elsewhere in current law and the RCC as a separate offense with a lower penalty.[65] Including use of a dangerous weapon or imitation dangerous weapon within the kidnapping statute as an element of the

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their duties or on account of those duties, or actions against a family member of a District official or employee);

[59] D.C. Code § 22-851. Subsection (a)(2)(B)(ii) of the RCC aggravated kidnapping offense provides liability for kidnapping committed with the purpose of harming the complainant because of the complainant's status as a District official.

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

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

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

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

[64] "Using" a weapon includes physically touching another person with the weapon. For example, if all other offense elements are satisfied, placing a knife or firearm to the complainant's back and telling them to walk to another location may constitute aggravated kidnapping.

[65] *See* D.C. Code § 22-4514(b); RCC § 22E-[X].

aggravated kidnapping improves the proportionality of punishment by matching more severe penalties to kidnapping in which the actor actually uses or displays a weapon.

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

First, the RCC kidnapping statute specifies that the actor must have "knowingly" confined or moved another person. The current kidnapping statute references as one means of committing the offense that the actor had "intent to hold or detain,"[66] but it is not clear whether this culpable mental state applies to other elements of the offense, and the phrase "with the intent" is not defined in the statute. In one case the DCCA stated that the current kidnapping statute requires that the actor had "specific intent to detain the complainant"[67] although it is unclear whether the DCCA in that case was referring only to the defendant's motive rather than their awareness of the objective elements of the offense. Current District practice appears to treat the kidnapping as a "general intent" offense.[68] The revised kidnapping statute specifies that a "knowingly" culpable mental state applies to the element of confining or moving the complainant. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[69] Specifying a culpable mental state for the offense improves the clarity of the RCC and is consistent with requirements for most other offenses.

Second, the RCC kidnapping offense requires that the complainant did not effectively consent to the interference, other than in cases involving complainants under the age of 16, or who are incapacitated. The current kidnapping statute is silent as to whether and by what means the actor must confine or move the complainant. The current statute broadly states that a person commits kidnapping by "seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual",[70] but none of these terms are statutorily defined. The DCCA has generally recognized that kidnapping requires an "involuntary seizure,"[71] which includes forcible

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[66] *See* D.C. Code § 22-2001 ("…holding or detaining, or with the intent to hold or detain, such individual for ransom or reward or otherwise…").

[67] *Davis v. United States*, 613 A.2d 906, 912 (D.C. 1992) ("To prove a kidnapping, the government must show that the defendant confined the complainant with specific intent to detain the complainant for 'ransom or reward or otherwise' and that such detention was involuntary or by use of coercion; the detention may be for any purpose that the defendant believes might benefit him.").

[68] Redbook § 4.303 Kidnapping requires that the accused acted "voluntarily and on purpose, and not by mistake or accident," which accords with the jury instructions treatment of "general intent," not "specific intent" offenses. See Redbook § 3.100 Defendant's State of Mind.

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

[70] The current statute states that a person can commit kidnapping by "seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever[,]" D.C. Code § 22-2001.

[71] *Walker v. United States*, 617 A.2d 525, 527 (D.C. 1992) (noting that "involuntary seizure is the very essence of the crime of kidnapping"); *Davis v. United States*, 613 A.2d 906, 912 (D.C. 1992) ("To prove a kidnapping, the government must show that the defendant confined the complainant with specific intent to detain the complainant for "ransom or reward or otherwise" and that such detention was involuntary or by use of coercion[.]")

seizures[72], or restraining a person by threat of force.[73] Current District practice also recognizes that a person can commit kidnapping by "seiz[ing], confin[ing], abduct[ing], or carr[ying] away [the complainant] against his/her will"[74] The revised kidnapping statute specifies that the confinement or movement must be without effective consent of the complainant, except in cases where the complainant is under the age of 16 or incapacitated. The revised language improves the clarity and proportionality of the offense.

Third, the RCC kidnapping statute requires that the actor must "substantially" confine or move the complainant. The current kidnapping statute does not explicitly include any substantiality element, and the DCCA has never discussed in a published opinion whether momentary or trivial confinement or movement suffices under the current kidnapping statute.[75] By contrast, the revised kidnapping statute requires that the actor must "substantially" confine or move the complainant. This excludes momentary or trivial confinement or movement. The precise effect on current law is somewhat unclear, as there is no case law on point. Requiring that the actor "substantially" confine or move the complainant improves the proportionality of the RCC by excluding cases that only involve trivial or momentary interference.[76]

Fourth, when the complainant is under the age of 16[77] or is incapacitated, the RCC kidnapping statute requires that the actor be reckless as to the fact that a person with legal authority over the complainant would not effectively consent to the confinement or movement. The current kidnapping statute does not specify when confining or moving a person who is under the age of 16 or is incapacitated constitutes kidnapping, and there is no relevant DCCA case law on point.[78] It is unclear under current law whether, and

[72] *E.g., Hughes v. United States*, 150 A.3d 289, 306 (D.C. 2016) (holding that evidence showing defendant grabbed victim by the hair and pushing her into a changing room was sufficient to prove that she had been seized and detained involuntarily).

[73] *E.g., Battle v. United States*, 515 A.2d 1120 (D.C. 1986) (defendant committed kidnapping by displaying a gun, got into complainant's car, and drove the car away to a different location where the complainant would be held).

[74] D.C. Crim. Jur. Instr. § 4.303 Kidnapping.

[75] DCCA case law discussing whether kidnapping should merge with other offenses has suggested that relatively brief interference with another person's freedom of movement can constitute kidnapping. *E.g., Sinclair v. United States*, 388 A.2d 101, 1204 (D.C. 1978) (noting that "victims of [rape or robbery] are detained against their will while the criminal is accomplishing his objective"). This case law implies that even the brief detention associated with an ordinary street robbery is sufficient for kidnapping. However, the DCCA has never specifically decided whether on its own, such a brief detention would satisfy the elements of kidnapping.

[76] If a defendant intended to interfere with a person's freedom of movement to a substantial degree but failed to do so and was only able to interfere in an insubstantial manner, attempt liability may still be applicable depending on the facts of the case.

[77] This form of kidnapping also requires that the actor is 18 years of age or older, and at least four years older than the complainant.

[78] *But see*, *Blackledge v. United States*, 871 A.2d 1193, 1197 (D.C. 2005) (holding that convictions for kidnapping and enticing a minor do not merge, noting that "the kidnapping statute requires . . . that the complainant was seized involuntarily through the defendant's use of mental or physical coercion; however, consent is never a valid defense to child enticement, and therefore the government is not required to show that the child was taken involuntarily."). This language suggests that kidnapping requires, even in the case of minors, that the defendant seize another person "involuntarily", and that kidnapping does not criminalize moving or confining a minor by means of enticement.

under what circumstances, a person would be guilty of kidnapping for confining or moving a person without effective consent of a person with legal authority over the complainant. The revised statute resolves this ambiguity by requiring that the actor at least be reckless as to whether a person with legal authority over the complainant would effectively consent to the confinement or movement. This change improves the clarity, completeness, and perhaps the proportionality, of the revised statute.

Fifth, the RCC kidnapping statute requires that the actor confines or moves another person. The current kidnapping statute criminalizes "seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever[.]"[79] With the exception of "enticing," discussed below, replacing these verbs with "confines" and "moves" does not appear to change current District law. The verbs "seizing," "confining," "kidnapping," "abducting," "concealing," and "carrying away" all constitute confining or moving another person. However, it is possible that "inveigling" and "decoying" a person includes conduct not covered by confining and moving another.[80] The terms "inveigling" and "decoying" are not defined in the current statute, and there is no DCCA case law defining these terms, and it is unclear how omitting these terms changes the scope of the offense. The RCC kidnapping statute resolves this ambiguity by requiring that the actor confine or move another person, without that person's effective consent.[81] These limitations improve the clarity and proportionality of the offense, by more clearly defining the scope of the offense, and only including conduct dangerous enough to warrant the penalties under the kidnapping statute.[82]

Sixth, the RCC's kidnapping statute omits the word "entices." The current kidnapping statute states that a person commits kidnapping by "enticing . . . any individual . . . with intent to hold or detain such individual for ransom, reward, or otherwise[.]"[83] Under a plain language reading, the current kidnapping statute provides liability for merely enticing a person with intent to hold or detain that person for some personal benefit, even if the person was never actually held. However, the DCCA has never discussed in a published opinion whether such conduct would actually constitute kidnapping, and such an interpretation would run counter to case law requiring the kidnapping to be "involuntary" in nature.[84] The RCC's kidnapping statute resolves this ambiguity by providing that kidnapping requires actually confining or moving a person without that person's effective consent. A person cannot commit kidnapping merely by

[79] D.C. Code § 22-2001.

[80] For example, the word "inveigles" may include causing a person to move by means of flattery. Under the RCC kidnapping offense, the mere use of flattery to confine or move someone would be insufficient.

[81] Or without the effective consent of a person with legal authority over the complainant if the complainant is an incapacitated individual, or under the age of 16.

[82] Since the RCC kidnapping statute requires intent to achieve one of the goals under paragraph (b)(3), it is unlikely, though possible, that a defendant could satisfy all the elements of kidnapping without using physical force, coercive threats, or deception. For example, it is unlikely a person would hold another person hostage or for ransom without using physical force, coercive threats, or deception.

[83] D.C. Code § 22-2001.

[84] *C.f. Walker*, 617 A.2d at 527 (noting that "involuntary seizure is the very essence of the crime of kidnapping").

offering some reward, without actually confining or moving another person.[85] These limitations improve the clarity and proportionality of the offense, by more clearly defining the scope of the offense, and only including conduct dangerous enough to warrant the penalties under the kidnapping statute.[86]

Seventh, the RCC kidnapping statute does not separately criminalize a conspiracy to commit kidnapping. The District's current kidnapping statute specifically provides that any person who conspires to commit kidnapping "shall be deemed to have violated the provisions of this section."[87] The current kidnapping statute's reference to a conspiracy, however, does not specify what culpable mental states, if any, apply to the conspiracy. By contrast, under the RCC kidnapping statute, conspiracy to commit kidnapping is subject to the RCC's general conspiracy statute. The RCC's general conspiracy statute details the culpable mental state and other requirements for proof of a conspiracy in a manner broadly applicable to all offenses. To the extent that the RCC's general conspiracy provision differs from the law on conspiracy as applied to the current kidnapping statute, relying on the RCC's general conspiracy provision may constitute a change in current law.[88] This change improves the clarity and consistency of the revised offense.

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

The RCC kidnapping statute does not contain special provisions regarding jurisdiction. The current kidnapping statute states that "[t]his section shall be held to have been violated if the seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, carrying away, holding, or detaining occurs in the District of Columbia."[89] This language apparently is intended to ensure that District courts have jurisdiction over kidnappings that do not occur entirely within the District of Columbia. However, it is unclear whether this language changes the scope of jurisdiction that a District court would otherwise have over kidnapping cases. The DCCA has generally held that District courts have jurisdiction over alleged offenses if "one of several constituent elements to the complete offense" occurs within the District, "even though the

[85] However, a person can commit kidnapping by initially enticing another person with offer of some benefit as a means of luring the other person to move to or remain in a particular location as long as the actor confines or moves a person without effective consent.

[86] Since the RCC kidnapping statute requires intent to achieve one of the goals under subsection (b)(3), it is unlikely, though possible, that a defendant could satisfy all the elements of kidnapping without using force, threat of force, or deception. For example, it is unlikely a person would hold another person hostage or for ransom without using force, threat of force, or deception.

[87] D.C. Code § 22-2001. "If 2 or more individuals enter into any agreement or conspiracy to do any act or acts which would constitute a violation of the provisions of this section, and 1 or more of such individuals do any act to effect the object of such agreement or conspiracy, each such individual shall be deemed to have violated the provisions of this section. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01."

[88] For discussion on the RCC conspiracy statute's possible changes to current District law, see First Draft of Report #12, Definition of Criminal Conspiracy.

[89] D.C. Code § 22-2001.

remaining elements occurred outside of the District."[90] Consequently, although the DCCA has not applied this rule to kidnapping cases, it seems that District courts would have jurisdiction over any case in which a person was seized or held within the District, regardless of whether the person was initially seized outside of the District, or if the person were seized within the District and transported out of the District.[91] The RCC kidnapping statute eliminates jurisdiction language specific to kidnapping. In addition to general case law providing authority for offenses if "one of several constituent elements to the complete offense" occurs within the District,"[92] RCC § 22E-303 specifically provides jurisdiction for conspiracies formed within the District when the object of the conspiracy is engage in conduct outside of the District if the conduct would constitute a crime under D.C. Code.[93] District courts would therefore have jurisdiction over conspiracies to commit kidnapping outside of the District. Omitting special jurisdiction language from the kidnapping statute improves the law's clarity by omitting unnecessary language and making the offense more consistent with other offenses.

[90] *United States v. Baish*, 460 A.2d 38, 40–41 (D.C. 1983), abrogated on other grounds by *Carrell v. United States*, 80 A.3d 163 (D.C. 2013).
[91] For example, a person who attempts to lure a person in another jurisdiction into the District for purposes of kidnapping that person may be guilty of attempted kidnapping, assuming that the defendant's conduct satisfied the dangerous proximity test.
[92] *Baish*, 460 A.2d at 40–41.
[93] RCC § 22E-303(c).

RCC § 22E-1402. Criminal Restraint.

Explanatory Note. *This section establishes the criminal restraint offense for the Revised Criminal Code. This offense criminalizes knowingly confining or moving a person without that person's effective consent. The offense is identical to the RCC's kidnapping offense, except that criminal restraint does not require intent to hold that person for ransom or another specified purpose [1] Along with the revised kidnapping[2] offense, the revised criminal restraint offense replaces the kidnapping offense in the current D.C. Code. The statute also includes an aggravated form of the offense, which requires that the accused commits criminal restraint with recklessness as to the fact that the complainant is a protected person; with the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public safety employee, or public official; or by knowingly displaying or using a dangerous weapon or imitation dangerous weapon.*

Subsection (a) specifies the elements of aggravated criminal restraint. Paragraph (a)(1) specifies that criminal restraint requires the actor knowingly and substantially confines or moves another person. The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the actor was practically certain that he or she would confine or move another person. Moving a person requires causing that person to move to another location when that person would not have done so absent the actor's intervention. Confining a person requires causing that person to remain in a location when that person would not have done so absent the actor's intervention. Confining or moving a person per this subsection need not involve force, threats, or other forms of coercion.[3]

Paragraph (a)(1) also requires that the actor must *substantially* confine or move the complainant. This paragraph clarifies that momentary or trivial[4] confinement or movement is insufficient. Per the rule of construction under RCC § 22E-207, the "knowingly" mental state also applies to this element. The actor must be practically certain that the confinement or movement was substantial.

Paragraph (a)(2) specifies two means of committing aggravated criminal restraint.

Subparagraph (a)(2)(A) requires that the actor, who is in fact over the age of 18, confines or moves a person, with recklessness as to the fact that the complainant is under the age of 12 and that a person with legal authority over the complainant would not give effective consent to the movement or confinement, regardless of whether the complainant actually does so.[5] "In fact," a defined term in RCC § 22E-207, specifies that there is no

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[1] *See* RCC § 22E-1402.

[2] RCC § 22E-1402.

[3] For example, a person who invites a guest to his home for dinner has "moved" and "confined" the guest, as the guest would not have gone to and remained at the person's home absent the dinner invitation. However, this would not constitute kidnapping, as the movement and confinement were consensual.

[4] Confinement or movement may be trivial even if they are of significant duration. For example, if a person barricades a door to prevent another from leaving a building, but there is an alternate exit that is easily accessible, the interference would not be substantial regardless of how long the door remains barricaded.

[5] For example, a person can commit criminal restraint by carrying away a young child without the parent's consent, even if the child wants to be carried away.

culpable mental state required as to the actor's age. "Person with legal authority over the complainant" also is a defined term, under RCC § 22E-701.[6] This subparagraph requires that the actor was reckless as to the fact that the complainant was under the age of 12, and that a person with legal authority over the complainant would not give effective consent to the confinement or movement. This element can be satisfied if the person with legal authority over the complainant is unaware of the confinement or movement, as long as the actor is reckless as to whether the person with authority would not have given effective consent had he or she been informed.[7] The subparagraph specifies that a "reckless"[8] culpable mental state applies, which requires here that the accused consciously disregarded a substantial risk that the complainant was under the age of 12, and that a person with legal authority would not have consented to the interference.[9]

Subparagraph (a)(2)(B) requires that the actor move or confine the complainant without effective consent of the complainant. The term "effective consent" is defined under RCC § 22E-701 as "consent other than consent induced by physical force, a coercive threat, or deception." Per the rule of construction under RCC § 22E-207, the "knowingly" mental state also applies to this element. The actor must be practically certain the he or she lacked effective consent to confine or move the complainant.

Subparagraph (a)(2)(B) also requires that the actor satisfies at least one of the elements in (a)(2)(B)(i)-(iii). Sub-subparagraph (a)(2)(B)(i) requires that the actor was reckless as to the complainant being a protected person. The term "protected person" is defined under RCC § 22E-701, which includes a person who is "under 18 years of age, when, in fact the actor is 18 years of age or older and at least 4 years older than the other person," "65 years or older, when, in fact, the actor is under 65 years of age," "a vulnerable adult," "a law enforcement officer, while in the course of official duties", "public safety employee, while in the course of official duties," "transportation worker, while in the course of official duties," or "a District official." Under sub-subparagraph (a)(2)(B)(i), the actor must have been reckless as to the complainant being a protected person, a culpable mental state defined in RCC § 22E-206, meaning the accused must consciously disregard a substantial risk that the complainant is a "protected person," and that disregard of that risk is clearly blameworthy.

Sub-subparagraph (a)(2)(B)(ii) requires that the actor has the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public

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[6] "Person with legal authority over the complainant" means:

(C) When the complainant is under 18 years of age, the parent, or a person acting in the place of a parent per civil law, who is responsible for the general care and supervision of the complainant, or someone acting with the effective consent of such a parent or person;

(D) When the complainant is an incapacitated individual, the court-appointed guardian to the complainant engaging in conduct permitted under civil law controlling the actor's guardianship, or someone acting with the effective consent of such a guardian.

[7] The determination of whether the actor was reckless as to whether the person with authority over the complainant would have given effective consent is a fact-specific inquiry. The complainant's age, the nature and purpose of the interference, and any other relevant circumstances may be taken into account.

[8] RCC § 22E-206.

[9] Whether there was a substantial risk that a person with authority would not have consented, and whether the actor's conduct grossly deviated from the ordinary standard of care is a fact based analysis that may take into account the complainant's age, the nature and purpose of the interference, or any other relevant facts.

safety employee, or public official. This requires that the accused acted with "purpose," a term defined at RCC § 22E-206, which means that the actor must consciously desire to harm that person because of his or her status as a law enforcement officer, public safety employee, or District official.[10] Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes.[11] "Law enforcement officer," "public safety employee," and "public official" are all defined terms in RCC § 22E-701. Per RCC § 22E-205, the object of the phrase "with the purpose" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Here, it is not necessary to prove that the complainant who was harmed was a law enforcement officer, public safety employee, or District official, only that the actor believed to a practical certainty that the complainant that he or she would harm a person of such a status.

Sub-subparagraph (a)(2)(B)(iii) requires that the accused commits criminal restraint by knowingly displaying or using a dangerous weapon or imitation weapon. The phrase "by displaying or using a dangerous weapon or imitation dangerous weapon" should be broadly construed to include criminal restraints in which the accused only momentarily displays such a weapon, or slightly touches the complainant with such a weapon.[12] The term "use" is intended to include making physical contact with the weapon, and conduct other than oral or written language, symbols, or gestures, that indicates the presence of a weapon.[13] The terms "dangerous weapon" or "imitation weapon," are defined in RCC § 22E-701. Sub-subparagraph (a)(2)(B)(iii) specifies that a "knowing" culpable mental state applies to this element, which requires that the actor was practically certain that he or she would display or use a dangerous weapon or imitation weapon. However, the sub-subparagraph also uses the term "in fact," a defined term in RCC § 22E-207, to specify that there is no culpable mental state required as to whether the implement used or displayed was a dangerous weapon or imitation dangerous weapon.

Subsection (b) defines the elements of criminal restraint. Paragraph (b)(1) specifies that criminal restraint requires the actor knowingly and substantially confines or moves another person. The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the actor was practically certain that he or she would confine or move another person. Moving another person can include either moving a person against his or her will, such as by tying up and carrying away a person, or by causing the person to move by means of a threat or deception. Confining a person requires causing that person to remain in a location when that person would not have done so absent the

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

[11] For example, confining or moving a person without consent may constitute harm, even if no bodily injury occurs, because it is an interference with the person's freedom of movement.

[12] For example, assuming the other elements of the offense are proven, rearranging one's coat to provide a momentary glimpse of part of a knife, or holding a sharp object to someone's back without actually causing injury, may be sufficient for liability under paragraph (a)(3).

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

actor's intervention. Confining or moving a person need not involve force, threats, or other forms of coercion.

Paragraph (b)(1) also requires that the actor must *substantially* confine or move the complainant. This paragraph clarifies that momentary or trivial[14] confinement or movement is insufficient. Per the rule of construction under RCC § 22E-207, the "knowingly" mental state also applies to this element. The actor must be practically certain that the confinement or movement was substantial. The element under (b)(1) is identical to the element under paragraph (a)(1).

Paragraph (b)(2) specifies three alternate means of committing criminal restraint. Subparagraph (b)(2)(A) requires that the accused interfere with the complainant's freedom of movement without effective consent of the complainant. The term "effective consent" is defined under RCC § 22E-701 as "consent other than consent induced by physical force, a coercive threat, or deception." Per the rule of construction under RCC § 22E-207, the "knowingly" mental state also applies to this element. The actor must be practically certain the he or she lacked effective consent to interfere with the complainant's freedom of movement.

Subparagraph (b)(2)(B) requires that the actor was reckless as to the complainant being an incapacitated individual, and that a person with legal authority over the complainant would not give effective consent to the confinement or movement, regardless of whether the complainant does so.[15] "Person with authority over the complainant" is a defined under RCC § 22E-701, which means in relevant part "[w]hen the complainant is incapacitated, the court-appointed guardian to the complainant engaging in conduct permitted under civil law controlling the actor's guardianship, or someone acting with the effective consent of such a guardian."[16] This element can be satisfied if the person with authority over the complainant is unaware of the interference, as long as the actor is reckless as to whether the person with authority would not have given effective consent had he or she been informed.[17] The subparagraph specifies that a "reckless" culpable mental state applies to this element, which requires that the accused disregarded a substantial risk that the complainant is incapacitated, and that a person with authority would not have consented to the interference.[18]

Subparagraph (b)(3)(B) requires that the actor is 18 years or older, and acts with recklessness that the complainant is under the age of 16, and at least 4 years younger than the actor, and that a person with authority over the complainant would not give effective

[14] Confinement or movement may be trivial even if they are of significant duration. For example, if a person barricades a door to prevent another from leaving a building, but there is an alternate exit that is easily accessible, the interference would not be substantial regardless of how long the door remains barricaded.

[15] For example, a person can commit criminal restraint by leading away an incapacitated person, without his or her guardian's consent, even if the incapacitated person wants to be led away.

[16] RCC § 22E-701.

[17] The determination of whether the actor was reckless as to whether the person with authority over the complainant would have given effective consent is a fact-specific inquiry. The complainant's age, the nature and purpose of the interference, and any other relevant circumstances may be taken into account.

[18] Whether there was a substantial risk that a person with authority would not have consented, and whether the actor's conduct grossly deviated from the ordinary standard of care is a fact based analysis that may take into account the complainant's age, the nature and purpose of the interference, or any other relevant facts.

consent to the interference, regardless of whether the complainant does so.[19] "In fact" a defined term specifies that there is no culpable mental state required as to the actor's age. "Person with authority over the complainant" is a defined under RCC § 22E-701, which means in relevant part "[w]hen the complainant is under 18 years of age, the parent, or a person acting in the place of a parent per civil law, who is responsible for the general care and supervision of the complainant, or someone acting with the effective consent of such a parent or person."[20] This element can be satisfied if the person with authority over the complainant is unaware of the interference, as long as the actor is reckless as to whether the person with authority would not have given effective consent had he or she been informed.[21] The subparagraph specifies that a "reckless" culpable mental state applies to this element, which requires that the accused disregarded a substantial risk that the complainant was under the age of 16, and 4 years younger than the actor, and that a person with authority would not have consented to the interference.[22]

Subsection (c) provides three exceptions to liability. Paragraph (c)(1) provides an exception if the actor lacked effective consent to confine or move the complainant due to the use of deception, unless the actor had intent to[23] proceed by the infliction of bodily injury or a coercive threat if the deception should fail. Under this exception, criminal restraint premised on deception requires proof that the actor would have immediately attempted to obtain consent by causing bodily injury or using a coercive threat if the deception had failed.[24] The term "coercive threat" is defined in RCC § 22E-701. Paragraph (c)(2) provides two additional exceptions to liability when the complainant is under the age of 18. Subparagraph (c)(2)(A) provides an exception if the complainant is under 18 years of age, and the actor is a person with legal authority over the complainant. The term "person with legal authority over the complainant" is defined in RCC § 22E-701. Subparagraph (c)(2)(B) provides an exception to liability when the complainant is under the age of 18, and the actor is a close relative or a former legal guardian with

[19] For example, a person can commit criminal restraint by leading away a child without the parent's consent, even if the child wants to be led away, provided the actor is at least 18 years of age, and at least 4 years older than the complainant.

[20] RCC § 22E-701.

[21] The determination of whether the actor was reckless as to whether the person with authority over the complainant would have given effective consent is a fact-specific inquiry. The complainant's age, the nature and purpose of the interference, and any other relevant circumstances may be taken into account.

[22] Whether there was a substantial risk that a person with authority would not have consented, and whether the actor's conduct grossly deviated from the ordinary standard of care is a fact based analysis that may take into account the complainant's age, the nature and purpose of the interference, or any other relevant facts.

[23] "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that he or she would proceed by the infliction of bodily injury or a coercive threat if the deception should fail. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor proceeded with the infliction of bodily injury or a coercive threat, only that the actor believed to a practical certainty that he or she would do so if the deception failed.

[24] Deception can fail either by the complainant realizing that he or she has been deceived, or by a third party intervening on behalf of the complainant. The defendant's motive for deceiving the other person, whether the defendant was armed, or an actual attempt to use force or threats may all be relevant to determinations of the defendant's willingness to resort to force or threats should the deception fail.

authority to control the complainant's freedom of movement who acts "with intent to"[25] assume full responsibility for the care and supervision of the complainant, and does not cause bodily injury or use a coercive threat. The term "close relative" is defined in RCC § 22E-701, and means a parent, grandparent, child, sibling, aunt, or uncle. The exceptions under subsection (c) do not preclude criminal liability under any other offenses.[26]

Subsection (d) specifies relevant penalties for the criminal restraint and aggravated criminal restraint.

Subsection (e) provides that a person may not be convicted of criminal restraint or aggravated criminal restraint and a separate offense if the confinement or movement was incidental to the commission of the other offense. Confinement or movement is incidental to another offense when the actor's primary purpose in confining or moving the other person was to commit the other offense, provided that the movement or confinement did not exceed what is normally associated with the other offense.[27] The subsection specifies that, consistent with RCC § 22E-214, multiple convictions are barred only after the time for judgment for appeal has expired, or after the judgment appealed from has been affirmed.

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

Relation to Current District Law. *The revised criminal restraint offense changes current District law in seven main ways.*

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[25] "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain he or she would assume full responsibility for the care and supervision of the complainant. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor assumed full responsibility for the care and supervision of the complainant, only that he or she believed to a practical certainty that he or she would do so.
Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase.

[26] For example, although the exception under paragraph (c)(2)(A) bars criminal restraint liability when a parent confines his own child, confining one's own child may constitute child abuse under RCC § 22E-1501, provided the elements of that offense are satisfied.

[27] This provision is intended to re-instate DCCA case law prior to *Parker v. United States*, 692 A.2d 913 (D.C. 1997). Prior to *Parker*, District courts employed a fact-based inquiry to determine whether convictions for kidnapping and other offenses that arise from a single act or course of conduct should merge. In *Parker*, the DCCA held that instead of a fact-based inquiry, courts should only use a *Blockburger* elements test to determine if convictions for kidnapping and separate offenses should merge. The restraint need not be necessarily associated with commission of the other offense. For example, a person who commits robbery by forcing a person to walk into an adjacent room to locate valuables would not be guilty of criminal restraint because the movement was incidental to the robbery. However, a person who confines another for a full day in order to facilitate commission of a robbery may still be convicted of a criminal restraint because the duration of the confinement far exceeded what would normally be associated with a robbery. *See, e.g. Sinclair v. United States*, 388 A.2d 1201 (D.C. 1978) (kidnapping was not incidental to robbery when the defendant held a person at gunpoint in a car and drove 25 blocks away); *Robinson v. United States*, 388 A.2d 1210, 1211–12 (D.C. 1978) (holding that when defendant dragged a person 63 paces over the course of a few moments in order to commit a sexual assault, the "seizure and asportation was clearly incidental to the crime of assault with intent to rape" and that the conduct should not constitute two separate crimes.).

First, the RCC criminal restraint offense codifies as a separate offense confining or moving another person when the motive of the perpetrator is not ransom, the infliction of bodily injury, or other particularly harmful or dangerous acts. The current kidnapping statute requires that the defendant hold a person "for ransom, reward, *or otherwise*[.]"[28] The D.C. Court of Appeals (DCCA) has interpreted the "or otherwise" language broadly and held that "[t]he motive behind the kidnapping is unimportant, so long as the act was done with the expectation of benefit to the transgressor."[29] By contrast, the RCC divides the current kidnapping offense into two primary offenses, with criminal constraint providing liability for confining or moving another person while the revised kidnapping requires an added wrongful intent that makes the confinement or movement especially dangerous, harmful, or terrifying. Codifying a new criminal restraint offense improves the proportionality of the RCC by separately labeling and penalizing less harmful and dangerous forms of confinement or movement.[30]

Second, the criminal restraint offense provides exceptions to liability when the complainant is under the age of 18, and the actor is either a person with legal authority over the complainant, or a close relative or a former legal guardian with authority to control the complainant's freedom of movement.[31] The current kidnapping statute provides an exception to liability if the victim is a minor, and the actor is the victim's parent. By contrast, the RCC criminal restraint statute extends the exception to all persons with legal authority over the complainant, and in certain circumstances, to close relatives and former legal guardians. The revised criminal restraint statute recognizes that certain authority figures may lawfully confine or move a child under their supervision,[32] and that under certain circumstances, a close relative or former legal guardian may lawfully confine or move a child. Extending the parental exception to include other authority figures improves the proportionality of the revised offense.

Third, the RCC criminal restraint statute bars multiple convictions for criminal restraint or aggravated criminal restraint and any other offense if the interference was incidental to the commission of the other offense.[33] Under current DCCA case law a person may be convicted of both kidnapping and another offense that arise from the same

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[28] D.C. Code § 22-2001.

[29] *Walker v. United States*, 617 A.2d 525, 527 (D.C. 1992) (quoting *United States v. Wolford*, 144 U.S.App.D.C. 1, 5-6, 444 F.2d 876, 880-81 (1971) (internal quotations omitted). For example, restraining another person in order to enact revenge, or out of a desire for companionship could sustain a kidnapping conviction under current law. *See Walker*, 617 A.2d at 527.

[30] For example, a person who in the heat of the moment blocks a door to prevent his significant other to leave in the midst of an argument may be guilty of kidnapping under current law, and subject to the same penalty as a person who, after substantial planning, forcibly seizes a person, transports them to another location, and holds them for ransom on fear of death. Under the RCC, these two types of conduct would be penalized differently, as a criminal restraint and kidnapping.

[31] When the actor is a close relative or former legal guardian, the exception also requires that the actor acts with intent to assume full responsibility for the care and supervision of the complainant, and does not cause bodily injury or use a coercive threat.

[32] For example, a parent forcing his child to stay in his room under threat of spanking does not warrant criminal liability, even though this conduct otherwise satisfies the elements of criminal restraint.

[33] By barring sentences for kidnapping, the revised statute allows for the possibility that convictions for kidnapping and the other offense may be entered for purposes of appeal. If the conviction for the other offense is reversed on appeal, the appellate court may order a lower court to sentence the defendant for the surviving kidnapping conviction.

act or course of conduct, as long as kidnapping and the other offense each include "at least one element which the other one does not."[34] By contrast, the RCC criminal restraint statute reinstates the fact-based test applied by the DCCA prior to *Parker v. United States*,[35] which required courts to make a determination in each case as to whether the interference with the other person's freedom of was merely incidental to another offense.[36] Where, as is common,[37] such interference with a person's freedom of movement is incidental to another offense,[38] the authorized punishment for the other offense is sufficient. The RCC criminal restraint sentencing provision improves the proportionality of the offense.

Fourth, the RCC aggravated criminal restraint offense incorporates multiple penalty enhancements based on the status of the complainant into a new criminal restraint gradation, capping the effect of these enhancements. The D.C. Code currently provides multiple penalty enhancements for the commission of a kidnapping offense,[39] without specifying whether or how these enhancements may be combined or "stacked" when multiple enhancements are applicable to a single charge. DCCA case law has not addressed whether most combinations of these penalty enhancements can be combined, but the combination of at least some of these enhancements has been upheld.[40] By contrast, under the aggravated criminal restraint offense, the penalty for criminal restraint cannot be enhanced more than once based on any of the listed aggravating factors.[41] While multiple aggravating factors may be charged, proof of just one is sufficient for an aggravated criminal restraint conviction and proof of others does not change the

[34] *Malloy v. United States*, 797 A.2d 687, 691 (D.C. 2002)

[35] 692 A.2d 913 (D.C. 1997). In *Parker*, the DCCA applied a new test for how to determine, in the absence of legislative intent, whether charged offenses should merge. The *Parker* ruling applied the new "elements" test the DCCA first adopted in *Byrd v. United States*, 598 A.2d 386 (D.C.1991) (en banc) because there was no legislative intent discernible as to whether kidnapping should merge with murder.

[36] *E.g.*, *West v. United States*, 599 A.2d 788, 793 (D.C. 1991); *Vines v. United States*, 540 A.2d 1107, 1109 (D.C. 1988); *Robinson v. United States*, 388 A.2d 1210, 1211–12 (D.C. 1978).

[37] Many offenses against persons commonly involve some type of significant, non-consensual interference with another person's freedom of movement. For example, victims of robberies, assaults, sexual assaults, and homicides are frequently subjected to threats or physical restraint that prevent them from fleeing. Under current District law, such offenses against persons typically would provide the basis for a kidnapping charge. In practice, however, kidnapping charges are not typically brought in cases with such offenses against persons.

[38] *E.g.*, *Robinson*, 388 A.2d at 1212–13 (holding that when defendant dragged a person 63 paces over the course of a few moments in order to commit a sexual assault, the "seizure and asportation was clearly incidental to the crime of assault with intent to rape" and that the conduct should not constitute two separate crimes.).

[39] *See*, e.g., D.C. Code § 22-3602 (providing an enhanced penalty for kidnapping committed against "a member of a citizen patrol ("member") while that member is participating in a citizen patrol, or because of the member's participation in a citizen patrol"); D.C. Code § 22-851 (District official or employee while in the course of their duties or on account of those duties, or actions against a family member of a District official or employee); D.C. Code § 22-4502 (enhanced penalty for committing kidnapping "while armed" or with a dangerous weapon "readily available").

[40] Convictions have been upheld applying multiple enhancements. *C.f. Forte v. United States*, 856 A.2d 567 (D.C. 2004) (holding that "double enhancement" under senior citizen penalty enhancement statute and repeat offender statute was proper).

[41] For instance, the status of the complainant and the defendant's use of a weapon.

maximum statutory penalty for the crime.[42] Capping the effect of penalty enhancements improves the proportionality of the District law by preventing aggravated forms of the offense from being penalized the same as much more serious offenses.[43]

Fifth, the RCC aggravated criminal restraint offense provides new, heightened penalties based on recklessness as to the status of the complainant as a protected person, which includes on-duty law enforcement officers, on-duty public safety employee, on-duty transportation workers. The current kidnapping statute has no gradations and does not reference the status of the complainant, but multiple statutes in the current D.C. Code authorize enhanced penalties for kidnapping committed against certain groups of persons.[44] Currently, the D.C. Code does not enhance crimes based on the status of the complainant as an on-duty law enforcement officer, public safety employee, or on-duty transportation workers. By contrast, through its use of the term "protected person," the RCC aggravated criminal restraint offense authorizes heightened penalties if the accused is reckless as to the fact the complainant is an on-duty law enforcement officer, on-duty public safety employee, or on-duty transportation worker. Such penalties are consistent with enhancements for assault-type,[45] robbery[46], and homicide offenses,[47] and reflect some unique vulnerabilities of such complainants.[48] Requiring a reckless culpable mental state is also consistent with many current statutes that authorize enhanced penalties based on the complainant's status.[49] Including recklessness as to the complainant being an on-duty law enforcement officer, public safety employee, a vulnerable adult, or on-duty transportation worker as an element of aggravated criminal restraint removes a possible gap in current law, and improves the consistency and proportionality of the revised code.

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[42] The existence of more than one aggravating factors may be a significant factor in sentencing, however.

[43] For example, under current law the unarmed kidnapping of a 65 year old taxi cab driver is subject to two penalty enhancements under D.C. Code § 22-3601, and § 22-3751, each of which permits a sentence 1 ½ times the maximum sentence otherwise allowed. Kidnapping ordinarily carries a maximum sentence of 30 years. If these enhancements are both applied, kidnapping a 65 year old taxi driver would be subject to a maximum 60 year sentence, the same as first degree murder. D.C. Code § 22-2104.

[44] D.C. Code § 22-851 (District official or employee while in the course of their duties or on account of those duties, or actions against a family member of a District official or employee); D.C. Code § 22-3611 (minors); D.C. Code § 22-3601 (persons over 65 years of age); D.C. Code §§ 22-3751; 22-3752 (taxicab drivers); and D.C. Code §§ 22-3751.01; 22-3752 (transit operators and Metrorail station managers); and D.C. Code § 22-3602 (members of a citizen patrol).

[45] RCC § 22E-1202.

[46] RCC § 22E-1201.

[47] RCC §§ 22E-1101 - 1102.

[48] For example, on-duty law enforcement and public safety officers performing investigative duties and private vehicle-for-hire services drivers may often enter situations where they are isolated with persons in enclosed places and more susceptible to unwanted interference with their personal movements; vulnerable adults may be targeted due to their limited ability to evade interference with their freedom of movement.

[49] Under current District law it is a defense to the senior citizen complainant enhancement that "the accused knew or reasonably believed the complainant was not 65 years old or older at the time of the offense, or could not have known or determined the age of the complainant because of the manner in which the offense was committed." D.C. Code § 22-3601(c). Similarly, under the current minor complainant enhancement, it is a defense that "the accused reasonably believed that the complainant was not a minor [person less than 18 years old] at the time of the offense." D.C. Code § 22-3611(b). The current assault of a law enforcement officer offense requires that the defendant was

Sixth, the aggravated criminal restraint offense provides new, heightened penalties based on the crime being committed for the purpose of harming the complainant because of his or her status as a law enforcement officer, public safety employee, or District official. The current kidnapping statute has no gradations and does not reference a purpose of harming the complainant because of the status of the complainant, although multiple statutes in the current D.C. Code authorize enhanced penalties for kidnapping committed against certain groups of persons.[50] By contrast, the aggravated criminal restraint offense includes as an element committing criminal restraint for the purpose of harming another person due to that person's status as a law enforcement officer, public safety employee, or District official. In practice, this change only affects law enforcement officers and public safety employees who are not District employees, as kidnapping of any District employee is subject to more severe statutory penalties under current District law.[51] Authorizing heightened penalties for criminal restraint with the purpose of harming the complainant because of the complainant's status as a law enforcement officer or public safety employee removes a possible gap in current law, and improves the consistency and proportionality of penalties.

Seventh, the aggravated criminal restraint offense incorporates penalty enhancements for "displaying or using" a dangerous weapon or imitation dangerous weapon. Current D.C. Code § 22-4502 provides enhanced penalties for committing kidnapping "while armed" or "having readily available" a dangerous weapon. District case law on D.C. Code § 22-4502 holds that the penalty enhancements are authorized if the accused either had "actual physical possession of [a weapon]";[52] or if the weapon was merely in "close proximity or easily accessible during the commission of the underlying [offense],"[53] provided that the accused also constructively possessed the weapon.[54] There is no requirement under D.C. Code § 22-4502 that the accused actually used the weapon to commit kidnapping.[55] By contrast, the revised aggravated criminal restraint statute

[50] D.C. Code § 22-3602 (providing an enhanced penalty for kidnapping committed against "a member of a citizen patrol ("member") while that member is participating in a citizen patrol, or because of the member's participation in a citizen patrol"); D.C. Code § 22-851 (District official or employee while in the course of their duties or on account of those duties, or actions against a family member of a District official or employee);

[51] D.C. Code § 22-851. Subparagraph (a)(3)(B) of the RCC aggravated criminal restraint offense provides liability for criminal restraints with the purpose of harming the complainant because of the complainant's status as a District employee.

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

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

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

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

requires that the actor actually displayed or used[56] a dangerous weapon or imitation dangerous weapon. Merely possessing or having a weapon readily available is insufficient to satisfy the element under sub-subparagraph (a)(2)(B)(iii) for aggravated criminal restraint, although such conduct is criminalized elsewhere in current law and the RCC as a separate offense with a lower penalty.[57] Including use of a dangerous weapon or imitation dangerous weapon within the aggravated criminal restraint statute as an element of the offense improves the proportionality of punishment by matching more severe penalties to criminal restraints in which the defendant actually uses a weapon.

Beyond these seven changes to current District law, eight other aspects of the revised criminal restraint offense may constitute substantive changes to current District law.

First, the RCC criminal restraint statute specifies that the actor must have "knowingly" confined or moved another person. The current kidnapping statute references as one means of committing the offense that the actor had "intent to hold or detain,"[58] but it is not clear whether this culpable mental state applies to other elements of the offense, and the phrase "with the intent" is not defined in the statute. In one case the DCCA stated that the current kidnapping statute requires that the actor had "specific intent to detain the complainant"[59] although it is unclear whether the DCCA in that case was referring only to the defendant's motive rather than their awareness of the objective elements of the offense. Current District practice appears to treat the kidnapping as a "general intent" offense.[60] The revised criminal restraint statute specifies that a "knowingly" culpable mental state applies to the element of confining or moving the complainant. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[61] Specifying a culpable mental state for the offense improves the clarity of the RCC and is consistent with requirements for most other offenses.

Second, the RCC criminal restraint offense requires that the complainant did not effectively consent to the interference, other than in cases involving complainants under the age of 16, or who are incapacitated. The current kidnapping statute is silent as to whether and by what means the actor must confine or move the complainant. The current

[56] "Using" a weapon includes physically touching another person with the weapon. For example, if all other offense elements are satisfied, placing a knife or firearm to the complainant's back and telling them to walk to another location may constitute aggravated kidnapping.
[57] *See* D.C. Code § 22-4514(b); RCC § 22E-[X].
[58] *See* D.C. Code § 22-2001 ("…holding or detaining, or with the intent to hold or detain, such individual for ransom or reward or otherwise…").
[59] *Davis v. United States*, 613 A.2d 906, 912 (D.C. 1992) ("To prove a kidnapping, the government must show that the defendant confined the complainant with specific intent to detain the complainant for 'ransom or reward or otherwise' and that such detention was involuntary or by use of coercion; the detention may be for any purpose that the defendant believes might benefit him.").
[60] Redbook § 4.303 Kidnapping requires that the accused acted "voluntarily and on purpose, and not by mistake or accident," which accords with the jury instructions treatment of "general intent," not "specific intent" offenses. See Redbook § 3.100 Defendant's State of Mind.
[61] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

statute broadly states that a person commits kidnapping by "seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual",[62] but none of these terms are statutorily defined. The DCCA has generally recognized that kidnapping requires an "involuntary seizure,"[63] which includes forcible seizures[64], or restraining a person by threat of force.[65] Current District practice also recognizes that a person can commit kidnapping by "seiz[ing], confin[ing], abduct[ing], or carr[ying] away [the complainant] against his/her will"[66] The revised criminal restraint statute specifies that the confinement or movement must be without effective consent of the complainant, except in cases where the complainant is under the age of 16 or incapacitated. The revised language improves the clarity and proportionality of the offense.

Third, the RCC criminal restraint statute requires that the actor must "substantially" confine or move the complainant. The current kidnapping statute does not explicitly include any substantiality element, and the DCCA has never discussed in a published opinion whether momentary or trivial confinement or movement suffices under the current kidnapping statute.[67] By contrast, the revised criminal restraint statute requires that the actor must "substantially" confine or move the complainant. This excludes momentary or trivial confinement or movement. The precise effect on current law is somewhat unclear, as there is no case law on point. Requiring that the actor "substantially" confine or move the complainant improves the proportionality of the RCC by excluding cases that only involve trivial or momentary interference.[68]

Fourth, when the complainant is under the age of 16 or is incapacitated, the RCC criminal restraint statute requires that the actor be reckless as to the fact that a person with legal authority over the complainant would not effectively consent to the

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[62] The current statute states that a person can commit kidnapping by "seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever[,]" D.C. Code § 22-2001.

[63] *Walker v. United States*, 617 A.2d 525, 527 (D.C. 1992) (noting that "involuntary seizure is the very essence of the crime of kidnapping"); *Davis v. United States*, 613 A.2d 906, 912 (D.C. 1992) ("To prove a kidnapping, the government must show that the defendant confined the complainant with specific intent to detain the complainant for "ransom or reward or otherwise" and that such detention was involuntary or by use of coercion[.]")

[64] *E.g., Hughes v. United States*, 150 A.3d 289, 306 (D.C. 2016) (holding that evidence showing defendant grabbed victim by the hair and pushing her into a changing room was sufficient to prove that she had been seized and detained involuntarily).

[65] *E.g., Battle v. United States*, 515 A.2d 1120 (D.C. 1986) (defendant committed kidnapping by displaying a gun, got into complainant's car, and drove the car away to a different location where the complainant would be held).

[66] D.C. Crim. Jur. Instr. § 4.303 Kidnapping.

[67] DCCA case law discussing whether kidnapping should merge with other offenses has suggested that relatively brief interference with another person's freedom of movement can constitute kidnapping. *E.g., Sinclair v. United States*, 388 A.2d 101, 1204 (D.C. 1978) (noting that "victims of [rape or robbery] are detained against their will while the criminal is accomplishing his objective"). This case law implies that even the brief detention associated with an ordinary street robbery is sufficient for kidnapping. However, the DCCA has never specifically decided whether on its own, such a brief detention would satisfy the elements of kidnapping.

[68] If a defendant intended to interfere with a person's freedom of movement to a substantial degree but failed to do so and was only able to interfere in an insubstantial manner, attempt liability may still be applicable depending on the facts of the case.

confinement or movement. The current kidnapping statute does not specify when confining or moving a person who is under the age of 16 or is incapacitated constitutes kidnapping, and there is no relevant DCCA case law on point.[69] It is unclear under current law whether, and under what circumstances, a person would be guilty of kidnapping for confining or moving a person without effective consent of a person with legal authority over the complainant. The revised statute resolves this ambiguity by requiring that the actor at least be reckless as to whether a person with legal authority over the complainant would effectively consent to the confinement or movement. This change improves the clarity, completeness, and perhaps the proportionality, of the revised statute.

Fifth, the RCC criminal restraint statute requires that the actor confines or moves another person. The current kidnapping statute criminalizes "seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever[.]"[70] With the exception of "enticing," discussed below, replacing these verbs with "confines" and "moves" does not appear to change current District law. The ordinary definitions of the verbs "seizing," "confining," "kidnapping," "abducting," "concealing," and "carrying away" all constitute confining or moving another person. However, it is possible that "inveigling" and "decoying" a person includes conduct not covered by confining and moving another.[71] The terms "inveigling" and "decoying" are not defined in the current statute, and there is no DCCA case law defining these terms. The RCC criminal restraint statute resolves this ambiguity by requiring that the actor confine or move another person, without that person's effective consent.[72] These limitations improve the clarity and proportionality of the offense, by more clearly defining the scope of the offense.

Sixth, the RCC's criminal restraint statute omits the word "entices." The current kidnapping statute states that a person commits kidnapping by "enticing . . . any individual . . . with intent to hold or detain such individual for ransom, reward, or otherwise[.]"[73] Under a plain language reading, the current kidnapping statute provides liability for merely enticing a person with intent to hold or detain that person for some personal benefit, even if the person was never actually held. However, the DCCA has never discussed in a published opinion whether such conduct would actually constitute kidnapping, and such an interpretation would run counter to case law requiring the

[69] *But see*, *Blackledge v. United States*, 871 A.2d 1193, 1197 (D.C. 2005) (holding that convictions for kidnapping and enticing a minor do not merge, noting that "the kidnapping statute requires . . . that the complainant was seized involuntarily through the defendant's use of mental or physical coercion; however, consent is never a valid defense to child enticement, and therefore the government is not required to show that the child was taken involuntarily."). This language suggests that kidnapping requires, even in the case of minors, that the defendant seize another person "involuntarily", and that kidnapping does not criminalize moving or confining a minor by means of enticement.

[70] D.C. Code § 22-2001.

[71] For example, the word "inveigles" may include causing a person to move by means of flattery. Under the RCC criminal restraint offense, the mere use of flattery to confine or move someone would be insufficient.

[72] Or without the effective consent of a person with legal authority over the complainant if the complainant is an incapacitated individual, or under the age of 16.

[73] D.C. Code § 22-2001.

kidnapping to be "involuntary" in nature.[74] The RCC's criminal restraint statute resolves this ambiguity by providing that the offense requires actually confining or moving a person without that person's effective consent. A person cannot commit criminal restraint merely by offering some reward, without actually confining or moving another person.[75] These limitations improve the clarity and proportionality of the offense, by more clearly defining the scope of the offense, and only including conduct dangerous enough to warrant the penalties under the criminal restraint statute.

Seventh, the RCC criminal restraint statute bars liability when the actor obtained consent by deception, unless the actor had intent to obtain consent by inflicting bodily injury or making a coercive threat if the deception should fail. The current D.C. Code kidnapping statute does not reference use of "deception," but it does include the terms "inveigle" and "decoy" which, at least considered alone, may allow for kidnapping liability for the use of deception.[76] The DCCA has never discussed in a published opinion whether a deception that causes a person to change how they otherwise would exercise their freedom of movement can alone constitute kidnapping, absent proof that the defendant would have resorted to force or threats should the deception fail.[77] Federal courts interpreting an analogous federal kidnapping statute[78] are split as to whether deception alone can constitute kidnapping.[79] The revised statute clarifies this ambiguity,

[74] *C.f. Walker*, 617 A.2d at 527 (noting that "involuntary seizure is the very essence of the crime of kidnapping").

[75] However, a person can commit kidnapping by initially enticing another person with offer of some benefit as a means of luring the other person to move to or remain in a particular location as long as the actor confines or moves a person without effective consent.

[76] D.C. Code § 22-2001. ("Whoever shall be guilty of, or of aiding or abetting in, seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever, and holding or detaining, or with the intent to hold or detain, such individual for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction thereof, be punished by imprisonment for not more than 30 years."). One meaning of "inveigle" is "to win over by wiles." Merriam Webster Dictionary Online, at https://www.merriam-webster.com/dictionary/inveigle. However, in addition to "inveigle," the plain text of the current statute also to requires "holding or detaining, or with the intent to hold or detain…" which suggests that mere substantial movement or confinement by deception may be inadequate for liability.

[77] *Miller v. United States*, 138 F.2d 258, 260 (8th Cir.1943) (defendant initially deceived complainant by lying about taking her to see her dying grandfather, then enslaved complainant and kept her in servitude by using beatings and death threats).

[78] *United States v. Wolford*, 444 F.2d 876, 879-80 (D.C. Cir. 1971) ("For all practical purposes, the conduct prohibited by section 2101 is identical to that proscribed by the Federal Kidnaping Act, as presently worded, 18 U.S.C. 1201 (1964),[6] with the exception of the requirement of the federal statute that the complainant be transported in interstate or foreign commerce. For this reason, and because both statutes were enacted by Congress, decisions construing the meaning and application of the Federal Kidnaping Act may be resorted to as an aid in determining the meaning of the similar language employed in the District statute.); D.C. Crim. Jur. Instr. § (noting that the District's kidnapping statute is "intended to cover the same acts as the federal kidnapping statute 18 U.S.C. § 1201 (a)(1)").

[79] *United States v. Corbett*, 750 F.3d 245, 246 (2d Cir. 2014) ("Other circuits differ as to whether a defendant who first "takes" control of his victim by "decoy" or trick must intend to back up his pretense with physical or psychological force in order to "hold" the unwilling victim under the statute. *Compare United States v. Boone*, 959 F.2d 1550, 1555 & n. 5 (11th Cir.1992) (requiring that the defendant "ha[ve] the willingness and intent to use physical or psychological force to complete the kidnapping in the event that his deception fail[s]"), *with United States v. Hoog*, 504 F.2d 45, 50–51 (8th Cir.1974) (finding the

making deception alone an insufficient basis for criminal restraint liability. The revised language improves the clarity and proportionality[80] of the offense.

Eighth, the revised statute does not separately criminalize a conspiracy to commit criminal restraint. The District's current kidnapping statute specifically provides that any person who conspires to commit kidnapping "shall be deemed to have violated the provisions of this section."[81] The current kidnapping statute's reference to a conspiracy, however, does not specify what culpable mental states, if any, apply to the conspiracy. By contrast, under the RCC criminal restraint statute, conspiracy to commit criminal restraint is subject to the RCC's general conspiracy statute. The RCC's general conspiracy statute details the culpable mental state and other requirements for proof of a conspiracy in a manner broadly applicable to all offenses. To the extent that the RCC's general conspiracy provision differs from the law on conspiracy as applied to the current kidnapping statute, relying on the RCC's general conspiracy provision may constitute a change in current law.[82] This change improves the clarity and consistency of the revised offense.

One other change to the revised statute is clarificatory in nature and is not intended to substantively change District law.

The RCC criminal restraint statute does not contain special provisions regarding jurisdiction. The current kidnapping statute states that "[t]his section shall be held to have been violated if the seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, carrying away, holding, or detaining occurs in the District of Columbia."[83] This language apparently is intended to ensure that District courts have jurisdiction over kidnappings that do not occur entirely within the District of Columbia. However, it is unclear whether this language changes the scope of jurisdiction that a District court would otherwise have over kidnapping cases. The DCCA has generally held that District courts have jurisdiction over alleged offenses if "one of several constituent elements to the complete offense" occurs within the District, "even though the remaining elements occurred outside of the District."[84] Consequently, although the

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evidence to be sufficient where the defendant promised the victim a ride and then kept her in his car by inventing an emergency detour).").

[80] Absent the RCC specification that consent by deception must be accompanied by an intent to use bodily injury or threat of bodily injury if necessary, a broad range of otherwise accepted, legal conduct may fall within the scope of the RCC criminal restraint and current kidnapping statute. For example, if a defendant lures another person to a location, and convinces the person to remain in that location by false promise of employment, the defendant could be convicted of criminal restraint even if the defendant had no intent to use force or threats to compel the person to remain.

[81] D.C. Code § 22-2001. ("If 2 or more individuals enter into any agreement or conspiracy to do any act or acts which would constitute a violation of the provisions of this section, and 1 or more of such individuals do any act to effect the object of such agreement or conspiracy, each such individual shall be deemed to have violated the provisions of this section. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[82] For discussion on the RCC conspiracy statute's possible changes to current District law, see First Draft of Report #12, Definition of Criminal Conspiracy.

[83] D.C. Code § 22-2001.

[84] *United States v. Baish*, 460 A.2d 38, 40–41 (D.C. 1983), abrogated on other grounds by *Carrell v. United States*, 80 A.3d 163 (D.C. 2013).

DCCA has not applied this rule to kidnapping cases, it seems that District courts would have jurisdiction over any case in which a person was seized or held within the District, regardless of whether the person was initially seized outside of the District, or if the person were seized within the District and transported out of the District.[85] The RCC criminal restraint statute eliminates jurisdiction language specific to kidnapping and criminal restraint. In addition to general case law providing authority for offenses if "one of several constituent elements to the complete offense" occurs within the District,"[86] RCC § 22E-303 specifically provides jurisdiction for conspiracies formed within the District when the object of the conspiracy is engage in conduct outside of the District if the conduct would constitute a crime under D.C. Code.[87] District courts would therefore have jurisdiction over conspiracies to commit criminal restraint outside of the District. Omitting special jurisdiction language from the criminal restraint statute improves the law's clarity by omitting unnecessary language and making the offense more consistent with other offenses.

[85] For example, a person who attempts to lure a person in another jurisdiction into the District for purposes of kidnapping that person may be guilty of attempted kidnapping, assuming that the defendant's conduct satisfied the dangerous proximity test.
[86] *Baish*, 460 A.2d at 40–41.
[87] RCC § 22E-303(c).

RCC § 22E-1501. Criminal Abuse of a Minor.

Explanatory Note. *The RCC criminal abuse of a minor offense proscribes a broad range of conduct in which there is harm to a minor's bodily integrity or mental well-being, including conduct that constitutes stalking, menacing, criminal threats, criminal restraint, or first degree offensive physical contact, as those crimes are defined in the RCC.*[1] *The penalty gradations are primarily based on the degree of bodily harm or mental harm. Along with the revised criminal neglect of a minor offense,*[2] *the revised criminal abuse of a minor offense replaces the child cruelty offense*[3] *and the failure to provide for a child offense*[4] *in the current D.C. Code. Insofar as it is applicable to the current child cruelty offense, the revised child abuse statute also replaces the current enhancement for certain crimes committed against minors.*[5]

There are three degrees of criminal abuse of a minor. Each gradation requires that the accused must be "reckless as to the fact that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant who is under 18 years of age"[6] (subsection (a)(1) for first degree, subsection (b)(1) for second degree, and subsection (c)(1)) for third degree). Per the rule of construction in RCC § 22E-207, the "reckless" culpable mental state specified in subsection (a)(1) for first degree, subsection (b)(1) for second degree, and subsection (c)(1)) for third degree, applies to both the fact that the complainant has the specified responsibility to the complainant and the fact that the complainant is under 18 years of age. "Reckless" is a defined term in RCC § 22E-206 that here means the accused must disregard a substantial risk that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant and that the complainant is under the age of 18 years. "As to the fact that" indicates that the accused must actually have the specified responsibility to the complainant and the complainant must actually be under 18 years of age.

Subsection (a)(2) specifies the two types of prohibited conduct in first degree criminal abuse of a minor, the highest grade of the revised offense. Subsection (a)(2)(A) establishes liability for causing "serious mental injury," a term defined in RCC § 22E-701 as "substantial, prolonged harm to a person's psychological or intellectual functioning." Subsection (a)(2)(A) specifies that the culpable mental state for causing "serious mental injury" to the complainant is "purposely," a term defined in RCC § 22E-206 to here mean the accused must consciously desire that his or her conduct causes "serious mental injury" to the complainant. Subsection (a)(2)(B) establishes liability causing "serious bodily injury," a term defined in RCC § 22E-701 as injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ. Subsection (a)(1)(B) specifies that the culpable mental state for causing "serious bodily injury" to the complainant is "recklessly," a term

[1] RCC §§ 22E-1206 (stalking), 22E-1203 (menacing), 22E-1204 (criminal threats), 22E-1404 (criminal restraint), 22E-1205(a) (first degree offensive physical contact).
[2] RCC § 22E-1502.
[3] D.C. Code § 22-1101.
[4] D.C. Code § 22-1102.
[5] D.C. Code § 22-3611.
[6] Such a duty of care to the complainant may arise, for example, from the actor being a teacher, doctor, daycare provider, or babysitter, depending on the facts of a case.

defined in RCC § 22E-206 that here means being aware of a substantial risk that one's conduct will cause serious bodily injury to the complainant.

Subsection (b)(2) specifies the two types of prohibited conduct in second degree criminal abuse of a minor, the middle grade of the revised offense. Subsection (b)(2)(A) establishes liability for causing "serious mental injury," a term defined in RCC § 22E-701 as "substantial, prolonged harm to a person's psychological or intellectual functioning." Subsection (b)(2)(B) establishes liability for causing "significant bodily injury." "Significant bodily injury" is the intermediate level of bodily injury in the revised offenses against persons statutes and is defined in RCC § 22E-701 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone. Per the rule of construction in RCC § 22E-207, the "recklessly" culpable mental state in subsection (b)(1) applies to both causing "serious mental injury" to the complainant in subsection (b)(2)(A) and "significant bodily injury" to the complainant in subsection (b)(2)(B). "Recklessly" is a defined term in RCC § 22E-206 that here means being aware of a substantial risk that one's conduct will cause "serious mental injury" or "significant bodily injury" to the complainant.

Subsection (c)(2) specifies the three ways of committing third degree criminal abuse of a minor, the lowest grade of the revised offense. Subsection (c)(2)(A) requires for liability that the accused commit stalking, menacing, criminal threats, criminal restraint, or first degree offensive physical contact as those crimes are defined in the RCC,[7] against the complainant. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to whether the accused committed one of the specified offenses. The use of "in fact" does not change the culpable mental states required in the specified offenses. Subsection (c)(2)(B) requires for liability that the accused cause "significant emotional distress" by confining the complainant. "Significant emotional distress" is a defined term in RCC § 22E-207. Subsection (c)(2)(B) specifies a culpable mental state of "purposely," a defined term in RCC § 22E-206 that here means that the accused must consciously desire that his or her conduct confines the complainant, and, by so doing, caused significant emotional distress. Subsection (c)(2)(C) specifies the final type of prohibited conduct for third degree criminal abuse of a minor—causing "bodily injury." "Bodily injury" is the lowest level of bodily injury in the revised offenses against persons statutes and is defined in RCC § 22E-701 to require "physical pain, illness, or any impairment of condition." Subsection (c)(2)(B) specifies a culpable mental state of "recklessly," a defined term in RCC § 22E-206 that here means being aware of a substantial risk that one's conduct will cause "bodily injury" to the complainant.

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

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

Relation to Current District Law. *The revised criminal abuse of a minor statute changes current District law in five main ways.*

[7] RCC §§ 22E-1206 (stalking), 22E-1203 (menacing), 22E-1204 (criminal threats), 22E-1404 (criminal restraint), 22E-1205(a) (first degree offensive physical contact).

First, the revised criminal abuse of a minor statute does not criminalize as a completed offense conduct that does not actually harm the complainant. The current second degree child cruelty statute criminalizes not only actual "maltreatment" of a complainant, but also causing a "grave risk of bodily injury," without any distinction in penalty.[8] In contrast, the revised criminal abuse of a minor statute does not criminalize as a completed offense mere risk creation. Conduct that results in a risk of certain types of physical or mental harm is criminalized by the revised criminal neglect of a minor statute (RCC § 22E-1502), or may constitute attempted criminal abuse of a minor. This change improves the organization, clarity, and proportionality of the revised statute.

Second, the revised criminal abuse of a minor statute partially grades the offense based on whether the defendant "purposely" or "recklessly" caused "serious mental injury." The current District child cruelty statute is silent as to whether the offense covers purely psychological harms.[9] However, DCCA case law is clear that the current child cruelty statute extends at least to serious psychological harm.[10] Moreover, the current child cruelty statute provides for the same penalties whether such harm was inflicted "intentionally, knowingly, or recklessly."[11] In contrast, the revised criminal abuse of a minor statute specifically prohibits "serious mental injury," as defined in RCC § 22E-701. There are two gradations for "serious mental injury" in the revised statute depending on the culpable mental state—purposely causing "serious mental injury" in first degree criminal abuse of a minor and recklessly causing "serious mental injury" in second degree criminal abuse of a minor. This change improves the clarity, consistency, and proportionality of the revised statute.

Third, the revised criminal abuse of a minor statute limits liability to a person that is reckless as to the fact that that he or she has a "responsibility under civil law for the health, welfare, or supervision of the complainant who is under 18 years of age." The current child cruelty statute requires that the complainant be under 18 years of age,[12] but does not state any requirements for the defendant's relationship to the complainant. As a result, the current statute significantly overlaps with the District's current assault statutes,[13] which are also subject to separate enhancements for harming a minor.[14] In contrast, the revised criminal abuse of a minor statute limits liability to a person that is reckless as to the fact that he or she has a "responsibility under civil law for the health, welfare, or supervision of the complainant who is under 18 years of age." The RCC

[8] D.C. Code § 22-1101(b)(1), (c)(2) (second degree child cruelty statute prohibiting "maltreat[ing] a child" or "engag[ing] in conduct which causes a grave risk of bodily injury to a child" and, for either basis of liability, providing for a maximum term of imprisonment of 10 years).
[9] D.C. Code § 22-1101.
[10] The DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children" and that "maltreats" in first degree child cruelty "cannot reasonably be read as embracing only physical maltreatment." *Alfaro v. United States*, 859 A.2d 149, 153-54, 157. The DCCA has further stated that "the infliction of psychological harm can contravene a criminal statute prohibiting cruelty to children, but the harm must be serious and 'unjustifiable' rather than mild or trivial." *Alfaro*, 859 A.2d at 159 (agreeing with the analysis of the Supreme Court of Louisiana of a Louisiana child abuse statute).
[11] D.C. Code § 22-1101(a), (b), (c).
[12] D.C. Code § 22-1101.
[13] D.C. Code §§ 22-404; 22-404.01.
[14] D.C. Code § 22-3611.

applies a recklessly culpable mental state to the age of the complainant and logically, the culpable mental state for the required responsibility under civil law should match the culpable mental state for the element that gives rise to this responsibility. This change narrows the scope of liability for the offense to those persons with a duty of care to the complainant (e.g., a teacher, doctor, daycare provider, or babysitter may be liable for the offense). The revised criminal abuse of a minor offense thus provides a distinct charge for individuals with responsibilities under civil law for complainants under the age of 18 years and who harm those they are supposed to protect. The revised offense still overlaps in many respects with assault and other offenses that are predicates for third degree criminal abuse of a minor, but only for persons with a duty of care to the complainant they harm. Individuals who do not satisfy this requirement may still have liability under other revised offenses, such as assault (RCC § 22E-1202), menacing (RCC § 22E-1203), criminal threats (RCC § 22E-1204), criminal restraint (RCC § 22E-1404), or offensive physical contact (RCC § 22E-1205). This change reduces unnecessary overlap between the revised statute and other RCC offenses against persons, including assault.

Fourth, the revised criminal abuse of a minor statute is not subject to a separate penalty enhancement as a crime committed against a minor. Under current District law, first degree child cruelty is subject to a penalty enhancement if the defendant is 18 years of age or older and is at least two years older than a complainant under the age of 18 years.[15] There is no case law interpreting this enhancement as applied to child cruelty.[16] The current child cruelty statute and the penalty enhancement significantly overlap, effectively allowing a substantial increase in penalties for the same conduct whenever the actor is an adult. In contrast, the revised criminal abuse of a minor statute does not provide an enhancement based on the complainant's status as a minor. This change improves the proportionality of the revised criminal abuse of a minor statute, and reduces unnecessary overlap.

Fifth, the revised criminal abuse of a minor statute is not subject to a separate penalty enhancement for committing the offense "while armed" or "having readily available" a dangerous weapon, and does not grade the offense by the use or display of a weapon. Current D.C. Code § 22-4502 provides severe, additional penalties for committing, attempting, soliciting, or conspiring to commit an array of serious crimes, including first degree child cruelty, "while armed with" or "having readily available" a

[15] D.C. Code § 22-3611. The enhancement refers to a "minor" instead of a "child," but defines a "minor" as a person under the age of 18. D.C. Code § 22-3611(c)(3). Under the enhancement, the defendant "may" receive a fine of up to 1½ times the maximum fine for first degree child cruelty, a term of imprisonment of up to 1½ times the maximum term of imprisonment for first degree child cruelty, or both. D.C. Code § 22-3611(a).

[16] However, the DCCA has declined to allow enhancement of another offense where the enhancement concerns an element in the underlying offense. The DCCA has held that the "while armed" enhancement in D.C. Code § 22-4502(a)(1) may not apply to the offense of assault with a dangerous weapon because the offense already provides for an enhancement. *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982) ("The government concedes that [the "while armed" enhancement in D.C. Code § 22-4502(a)(1)] may not apply to [assault with a dangerous weapon] since [the assault with a dangerous weapon offense] provides for enhancement and is a more specific and lenient provision."). Similarly, it could be argued that the enhancement for crimes against a minor enhances a crime which is already enhanced due to the complainant being under 18 years of age.

dangerous weapon.[17] In contrast, the revised criminal abuse of a minor statute does not grade the offense based on the use or display of a dangerous weapon,[18] and is not subject to a separate while armed weapons enhancement. The focus of the offense is on the betrayal of trust to the victim and the harm suffered by the minor. Use or display of a dangerous weapon to commit conduct that satisfies the revised criminal abuse of a minor statute may be chargeable under the RCC assault statute (RCC § 22E-1202) or first degree menacing (RCC § 22E-1203(a)). Or, an individual who possesses a dangerous weapon while committing criminal abuse of a minor may be subject to liability for possessing a dangerous weapon in furtherance of a crime of violence per RCC § 22E-XXXX [revised PFCOV-type offense]. This change improves the proportionality of the revised statute.

Beyond these five substantive changes to current District law, six other aspects of the revised criminal abuse of a minor statute may be viewed as substantive changes of law.

First, the revised criminal abuse of a minor statute specifically bases liability on "serious mental injury," a term defined in RCC § 22E-701. The current District child cruelty statute is silent as to whether it includes psychological harm. [19] DCCA case law is clear that the current child cruelty statute extends to at least serious psychological injury,[20] but the court has not articulated a precise definition of the required harm. Instead of this ambiguity, RCC § 22E-701 defines "serious mental injury" as "substantial, prolonged harm to a person's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition." The RCC definition of "serious mental injury" differs from the definition of "mental injury" in the District's current civil statutes

[17] For a first offense of committing specified crimes of violence "while armed with or having readily available" a dangerous weapon, the defendant "may" receive a maximum term of imprisonment of up to 30 years. D.C. Code § 22-4502(a)(1). If the defendant committed the offense "while armed with any pistol or firearm," however, he or she "shall" receive a five year "mandatory-minimum" term of imprisonment of not less than 5 years. D.C. Code § 22-4502(a)(1). If the current conviction is for committing a specified crime of violence "while armed with or having readily available" a dangerous weapon and the defendant has at least one prior conviction for an armed crime of violence, the defendant "shall" be sentenced to "not less than 5 years" imprisonment and not more than 30 years. D.C. Code § 22-4502(a)(2). If the current conviction is for committing a specified crime of violence "while armed with any pistol or firearm" and the defendant has the required prior conviction for an armed crime of violence, the defendant "shall" be "imprisoned for a mandatory-minimum term of not less than 10 years." D.C. Code § 22-4502(a)(2).

[18] As is noted in the commentaries to other RCC offenses against persons, "display or use" of a dangerous weapon does not include a purely verbal reference to a dangerous weapon.

[19] D.C. Code § 22-1101.

[20] The DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children" and that "maltreats" in first degree child cruelty "cannot reasonably be read as embracing only physical maltreatment." *Alfaro*, 859 A.2d at 153-54, 157. The DCCA has further stated that "the infliction of psychological harm can contravene a criminal statute prohibiting cruelty to children, but the harm must be serious and 'unjustifiable' rather than mild or trivial." *Alfaro*, 859 A.2d at 159 (agreeing with the analysis of the Supreme Court of Louisiana of a Louisiana child abuse statute).

for proceedings on child delinquency, neglect, or need of supervision[21] by adding the requirement that the harm be "substantial" and "prolonged." These requirements reflect DCCA case law supporting a high standard for psychological harm for child cruelty,[22] but given the imprecision of current case law it is unclear what change, if any, the definition will have on current District law. This change improves the clarity and completeness of the revised statute.

Second, the revised criminal abuse of a minor statute prohibits committing stalking (RCC § 22E-1206), menacing (RCC § 22E-1203), criminal threats (RCC § 22E-1204), or criminal restraint (RCC § 22E-1404) against the complainant. The current District child cruelty statute is silent as to whether it includes psychological harm. DCCA case law is clear that the current child cruelty statute extends to at least serious psychological injury,[23] but the court has not articulated a precise definition of the required harm. Instead of this ambiguity, the revised statute reflects current case law by including "serious mental injury" in first degree and second degree criminal abuse of a minor, and by providing liability for separately codified criminal conduct that may cause comparatively less-serious psychological harms in third degree criminal abuse of a minor.[24] This change improves the clarity, consistency, and completeness of the revised statute.

Third, the revised criminal abuse of a minor statute requires a culpable mental state of "reckless" as to the fact that the complainant is under the age of 18 years. The current child cruelty statute does not specify what culpable mental state, if any, applies to the fact that the complaining witness is a "child." There is no DCCA case law discussing the culpable mental state for this element. However, under the current penalty enhancement for certain crimes against minors, including first degree child cruelty, it is an affirmative defense that "the accused reasonably believed that the victim was not a [person under 18 years old] at the time of the offense."[25] Instead of this ambiguity, the revised criminal abuse of a minor statute requires a culpable mental state of "reckless" as

[21] D.C. Code § 16-2301(31) ("The term 'mental injury' means harm to a child's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition.").

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[24] RCC §§ 22E-1206 (stalking), 22E-1203 (menacing), 22E-1204 (criminal threats), 22E-1404 (criminal restraint), 22E-1205(a) (first degree offensive physical contact).

[25] D.C. Code § 22-3611(b).

to the fact that the complainant is under the age of 18 years. The "reckless" culpable mental state in the revised criminal abuse of a minor statute preserves the substance of this defense.[26] This change improves the clarity, completeness, and proportionality of the revised criminal abuse of a minor statute.

Fourth, the revised criminal abuse of a minor statute specifies the types of physical injury that are a basis for liability. The current first degree child cruelty statute prohibits, in part, "tortures,"[27] "beats,"[28] "maltreats,"[29] and "causes bodily injury,"[30] and second degree child cruelty prohibits, in part, "maltreats."[31] The current statute does not define these terms, however. DCCA case law suggests that "bodily injury" in the child cruelty statute is a relatively low threshold,[32] but the required amount of physical harm is unclear. Similarly, the DCCA has not determined the required amount of physical harm for "tortures," "beats," or "maltreats."[33] Instead of this ambiguity, the revised criminal abuse of a minor statute specifies the minimal degree of physical harm required for each grade of the offense—"serious bodily injury," "significant bodily injury," "bodily injury," or conduct that satisfies criminal restraint (RCC § 22E-1404) or first degree offensive physical contact (RCC § 22E-1205(a)) (causing physical contact with bodily fluids or excrement). The specified types of "bodily injury" in the revised statute are defined in RCC § 22E-701 and are intended to cover conduct prohibited by the words "tortures," "beats," "maltreats," and "causes bodily injury" in the current child cruelty statute. The RCC definition of "bodily injury" in RCC § 22E-701 in particular, accords with the limited DCCA case law on "bodily injury" in the current child cruelty statute.[34] Use of the defined term "bodily injury" clarifies that not only physical contacts that result in pain are criminal under the RCC criminal abuse of a minor statute, but also potentially painless harms such as sickness[35] or impaired physical conditions.[36] Conduct that

[26] "Reckless" is defined in RCC § 22E-206 and means that the accused must disregard a substantial risk that the complainant was under 18. The enhancement for crimes against minors has an affirmative defense that "the accused reasonably believed that the victim was not a minor at the time of the offense." D.C. Code § 22-3611(b). If an accused reasonably believed that the complaining witness was not a minor, the accused would not satisfy the culpable mental state of recklessness as to the age of the complaining witness because the accused would not consciously disregard a substantial risk that the complainant was under 18 years of age.

[27] D.C. Code § 22-1101(a).

[28] D.C. Code § 22-1101(a).

[29] D.C. Code § 22-1101(a).

[30] D.C. Code § 22-1101(a).

[31] D.C. Code § 22-1101(b)(1).

[32] *See, e.g., Jones v. United States*, 67 A.3d 547, 548, 550 (finding the evidence sufficient for second degree child cruelty when the child sustained a "large raised bump on her head.").

[33] The DCCA has extensively discussed "maltreats" in terms of incorporating serious psychological or emotional harm, but not the required physical harm. *Alfaro v. United States*, 859 A.2d 149, 157-60 (D.C. 2004).

[34] *See, e.g., Jones v. United States*, 67 A.3d 547, 548, 550 (finding the evidence sufficient for second degree child cruelty when the child sustained a "large raised bump on her head.").

[35] Recklessly engaging in nonconsensual physical contact that transmits a disease to a complainant may suffice for criminal abuse of a minor. However, particular care should be given to the clear blameworthiness standard incorporated into the RCC definition of recklessness, which requires that the person's conscious disregard of a substantial risk, given the "nature and degree" of the risk, as well as the "nature and purpose of the person's conduct and the circumstances known to the person," have been "clearly blameworthy." RCC § 22E-206(d). For example, a sneezy parent who disregards a substantial risk

physically affects a minor but does not cause "bodily injury" may still be criminalized by third degree criminal abuse of a minor if the conduct satisfies criminal restraint (RCC § 22E-1404) or first degree offensive physical contact (RCC § 22E-1205(a)). Otherwise, there may be liability under second degree offensive physical contact (RCC § 22E-1205(b)) or kidnapping (RCC § 22E-1401). This change improves the clarity, consistency, and proportionality of the revised statute.

Fifth, the parental defense in RCC § 22E-40X applies to the revised criminal abuse of a minor statute, limiting liability for certain conduct undertaken with the intent of safeguarding or promoting the welfare of the complainant. The District's current child cruelty statute is silent as to whether there is a defense for parental discipline. However, while there is no case law on the applicability of a parental defense to child cruelty, the DCCA has recognized the defense for assault and has extended the parental discipline defense beyond parents to persons standing *in loco parentis* to the child.[37] The DCCA has not addressed the limits of permissible force in the parental discipline defense other than generally requiring that the force be "reasonable."[38] The parental defense in RCC § 22E-40X clarifies the scope of the parental defense as applied to RCC offenses against persons such as criminal abuse of a minor. This change improves the clarity and completeness of the law.

Sixth, the revised criminal abuse of a minor statute no longer separately criminalizes creating "a grave risk of bodily injury to a child, and thereby causes bodily injury." The current first degree child cruelty statute requires, in part, both that the defendant "engage[] in conduct which creates a graves risk of bodily injury to a child" and that the defendant "thereby cause[] bodily injury."[39] However, it is unclear whether or how this requirement differs from the alternative bases of liability in the current first

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that he will transmit a cold virus to a complainant under the age of 18 years by living in proximity to the complainant would not ordinarily satisfy the requirement of bodily injury. However, if a parent intentionally sneezes or blows cigarette smoke in a minor's face, there would be liability for third degree criminal abuse of a minor if pain, illness, or any impairment of the minor's physical condition results, and possibly a higher gradation depending on the facts of the case.

[36] For example, a parent who intentionally feeds a minor food laced with drugs would face liability under third degree criminal abuse of a minor if pain, illness, or any impairment of the minor's physical condition results, and possibly a higher gradation depending on the facts .

[37] *Martin v. United States*, 452 A.2d 360, 362 (D.C. 1982) (finding that there was no evidence that appellant stood *in loco parentis* with his 13-year-old cousin because the record reflected "at best . . . that appellant *helped* on occasion with the basic running of the household," that disciplinary authority over the cousin had never been "specifically delegated" to appellant, and appellant had not "assumed any obligations (such as financial support) that would be 'associated with one standing as a natural parent to a child.'") (emphasis in original) (quoting *Fuller v. Fuller*, 135 U.S. App. D.C. 353 (1969). The court in *Martin* stated that "*in loco parentis* refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation. . . . It embodies the ideas of both assuming the parental status and discharging the parental duties." *Martin*, 452 A.2d at 362 (internal citations omitted). The court noted that *in loco parentis* involves "more than a duty to aid or assist . . . It arises only when one is willing to assume *all* the obligations and to receive *all* the benefits associated with one standing as a natural parent to a child." *Id*. (emphasis in original) (internal citations omitted).

[38] *See, e.g., Newby v. United States*, 797 A.2d 1233, 1241-42 (endorsing the common law "reasonable force" standard); *Florence v. United States*, 906 A.2d 889, 893 ("The [parental discipline defense] is established where the defendant uses reasonable force for the purpose of exercising parental discipline.").

[39] D.C. Code § 22-1101(a).

degree child cruelty statute ("beats" or "maltreats" a child). No DCCA case law interprets this part of the current child cruelty statute. Instead of this ambiguity, the revised child abuse statute is limited to causing specific types of physical or mental harm. Conduct that results in a mere risk of certain types of physical or mental harm is criminalized by the revised criminal neglect of a minor statute in RCC § 22E-1502, or may constitute attempted criminal abuse of a minor. This change improves the clarity of the statute.

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

First, the revised criminal abuse of a minor statute codifies a culpable mental state of "reckless" in first degree criminal abuse of a minor (subsection (a)(1)), second degree criminal abuse of a minor (subsection (a)(2)), and third degree criminal abuse of a minor (subsection (c)(1)(C)). The current child cruelty statute requires a culpable mental state of "intentionally, knowingly, or recklessly."[40] While the meaning of "recklessly" is not defined in the current child cruelty statute, case law has briefly interpreted these terms[41] in a manner consistent with the Model Penal Code definitions. The revised criminal abuse of a minor statute codifies a culpable mental state of "reckless," which is defined in RCC § 22E-206. It is unnecessary to codify the higher culpable mental states of "intentionally" and "knowingly" because under the general rule of construction in RCC § 22E-206, they satisfy the lower culpable mental state of "reckless." In addition, the definition of "reckless" in RCC § 22E-206 is consistent with DCCA case law.[42] This change clarifies the statute.

Second, the revised criminal abuse of a minor statute categorizes a person under the age of 18 as a "minor" and defines the revised offense in terms of the age of the complainant. The current child cruelty statute requires that the complainant be "a child under 18 years of age."[43] Referring to a teenager as a "child" may be misleading and leads to inconsistency with other District offenses that have different definitions of "child."[44] These changes improve the clarity and consistency of the revised statute.

[40] D.C. Code § 22-1101(a), (b).
[41] *Jones v. United States*, 813 A.2d 220, 224-25 (D.C. 2002) (stating that the trial court did not err in giving a jury instruction that defined "intentionally or knowingly" as "the defendant acted voluntarily and on purpose, not by mistake or accident" and "recklessly" as "the defendant was aware of and disregarded the grave risk of bodily harm created by his conduct.").
[42] *Jones v. United States*, 813 A.2d 220, 224-25 (D.C. 2002).
[43] D.C. Code § 22-1101(a).
[44] For example, the current child sexual abuse statutes consider a complainant under the age of 16 years to be a "child." D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

RCC § 22E-1502. Criminal Neglect of a Minor.

Explanatory Note. *The RCC criminal neglect of a minor offense proscribes a broad range of conduct in which there is a risk of harm to a minor's bodily integrity or mental well-being. In addition to prohibiting a risk of harm to a minor, the RCC criminal neglect of a minor offense prohibits failing to provide a minor with necessary items or care, as well as abandoning a minor. The penalty gradations are primarily based on the type of physical or mental harm that is risked. Along with the revised criminal abuse of a minor offense,[1] the revised criminal neglect of a minor offense replaces the child cruelty offense[2] and the failure to provide for a child offense[3] in the current D.C. Code.*

There are three degrees of criminal neglect of a minor. Each gradation requires that the accused must be "reckless as to the fact that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant who is under 18 years of age"[4] (subsection (a)(1) for first degree, subsection (b)(1) for second degree, and subsection (c)(1)) for third degree). Per the rule of construction in RCC § 22E-207, the "reckless" culpable mental state specified in subsection (a)(1) for first degree, subsection (b)(1) for second degree, and subsection (c)(1)) for third degree, applies to both the fact that the complainant has the specified responsibility to the complainant and the fact that the complainant is under 18 years of age. "Reckless" is a defined term in RCC § 22E-206 that here means the accused must disregard a substantial risk that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant and that the complainant is under the age of 18 years. "As to the fact that" indicates that the accused must actually have the specified responsibility to the complainant and the complainant must actually be under 18 years of age.

Subsection (a)(2) specifies additional requirements for first degree criminal neglect of a minor, the highest grade of the revised offense. The accused must have created, or failed to mitigate or remedy, a substantial risk that the complainant would experience serious bodily injury or death. Per the rule of construction in RCC § 22E-207, the "reckless" culpable mental state in subsection (a)(1) applies to this requirement. "Reckless" is a defined term in RCC § 22E-206 that here means the accused must disregard a substantial risk that he or she created, or failed to mitigate or remedy, a substantial risk that the complainant would experience serious bodily injury or death. "Serious bodily injury" is a term defined in RCC § 22E-701 as injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ.

Subsection (b)(2) specifies the two types of prohibited conduct in second degree criminal neglect of a minor, the middle grade of the revised offense. Subsection (b)(2)(A) establishes liability for creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience "significant bodily injury." "Significant bodily injury" is the intermediate level of bodily injury in the revised offenses against

[1] RCC § 22E-1501.
[2] D.C. Code § 22-1101.
[3] D.C. Code § 22-1102.
[4] Such a duty of care to the complainant may arise, for example, from the actor being a teacher, doctor, daycare provider, or babysitter, depending on the facts of a case.

persons statutes and is defined in RCC § 22E-701 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone. Subsection (b)(2)(B) establishes liability for creating, or failing to mitigate or remedy, a substantial risk that a child would experience "serious mental injury." "Serious mental injury" is a term defined in RCC § 22E-701 as "substantial, prolonged harm to a person's psychological or intellectual functioning." Per the rule of construction in RCC § 22E-207, the "reckless" culpable mental state in subsection (b)(1) applies to both creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience "significant bodily injury" or "serious mental injury." "Reckless" is a term defined in RCC § 22E-206 which, applied here, means being aware of a substantial risk that one's conduct will create, or fail to mitigate or remedy, a substantial risk that the complainant would experience "significant bodily injury" or "serious mental injury."

Subsection (c)(2) specifies the two types of prohibited conduct in third degree criminal neglect of a minor, the lowest grade of the revised offense. Subsection (c)(2)(A) establishes liability for leaving the complainant in any place. There are two culpable mental states for this conduct. First, the accused must "knowingly" leave the complainant in any place. "Knowingly" is a defined term in RCC § 22E-206 which, applied here, means the accused is practically certain that his or her conduct will result in leaving the complainant. Second, the accused must act "with intent to" abandon the complainant. "Intent" is a defined term in RCC § 22E-206 which, applied here, means the accused was practically certain that he or she would abandon the complainant. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such abandonment actually occurred, just that the defendant believed to a practical certainty, or consciously desired, that abandonment would result.

Subsection (c)(2)(B) establishes liability for failing to make a reasonable effort to provide, food, clothing, or other items or care for the complainant. Subsection (c)(2)(B) specifies that the culpable mental state for this conduct is "recklessly," a term defined in RCC § 22E-206 which, applied here, means being aware of a substantial risk that one's conduct will fail to make a reasonable effort to provide the items or care. Subsection (c)(2)(B) requires that the items or care be "essential to the physical health, mental health, or safety of the complainant." Per the rule of construction in RCC § 22E-207, the culpable mental state of "recklessly" also applies to this element, and requires that the accused to be aware of a substantial risk that the items or care are "essential to the physical health, mental health, or safety of the complainant."

Subsection (d) codifies an exception to liability for criminal neglect of a minor for the surrender of a newborn child in accordance with D.C. Code § 4-1451.01 *et. seq.*

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

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

Relation to Current District Law. *The revised criminal neglect of a minor statute changes current District law in five main ways.*

First, the revised criminal neglect of a minor statute prohibits leaving a complainant with intent to abandon him or her as an offense distinct from the revised criminal abuse of a minor statute. The current second degree child cruelty statute prohibits, in relevant part, "expos[ing] a child, or aid[ing] and abet[ting] in exposing a child in any highway, street, field house, outhouse or other place, with intent to abandon the child,"[5] as well as "maltreat[ing]" a child.[6] Both these means of committing second degree child cruelty have the same maximum ten year penalty.[7] There is no case law defining the meaning of "exposing." In contrast, in the RCC, abandoning a complainant under the age of 18 years is criminalized by the criminal neglect of a minor statute instead of the revised criminal abuse of a minor statute (RCC § 22E-1501). Abandonment alone, absent any actual harm, is comparatively less serious than the physical or mental injury required in the revised criminal abuse of a minor statute. However, higher gradations of the revised criminal neglect of a minor statute or other RCC offenses may apply to abandonment that involves a risk of serious injury or any actual harm.[8] This change reduces unnecessary overlap between offenses and improves the organization and proportionality of the revised offense.

Second, the revised criminal neglect of a minor statute incorporates liability for a failure to provide certain items and care for a complainant under 18 years of age. Current D.C. Code § 22-1102 prohibits a parent or guardian of "sufficient financial ability" from refusing or neglecting to provide the "food, clothing, and shelter as will prevent the suffering and secure the safety" of a child under 14 years of age.[9] The offense has a maximum term of imprisonment of three months.[10] In contrast, in the RCC, failing to support a child is criminalized as part of the revised criminal neglect of a minor statute[11] and is no longer a separate offense. Also, unlike the current failure to support offense, which is limited to children under 14 years of age,[12] the failure to support gradation in the revised criminal neglect of a minor statute applies to any complainant under 18 years of

[5] D.C. Code § 22-1101(b)(2).
[6] D.C. Code § 22-1101(b)(1).
[7] D.C. Code § 22-111(c)(2). In addition to abandoning a child, the current second degree cruelty statute prohibits "engag[ing] in conduct which causes a grave risk of bodily injury to a child." D.C. Code § 22-1101(b)(2). It also has a maximum term of imprisonment of ten years. D.C. Code § 22-111(c)(2).
[8] If leaving the complainant with intent to abandon him or her results in a *risk* of significant bodily injury, serious mental injury, serious bodily injury, or death, then the defendant's conduct may be subject to first degree or second degree criminal neglect of a minor. Moreover, if the complainant sustains physical or mental injury, or death, as a result of the abandonment, there may be liability under the revised criminal abuse of a minor statute, RCC § 22E-1501, the revised assault statute, RCC § 22E-1202, or the revised homicide statutes, RCC §§ 22E-1101 – 22E-1103.
[9] D.C. Code § 22-1102.
[10] D.C. Code § 22-1102.
[11] The specification of failing to support the complainant as third degree criminal neglect of a minor does not preclude the possibility that such failure to support may, depending on the facts of the case, be charged as a more serious gradation or offense. If failing to provide the necessary items or care results in a risk of significant bodily injury, serious mental injury, serious bodily injury, or death, then the defendant's conduct may be subject to first degree or second degree criminal neglect of a minor. Moreover, if the complainant sustains physical or mental injury, or death, as a result of the failure to provide, there may be liability under the revised criminal abuse of a minor statute, RCC § 22E-1501, the revised assault statute, RCC § 22E-1202, or the revised homicide statutes, RCC §§ 22E-1101 – 22E-1103.
[12] D.C. Code § 22-1102

age so that it matches the current child cruelty statute[13] and revised criminal abuse of a minor[14] statute. This change reduces unnecessary overlap between offenses and improves the consistency and proportionality of the revised statute.

Third, the revised criminal neglect of a minor statute is limited to conduct that does not actually harm the complainant. The current second degree child cruelty statute criminalizes actual "maltreatment," causing a "grave risk of bodily injury," and "exposing a child . . . with intent to abandon it," without any distinction in penalty.[15] In contrast, the revised criminal neglect of a minor statute is limited to conduct that does not actually harm the complainant. First degree and second degree of the revised criminal neglect of a minor statute prohibit endangering the complainant and third degree prohibits failing to provide for or abandoning the complainant. However, if the complainant sustains physical or mental injury as a result of the neglect, there may be liability under the revised criminal abuse of a minor statute (RCC § 22E-1501) or other RCC offenses against persons. This change improves the consistency and proportionality of the revised offense.

Fourth, the revised criminal neglect of a minor statute partially grades the offense based on creating a risk of "serious bodily injury or death," "significant bodily injury," or "serious mental injury." The current second degree child cruelty offense prohibits, in part, creating "a grave risk of bodily injury."[16] However, the statute does not define "bodily injury." DCCA case law on the current child cruelty statute suggests "bodily injury" may have a relatively low threshold for physical harm,[17] but does not provide a general definition. With regard to mental injury, the DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children."[18] However, the DCCA has not discussed whether a risk of extreme emotional pain or suffering is sufficient for the "grave risk of bodily injury" prong of the current second degree child cruelty offense. In contrast, the revised criminal neglect of a minor statute partially grades the offense based on whether there is a risk of "serious bodily injury or death," "significant bodily injury," or "serious mental injury" and defines those terms in RCC § 22E-701. These types of "bodily injury" are consistent with the RCC assault statute (RCC § 22E-1202). This change improves the clarity and proportionality of the revised child neglect statute.

Fifth, the revised criminal neglect of a minor statute limits liability to individuals that are "reckless" as to the fact that they have "a responsibility under civil law for the

[13] D.C. Code § 22-1101.
[14] RCC § 22E-1501.
[15] D.C. Code § 22-1101(b)(1), (c)(2) (second degree child cruelty statute prohibiting "maltreat[ing] a child" or "engag[ing] in conduct which causes a grave risk of bodily injury to a child" and providing for either basis of liability a maximum term of imprisonment of 10 years).
[16] D.C. Code § 22-111(b)(1).
[17] *See, e.g.*, *Jones v. United States*, 67 A.3d 547, 548, 550 (finding the evidence sufficient for second degree child cruelty when the child sustained a "large raised bump on her head.").
[18] *Alfaro*, 859 A.2d at 153-54; *see also Speaks*, 959 A.2d at 717 (stating that the evidence permitted a reasonable juror to conclude beyond a reasonable doubt that two minor children "sustained emotional pain and suffering and a battery (*i.e.*, they were 'terrified' and 'screaming')" and permitting separate convictions for second degree child cruelty under the "grave risk of bodily injury" prong).

health, welfare, or supervision of the complainant who is under 18 years of age." The current child cruelty statute does not state any requirements for the defendant's relationship to the child, and the DCCA has sustained second degree child cruelty convictions for creation of a "grave risk of bodily injury" when an individual has no relationship to the child.[19] There is no DCCA case law interpreting the scope of the abandonment prong of second degree child cruelty. The failure to support a child offense in D.C. Code § 22-1102, however, is limited to a "parent or guardian."[20] In contrast, all gradations of the revised criminal neglect of a minor statute require that the defendant is "reckless" as to the fact that "he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant who is under 18 years of age." This change narrows the scope of liability for the offense to those persons with a duty of care to the minor (e.g., a teacher, doctor, daycare provider, or babysitter may be liable for the offense). The revised criminal neglect of a minor offense thus provides a distinct charge for individuals with responsibilities under civil law for complainants under the age of 18 years who subject to a risk of harm those they are supposed to protect. The revised statute applies a culpable mental state of "reckless" as to the fact that the defendant has a responsibility under civil law for the health, welfare, or supervision of the complainant." Recklessness as to age is applied, and logically the culpable mental state as to this responsibility should match the attribute that gives rise to the duty. This change improves the proportionality and consistency of revised offenses.

Beyond these five substantive changes to current District law, seven other aspects of the revised criminal neglect of a minor statute may be viewed as substantive changes of law.

First, the revised criminal neglect of a minor statute requires a culpable mental state of "knowingly" for "leav[ing]" the complainant. The abandonment prong in the current child cruelty statute requires a culpable mental state of "intentionally, knowingly, or recklessly," but also requires the conduct occur "with intent to abandon the child."[21] While the meaning of these culpable mental states is not defined in the current child cruelty statute, case law has briefly interpreted these terms[22] in a manner consistent with the Model Penal Code definitions. Instead of this ambiguity, the revised criminal neglect of a minor statute codifies a culpable mental state of "knowingly" for the element "leaves the complainant in any place" and provides that leaving the complainant must be done

[19] *See, e.g.*, *Coffin v. United States*, 917 A.2d 1089, 1090, 1093 (affirming appellant's convictions for attempted second degree child cruelty when appellant drove a car dangerously while intoxicated with two children in the back seat that were not in seatbelts because he created a grave risk of bodily injury to the child passengers); *Speaks v. United States*, 959 A.2d 712, 713, 714, 716-17 (D.C. 2008) (affirming three counts of second degree cruelty to children while armed (which was subsequently amended to remove the "armed" element) when the appellant carjacked a vehicle containing three small children and crashed the vehicle into a parked car).

[20] D.C. Code § 22-1102.

[21] D.C. Code § 22-1101(b)(2).

[22] *Jones v. United States*, 813 A.2d 220, 224-25 (D.C. 2002) (stating that the trial court did not err in giving a jury instruction that defined "intentionally or knowingly" as "the defendant acted voluntarily and on purpose, not by mistake or accident" and "recklessly" as "the defendant was aware of and disregarded the grave risk of bodily harm created by his conduct.").

"with the intent of" abandoning the complainant. This change resolves the inconsistent culpable mental states in the current statute[23] and clarifies the law.

Second, the failure to support gradation in the revised criminal neglect of a minor statute broadly includes failures to provide "supervision, medical services, medicine, or other items or care essential for the health or safety of the child." The current failure to support a child offense in D.C. Code § 22-1102 refers only to "food, clothing, and shelter."[24] However, the DCCA has stated that "the broad sweep" of the current statute includes a duty of providing medical care.[25] Current District statutes defining a "neglected child" for civil purposes also specifically refer to a lack of parental "care or control necessary for [the child's] physical, mental, or emotional health."[26] The list of items and care in the revised third degree criminal neglect of a minor statute reflects the DCCA's expansive interpretation of current D.C. Code § 22-1102 and the broad sweep of relevant civil laws in the District. This change reduces possible gaps in the law and improves consistency with the civil statutes.

Third, the failure to support gradation of the revised criminal neglect of a minor statute requires that the defendant "fails to make a reasonable effort" to provide the specified support. The current statute in D.C. Code § 22-1102 refers only to a person "of sufficient financial ability, who shall refuse or neglect to provide…" the specified support.[27] The DCCA has not interpreted the limits of this language. In the revised statute, however, a person must only fail to make a "reasonable effort" to provide the specified support. The revised language would preclude liability where a person does not provide necessary support due, not only to insufficient financial ability, but also due to factors such as a hospitalization or other incapacity.[28] This change improves the clarity and proportionality of the revised statute.

Fourth, the revised criminal neglect of a minor statute specifies that "fail[ing] to mitigate" or "fail[ing] to remedy" a substantial risk is sufficient for liability. It is unclear whether the current child cruelty statute includes failing to mitigate or remedy a risk of harm to the complainant. Current first degree child cruelty criminalizes, in part, conduct that "maltreats" the complainant or "creates a grave risk of bodily injury to a child and thereby causes bodily injury."[29] Current second degree child cruelty criminalizes, in part, conduct that "maltreats" a child,[30] as well as conduct that "causes a grave risk of bodily

[23] It is unclear in the current child cruelty statute how a person could "recklessly" abandon a child "with intent to abandon" the child. However, a knowledge requirement as to leaving the child and an intent requirement as to abandonment, as these terms are defined in the RCC, are compatible. See, generally, Commentary to RCC § 22E-206.
[24] D.C. Code § 22-1102.
[25] *Faunteroy v. United States*, 413 A.2d 1294, 1300 (D.C. 1980).
[26] D.C. Code § 16-2301(9A).
[27] D.C. Code § 22-1102.
[28] The District's current civil statutes define "neglected child," in part as "a child:…(ii) who is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his or her physical, mental, or emotional health, and the deprivation is not due to the lack of financial means of his or her parent, guardian, or custodian; (iii) whose parent, guardian, or custodian is unable to discharge his or her responsibilities to and for the child because of incarceration, hospitalization, or other physical or mental incapacity." D.C. Code § 16-2301(9)(A).
[29] D.C. Code §22-1101(a). First degree child cruelty also prohibits "tortures" and "beats" a child. *Id.*
[30] D.C. Code § 22-1101(b)(1).

injury" to a child.[31] "Maltreats" is not statutorily defined and there is no DCCA case law regarding whether the current child cruelty offense extends to failing to mitigate or remedy a risk of harm. The current failure to support statute in D.C. Code § 22-1102 criminalizes the refusal or neglect to provide "food, clothing, and shelter as will prevent the suffering and secure the safety of such child,"[32] but is silent as to failing to mitigate or remedy a risk and there is no case law on point. However, in the context of parental duties, the DCCA also has recognized the "unique obligation of parents to take affirmative actions for their children's benefit."[33] Resolving this ambiguity, the revised criminal neglect of a minor statute clarifies that not only creating risks to a child, but also failing to mitigate or remedy a substantial risk, is sufficient for liability. Under the general provision in RCC § 22E-202, omissions are equivalent to affirmative conduct and sufficient for liability for any offense in the RCC where the defendant had a duty of care to the complainant.[34] However, although technically superfluous, given that neglect offenses usually will involve an omission, the revised statute explicitly codifies "fail[ing] to remedy" or "fail[ing] to remedy" as a basis for liability. This change clarifies the revised statute.

Fifth, the revised criminal neglect of a minor statute requires a culpable mental state of "reckless" as to the fact that the complainant is under 18 years of age. The current child cruelty statute does not specify what culpable mental state, if any, applies to the fact that the complaining witness is a "child." There is no DCCA case law discussing if there is a culpable mental state for this element. However, under the current enhancement for certain crimes against minors it is an affirmative defense that "the accused reasonably believed that the victim was not a minor [person less than 18 years old] at the time of the offense."[35] The "reckless" culpable mental state in the revised criminal neglect of a minor statute preserves the substance of this defense.[36] This change improves the clarity, completeness, and proportionality of the revised statute.

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[31] D.C. Code § 22-1101(b)(1).

[32] D.C. Code § 22-1102.

[33] *Young v. United States*, 745 A.2d 943, 948 (D.C. 2000). Similarly, the DCCA has used the common law to find that there is a common law duty of parents to provide medical care for their dependent children. *Faunteroy v. United States*, 413 A.2d at 1299-300 (D.C. 1980) ("The cases of several state courts hold there is a 'common law natural duty of parents to provide medical care for their minor dependent children. . . . Since no statute for the District operates to specifically abolish it, this duty remains the common law of this jurisdiction."). To the extent that the common law imposes a duty to aid a child, the DCCA may find a common law duty in the District. *See generally* § 6.2.Omission to act, 1 Subst. Crim. L. § 6.2 (3d ed.)

[34] This principle is reflected in the current version of the draft general provision on omission liability. See RCC § 202(c), (d) ("(c) 'Omission' means a failure to act when (1) a person is under a legal duty to act and (2) the person is either aware that the legal duty to act exists or, if the person lacks such awareness, the person is culpably unaware that the legal duty to act exists. (d) For purposes of this Title, a legal duty to act exists when: (1) The failure to act is expressly made sufficient by the law defining the offense; or (2) A duty to perform the omitted act is otherwise imposed by law.").

[35] D.C. Code § 22-3611(b).

[36] "Reckless" is defined in RCC § 22E-206 and, as applied here, means that the accused must disregard a substantial risk that the complainant was under the age of 18 years. The enhancement for crimes against minors has an affirmative defense that "the accused reasonably believed that the victim was not a minor at the time of the offense." D.C. Code § 22-3611(b). If an accused reasonably believed that the complaining witness was not a minor, the accused would not satisfy the culpable mental state of recklessness or knowledge as to the age of the complaining witness because the accused would not consciously disregard a

Sixth, for liability, the revised criminal neglect of a minor statute requires a "substantial risk" of the specified physical or mental harm. The current second degree child cruelty offense prohibits "engag[ing] in conduct which causes a grave risk of bodily injury."[37] There is no DCCA case law discussing the meaning of "grave risk." However, in an attempted second degree cruelty to children case, the DCCA affirmed a conviction based upon the defendant creating a "grave or substantial risk of bodily injury,"[38] suggesting that "grave" and "substantial" are interchangeable, equivalent terms. The revised criminal neglect of a minor statute clarifies that the required risk must be "substantial." The "substantial" language is technically superfluous where recklessness is alleged because the "reckless" culpable mental state, as defined in RCC § 22E-206, also requires that a risk be "substantial" and the accused's conscious disregard of the risk be "clearly blameworthy." However, given that neglect offenses will often depend on the nature of the risk to the complainant, the revised statute specifies the "substantial" requirement to clarify the statute, particularly where the defendant is alleged to act knowingly, intentionally, or purposely.[39] This change improves the clarity and consistency of the revised statute.

Seventh, the revised criminal neglect of a minor statute specifically bases liability on "serious mental injury" in RCC § 22E-701. The current District child cruelty statute is silent as to whether it includes psychological harm. DCCA case law is clear that the current child cruelty statute extends at least to serious psychological injury,[40] but the court has not articulated a precise definition of the requisite psychological harm. Instead of this ambiguity, RCC § 22E-701 defines "serious mental injury" as "substantial, prolonged harm to a person's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition." The RCC definition of "serious mental injury" modifies the definition of "mental injury" in the District's current civil statutes

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substantial risk (recklessness) or be practically certain (knowledge) that the complainant was under 18 years of age.

[37] D.C. Code § 22-111(b)(1).

[38] *Dorsey v. United States*, 902 A.2d 107, 112-13 (D.C. 2006) (discussing the Model Penal Code definition of "recklessly" and affirming the appellant's conviction for attempted second degree cruelty to children because the appellant "created a grave or substantial risk of bodily injury when he struck [the child] in the face and disregarded 'the risk of fractures of the orbital eye socket.'").

[39] For example, where a parent gives her sick child with cancer an experimental and dangerous drug prescribed by the child's oncologist, the fact that the parent *knows* (i.e., is practically certain) that doing so will create a risk of serious bodily injury or death to the child does not, by itself, establish first degree child neglect. Rather, it would also have to be proven by the government, as an affirmative element of the offense, that this risk was *substantial* under the circumstances.

[40] The DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children" and that "maltreats" in first degree child cruelty "cannot reasonably be read as embracing only physical maltreatment." *Alfaro*, 859 A.2d at 153-54, 157. The DCCA has further stated that "the infliction of psychological harm can contravene a criminal statute prohibiting cruelty to children, but the harm must be serious and 'unjustifiable' rather than mild or trivial." *Alfaro*, 859 A.2d at 159 (agreeing with the analysis of the Supreme Court of Louisiana of a Louisiana child abuse statute).

for proceedings on child delinquency, neglect, or need of supervision[41] by adding the requirement that the harm be "substantial" and "prolonged." by adding the requirement that the harm be "substantial" and "prolonged." The requirements of "substantial" and "prolonged" reflect DCCA case law supporting a high standard for psychological harm for child abuse,[42] but given the imprecision of current case law it is unclear what change, if any, the definition will have on current District law. This change clarifies the law.

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

First, the revised criminal neglect of a minor statute codifies a culpable mental state of "recklessly" for the element "created, or failed to mitigate or remedy, a substantial risk." The current child cruelty statute requires a culpable mental state of "intentionally, knowingly, or recklessly."[43] While the meaning of "recklessly" is not defined in the current child cruelty statute, case law has briefly interpreted these terms,[44] in a manner consistent with the Model Penal Code definitions. The revised criminal neglect of a minor statute codifies a culpable mental state of "recklessly," which is defined in RCC § 22E-206. It is unnecessary to codify the higher culpable mental states of "intentionally" and "knowingly" because under the general rule of construction in RCC § 22E-206, they satisfy the lower culpable mental state of "recklessly." In addition, the definition of "recklessly" in RCC § 22E-206 is consistent with DCCA case law.[45] This change clarifies the revised statute.

Second, subsection (f) of the revised criminal neglect of a minor statute codifies an exception to criminal liability for surrendering a newborn child in accordance with D.C. Code § 4-1451.01 *et. seq*. It is inconsistent for an individual who surrenders a newborn child in accordance with D.C. Code § 4-145.01 *et. seq.* to face criminal liability. Current D.C. Code § 4-1451.02 states such a person "shall not . . . be prosecuted for the surrender of the newborn."[46] This change clarifies the revised statute.

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[41] D.C. Code § 16-2301(31) ("The term 'mental injury' means harm to a child's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition.").

[42] The DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children" and that "maltreats" in first degree child cruelty "cannot reasonably be read as embracing only physical maltreatment." *Alfaro*, 859 A.2d at 153-54, 157. The DCCA has further stated that "the infliction of psychological harm can contravene a criminal statute prohibiting cruelty to children, but the harm must be serious and 'unjustifiable' rather than mild or trivial." *Alfaro*, 859 A.2d at 159 (agreeing with the analysis of the Supreme Court of Louisiana of a Louisiana child abuse statute).

[43] D.C. Code § 22-1101(a), (b).

[44] *Jones v. United States*, 813 A.2d 220, 224-25 (D.C. 2002) (stating that the trial court did not err in giving a jury instruction that defined "intentionally or knowingly" as "the defendant acted voluntarily and on purpose, not by mistake or accident" and "recklessly" as "the defendant was aware of and disregarded the grave risk of bodily harm created by his conduct.").

[45] *Jones v. United States*, 813 A.2d 220, 224-25 (D.C. 2002).

[46] D.C. Code § 4-1451.02(a) ("Except when there is actual or suspected child abuse or neglect, a custodial parent who is a resident of the District of Columbia may surrenders a newborn in accordance with this chapter and shall have the right to remain anonymous and to leave the place of surrender at any time and

Third, the revised criminal neglect of a minor statute categorizes a person under the age of 18 as a "minor" and defines the revised offense in terms of the age of the complainant. The current child cruelty statute requires that the complainant be "a child under 18 years of age."[47] Referring to a teenager as a "child" may be misleading and leads to inconsistency with other District offenses that have different definitions of "child."[48] These changes improve the clarity and consistency of the revised statute.

shall not be pursued by any person at the time of surrender or prosecuted for the surrender of the newborn.").

[47] D.C. Code § 22-1101(a).

[48] For example, the current child sexual abuse statutes consider a complainant under the age of 16 years to be a "child." D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

RCC § 22E-1503. Criminal Abuse of a Vulnerable Adult or Elderly Person.

Explanatory Note. *The RCC criminal abuse of a vulnerable adult or elderly person offense proscribes a broad range of conduct in which there is harm to a vulnerable adult or elderly person's bodily integrity or mental well-being, including conduct that constitutes stalking, menacing, criminal threats, criminal restraint, or first degree offensive physical contact, as those crimes are defined in the RCC.*[1] *The penalty gradations for the revised offense are primarily based on the degree of bodily harm or mental harm. Along with the revised criminal neglect of a vulnerable adult or elderly person offense,*[2] *the revised criminal abuse of a vulnerable adult or elderly person offense replaces several offenses and provisions in the current D.C. Code: abuse of a vulnerable adult or elderly person offense and penalties;*[3] *neglect of a vulnerable adult or elderly person offense and penalties;*[4] *and the spiritual healing defense for abuse or neglect of a vulnerable adult or elderly person.*[5]

There are three degrees of criminal abuse of a vulnerable adult or elderly person. Each gradation requires that the accused must be "reckless as to the fact that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant who is a vulnerable adult or elderly person"[6] (subsection (a)(1) for first degree, subsection (b)(1) for second degree, and subsection (c)(1)) for third degree). Per the rule of construction in RCC § 22E-207, the "reckless" culpable mental state specified in subsection (a)(1) for first degree, subsection (b)(1) for second degree, and subsection (c)(1)) for third degree, applies to both the fact that the complainant has the specified responsibility to the complainant and the fact that the complainant is a vulnerable adult or elderly person. "Reckless" is a defined term in RCC § 22E-206 that here means the accused must disregard a substantial risk that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant and that the complainant is a vulnerable adult or elderly person. "As to the fact that" indicates that the accused must actually have the specified responsibility to the complainant and the complainant must actually be a vulnerable adult or elderly person.

Subsection (a)(2)(A) describes liability for one type of prohibited conduct in first degree criminal abuse of a vulnerable adult or elderly person, the highest grade of the revised offense—causing "serious mental injury," a term defined in RCC § 22E-701 as "substantial, prolonged harm to a person's psychological or intellectual functioning." Subsection (a)(2)(A) specifies that the culpable mental state for causing "serious mental injury" is "purposely," a term defined in RCC § 22E-206 that, applied here, means the accused must consciously desire that his or her conduct causes "serious mental injury" to the complainant.

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[1] RCC §§ 22E-1206 (stalking), 22E-1203 (menacing), 22E-1204 (criminal threats), 22E-1404 (criminal restraint), 22E-1205(a) (first degree offensive physical contact).
[2] RCC § 22E-1504.
[3] D.C. Code §§ 22-933, 22-936.
[4] D.C. Code §§ 22-934, 22-936.
[5] D.C. Code § 22-935.
[6] Such a duty of care to the complainant may arise, for example, from the actor being a teacher, doctor, or caretaker, depending on the facts of a case.

Subsection (a)(2)(B) specifies the second type of prohibited conduct for first degree criminal abuse of a vulnerable adult or elderly person—causing "serious bodily injury," a term defined in RCC § 22E-701 as injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ. Subsection (a)(2)(B) specifies that the culpable mental state for causing "serious bodily injury" is "recklessly," a term defined in RCC § 22E-206 that, applied here, means "being aware of a substantial risk" that the accused's conduct will cause serious bodily injury to the complainant.

Subsection (b)(2)(A) describes liability for one type of prohibited conduct for second degree criminal abuse of a vulnerable adult or elderly person—causing "serious mental injury," a term defined in RCC § 22E-701 as "substantial, prolonged harm to a person's psychological or intellectual functioning." Subsection (b)(2)(B) specifies the second type of prohibited conduct for second degree criminal abuse of a vulnerable adult or elderly person—causing "significant bodily injury." "Significant bodily injury" is the intermediate level of bodily injury in the revised offenses against persons statutes and is defined in RCC § 22E-701 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone. Per the rule of construction in RCC § 22E-207, the "reckless" culpable mental state in subsection (b)(1) applies to both causing "serious mental injury" in subsection (b)(2)(A) and "significant bodily injury" in subsection (b)(2)(B). "Reckless" is a defined term in RCC § 22E-206 that here means being aware of a substantial risk that one's conduct will cause the complainant "serious mental injury" or "significant bodily injury."

Subsection (c)(2)(A) describes liability for one type of prohibited conduct for third degree criminal abuse of a vulnerable adult or elderly person—the accused must commit stalking, menacing, criminal threats, criminal restraint, or first degree offensive physical contact as those crimes are defined in the RCC.[7] "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to whether the accused committed one of the specified offenses. The use of "in fact" does not change the culpable mental states required in the specified offenses. Subsection (c)(2)(B) requires for liability that the accused cause "significant emotional distress" by confining the complainant. "Significant emotional distress" is a defined term in RCC § 22E-207. Subsection (c)(2)(B) specifies a culpable mental state of "purposely," a defined term in RCC § 22E-206 that here means that the accused must consciously desire that his or her conduct confines the complainant, and, by so doing, caused significant emotional distress. Subsection (c)(2)(C) specifies the final type of prohibited conduct for third degree criminal abuse of a vulnerable adult or elderly person—causing "bodily injury." "Bodily injury" is the lowest level of bodily injury in the revised offenses against persons statutes and is defined in RCC § 22E-701 to mean "physical pain, illness, or any impairment of condition." Subsection (c)(2)(C) specifies a culpable mental state of "recklessly," a defined term in RCC § 22E-206 that here means being aware of a substantial risk that one's conduct will cause "bodily injury" to the complainant.

Subsection (d) describes an offense-specific effective consent defense for religious prayer in lieu of medical treatment to the criminal abuse of a vulnerable adult or

[7] RCC §§ 22E-1206 (stalking), 22E-1203 (menacing), 22E-1204 (criminal threats), 22E-1404 (criminal restraint), 22E-1205(a) (first degree offensive physical contact).

elderly person statute. Subsection (d)(1) specifies that the defense is in addition to any defenses otherwise applicable to the conduct at issue. Subsection (d)(1) requires that the complainant give effective consent, or that the actor reasonably belief that the complainant gave effective consent, to the conduct charged to constitute the offense. The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, a coercive threat, or deception. Subsection (d)(1)(B) requires that the conduct charged to constitute the offense is the administration of, or allowing the administration of, religious prayer alone, in lieu of medical treatment which the actor otherwise had a responsibility under civil law, to provide or allow. Subsection (d)(2) specifies the burden of proof for this defense.

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

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

Relation to Current District Law. *The revised criminal abuse of a vulnerable adult or elderly person statute changes current District law in six main ways.*

First, the revised abuse of a vulnerable adult or elderly person statute includes a gradation for causing "significant bodily injury," which is defined in RCC § 22E-701. The current abuse of a vulnerable adult or elderly person statute grades, in part, based on whether "physical pain or injury,"[8] "serious bodily injury,"[9] or "permanent bodily harm"[10] resulted. The statute does not define any of these terms. The DCCA has interpreted "physical pain or injury" in the current abuse of a vulnerable adult or elderly person statute to include a contusion and an abrasion in a case where the complainant testified that he was "hurt,"[11] but there is no DCCA case law interpreting "serious bodily injury" or "permanent bodily harm." It is unclear how "serious bodily injury" and "permanent bodily harm" differ, if at all, particularly given that DCCA case law for the current aggravated assault statute includes permanent bodily injury in the definition of "serious bodily injury."[12] In contrast, the revised criminal abuse of a vulnerable adult or

[8] D.C. Code § 22-933(1); D.C. Code § 22-936(a).
[9] D.C. Code § 22-936(b).
[10] D.C. Code § 22-936(c).
[11] *Poole v. United States*, 929 A.2d 413, 415 (D.C. 2007) (finding sufficient evidence of "physical pain or injury" when appellant "put his knee into [the complaining witness's back] in an attempt to restrain [the complaining witness]" and threatened appellant, and appellant suffered a contusion and abrasion and testified that he was "hurt.").
[12] The District's current aggravated assault statute prohibits causing "serious bodily injury," but does not define the term. D.C. Code § 22-404.01. The DCCA has applied the definition of "serious bodily injury" that is codified in the District's current sexual abuse statutes to the aggravated assault statute. *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute."). The definition is "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement,

elderly person statute includes an additional gradation for causing "significant bodily injury," using the revised definition for that term in RCC § 22E-701. Both the current[13] and revised[14] assault statutes use "significant bodily injury" to partially grade the offenses, and the revised definition is modified from the definition in the current assault with significant bodily injury statute.[15] This change improves the clarity, consistency, and proportionality of the revised offense.

Second, the revised criminal abuse of a vulnerable adult or elderly person statute does not recognize as a distinct basis of liability causing the death of a vulnerable adult or elderly person. The current abuse of a vulnerable adult or elderly person statute grades, in part, based on the death of the vulnerable adult or elderly person.[16] The current statute provides a maximum term of imprisonment of 20 years for such conduct, which is inconsistent with applicable homicide penalties currently in the D.C. Code.[17] In contrast, the revised criminal abuse of a vulnerable adult or elderly person statute does not grade based on the death of the vulnerable adult or elderly person. The RCC homicide offenses, through penalty enhancements for killing a "protected person,"[18] provide enhanced liability for the death of a vulnerable adult or elderly person. This change reduces unnecessary overlap between the revised statute and RCC homicide offenses, and improves the proportionality and consistency of the revised statute.

Third, the revised criminal abuse of a vulnerable adult or elderly person statute has two grades that provide liability for causing "serious mental injury," depending on whether the conduct is done purposely or recklessly. The current abuse of a vulnerable adult or elderly person statute is graded, in part, based on whether "severe mental distress" resulted.[19] Such injury requires a culpable mental state of either "intentionally" or "knowingly," without distinction in penalty,[20] and neither the current statute nor case law defines these culpable mental state terms. In contrast, the revised statute prohibits "purposely" causing "serious mental injury" in first degree criminal abuse of a vulnerable adult or elderly person and "recklessly" causing "serious mental injury" in second degree criminal abuse of a vulnerable adult or elderly person. Including a "recklessly" culpable mental state makes the revised criminal abuse of a vulnerable adult or elderly person

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or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." D.C. Code § 22-3001(7).

[13] D.C. Code § 22-404(a)(2).

[14] RCC § 22E-1202.

[15] D.C. Code § 22-404(a)(2) (assault with significant bodily injury statute defining "significant bodily injury" as an "injury that requires hospitalization or immediate medical attention.").

[16] D.C. Code § 22-936(c).

[17] Currently, the maximum penalty for first degree murder, absent aggravating circumstances, is 60 years. The maximum penalty for second degree murder, absent aggravating circumstances, is 40 years. If an aggravating circumstance is present, the maximum penalty for first and second degree murder is incarceration for life. Notably, one aggravating factor for both first and second degree murder is that the victim was "more than 60 years old." The maximum penalty for voluntary and involuntary manslaughter is 30 years.

[18] RCC §§ 22E-1101(c)(3); 22E-1102(c)(3).

[19] D.C. Code §§ 22-933, 22-936(b) (making it a felony with a maximum term of imprisonment of 10 years if "serious bodily injury or severe mental distress" results).

[20] D.C. Code §§ 22-933 (abuse of a vulnerable adult or elderly person statute requiring a culpable mental state of "intentionally" or "knowingly."); 22-936 (penalty statute for abuse of a vulnerable adult or elderly person statute).

statute consistent with the current[21] and revised[22] assault offenses and the current[23] and revised[24] criminal abuse of a minor statutes, which either require or have gradations for a "recklessly" culpable mental state. This change improves the consistency and proportionality of the revised statute.

Fourth, the revised criminal abuse of a vulnerable adult or elderly person statute requires a culpable mental state of "recklessly" for physical harm. The current abuse of a vulnerable adult or elderly person statute requires a culpable mental state of either "intentionally" or "knowingly."[25] Neither the current statute nor case law defines these culpable mental state terms. In contrast, the revised first degree criminal abuse of a vulnerable adult or elderly person statute requires a "recklessly" culpable mental state for causing serious bodily injury, significant bodily injury, or bodily injury. The "recklessly" culpable mental state is consistent with gradations in the current[26] and revised[27] assault offenses and the current[28] and revised[29] criminal abuse of a minor statutes. This change improves the consistency and proportionality of the revised statute.

Fifth, the revised criminal abuse of a vulnerable adult or elderly person statute is no longer limited to "corporal means." The current abuse of a vulnerable adult or elderly person statute requires, in part, "inflict[ing] or threat[ening] to inflict physical pain or injury by hitting, slapping, kicking, pinching, biting, pulling hair or other corporal means."[30] There is no case law regarding the phrase "corporal means." In contrast, the revised statute requires that the defendant "cause[]" the specified type of physical or mental injury by any means.[31] This change broadens the statute to potentially include drugging a complainant or using mechanical devices to inflict bodily injury. The

[21] *See, e.g.*, D.C. Code § 22-404(a)(2) (offense of assault with significant bodily injury requiring a culpable mental state of "intentionally," "knowingly," or "recklessly," but not grading the penalty based on the culpable mental state). The District's current simple assault statute, D.C. Code § 22-404(a)(1) does not specify a culpable mental state. Current District case law suggests that recklessness may suffice, however, the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient. The culpable mental state for simple assault is discussed in First Draft of Report #15 Recommendations for Assault & Offensive Physical Contact Offenses.

[22] RCC § 22E-1202 (requiring a culpable mental state of "recklessly" in several gradations).

[23] D.C. Code § 22-1101(a), (b) (requiring a culpable mental state of "intentionally," "knowingly," or "recklessly," but not grading the penalty based on the culpable mental state).

[24] RCC § 22E-1501 (requiring a culpable mental state of "recklessly" in several gradations).

[25] D.C. Code § 22-933.

[26] *See, e.g.*, D.C. Code § 22-404(a)(2) (offense of assault with significant bodily injury requiring a culpable mental state of "intentionally," "knowingly," or "recklessly," but not grading the penalty based on the culpable mental state). The District's current simple assault statute, D.C. Code § 22-404(a)(1) does not specify a culpable mental state. Current District case law suggests that recklessness may suffice, however, the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient. The culpable mental state for simple assault is discussed in First Draft of Report #15 Recommendations for Assault & Offensive Physical Contact Offenses.

[27] RCC § 22E-1202 (requiring a culpable mental state of "recklessly" in several gradations).

[28] D.C. Code § 22-1101(a), (b) (requiring a culpable mental state of "intentionally," "knowingly," or "recklessly," but not grading the penalty based on the culpable mental state).

[29] RCC § 22E-1501 (requiring a culpable mental state of "recklessly" in several gradations).

[30] D.C. Code § 22-933(1).

[31] For example, throwing a caustic substance on someone, causing burns, or mixing a toxic ingredient in someone's food.

requirement of causing injury by any means matches the current[32] and revised[33] assault statutes and the current[34] and revised[35] child abuse statutes. This change reduces an unnecessary gap in the offense's coverage and improves the consistency of the statute with similar statutes.

Sixth, the revised criminal abuse of a vulnerable adult or elderly person statute limits liability to a person that reckless as to the fact that "he or she has a responsibility under civil law for the health, welfare, or supervision" of the complainant. The current abuse of a vulnerable adult or elderly person statute does not state any requirements for the defendant's relationship to the complainant.[36] As a result, the current statute significantly overlaps with the District's current assault statutes,[37] which are also subject to separate enhancements for harming an elderly person.[38] However, the current neglect of a vulnerable adult or elderly person statute requires "a duty to provide [necessary] care and services" to the vulnerable adult or elderly person statute.[39] Regarding mental states, the current abuse of a vulnerable adult or elderly person statute requires an "intentionally" culpable mental state, and the current neglect statute requires "willfully or through a wanton, reckless, or willful indifference fails to discharge a duty."[40] There is no DCCA case law interpreting "intentionally" in the abuse statute, but the DCCA has generally found that "wanton, reckless, or willful indifference" in the neglect statute requires something similar to recklessness.[41] In contrast, the revised criminal abuse of a vulnerable adult or elderly person statute limits liability to a person that is "reckless as to the fact that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant." This change narrows the scope of liability for the offense to those persons with a duty of care to the complainant (e.g., a teacher, doctor, or caretaker). The revised criminal abuse of a vulnerable adult or elderly person offense thus provides a distinct charge for individuals with responsibilities under civil law who harm those they are supposed to protect. The revised offense still overlaps in many respects with assault and other offenses that are predicates for third degree criminal abuse of a vulnerable adult or elderly person statute, but only for persons with a duty of care to the complainant they harm. Individuals who do not satisfy this requirement may still have liability under other revised offenses, such as assault (RCC § 22E-1202), menacing (RCC § 22E-1203), criminal threats (RCC § 22E-1204), criminal restraint (RCC § 22E-1404), or offensive physical contact (RCC § 22E-1205). This change reduces unnecessary

[32] *See, e.g.*, D.C. Code §§ 22-404(a)(2) ("causes significant bodily injury to another."); 22-404.01(a)(1), (2) ("causes serious bodily injury.").
[33] RCC § 22E-1202.
[34] D.C. Code § 22-1101(a) ("causes bodily injury.").
[35] RCC § 22E-1501.
[36] D.C. Code § 22-933.
[37] D.C. Code §§ 22-404; 22-404.01.
[38] D.C. Code § 22-3601.
[39] D.C. Code § 22-934.
[40] D.C. Code § 22-934.
[41] In *Tarpeh v. United States*, the DCCA held that "reckless indifference" requires not only "that the actor did not care about the consequences of his or her actions, but also that the actor was consciously aware of the risks involved in light of known alternative courses of action." *Tarpeh v. United States*, 62 A.3d 1266, 1271 (D.C. 2013).

overlap between the revised statute and other RCC offenses against persons, including assault.

Beyond these six substantive changes to current District law, eight other aspects of the revised criminal abuse of a vulnerable adult or elderly person statute may be viewed as substantive changes of law.

First, the revised criminal abuse of a vulnerable adult or elderly person statute prohibits behavior that would constitute stalking, menacing, criminal threats, or criminal restraint, as defined by the RCC. The current abuse of a vulnerable adult or elderly person statute prohibits, in part, conduct that "threatens to inflict physical pain or injury,"[42] uses "repeated or malicious oral or written statements that would be considered by a reasonable person to be harassing or threatening,"[43] or involves "unreasonable confinement or involuntary seclusion, including but not limited to, the forced separation from other persons against his or her will or the directions of any legal representative."[44] There is no DCCA case law interpreting the meaning of these provisions in the current statute, or how such conduct may differ from conduct covered in other current statutes that prohibit threats,[45] stalking,[46] or involuntary confinement.[47] Instead of this ambiguity, the revised criminal abuse of a vulnerable adult or elderly person statute clearly states that third degree includes the RCC offenses pertaining to stalking, menacing, criminal threats, or criminal restraint. The revised stalking (RCC § 22E-1206), menacing (RCC § 22E-1203) and criminal threats (RCC § 22E-1204) statutes cover threats of "physical pain or injury" and "repeated or malicious oral or written statements that would be considered by a reasonable person to be harassing or threatening." The revised criminal restraint statute (RCC § 22E-1404) covers conduct involving unreasonable confinement or involuntary seclusion. This change improves the clarity of the revised offense and creates consistency between the revised offense and other closely related offenses pertaining to menacing, criminal threats, and restraint.

Second, the revised criminal abuse of a vulnerable adult or elderly person statute prohibits behavior that satisfies first degree offensive physical contact as defined in RCC § 22E-1205(a) (knowingly causing physical contact with bodily fluid or excrement). The current abuse of a vulnerable adult or elderly person statute requires, in part, "inflict[ing] or threat[ening] to inflict physical pain or injury by hitting, slapping, kicking, pinching, biting, pulling hair or other corporal means."[48] The DCCA has interpreted "physical pain or injury…or other corporal means" in the current abuse of a vulnerable adult or elderly person statute to include a contusion and an abrasion in a case where the complainant testified that he was "hurt,"[49] but did not provide a definition of the terms. The revised

[42] D.C. Code § 22-933(1).
[43] D.C. Code § 22-933(2).
[44] D.C. Code § 22-933(3).
[45] D.C. Code §§ 22-404(a)(1); 22-1810.
[46] D.C. Code § 22-3133.
[47] D.C. Code § 22-2001.
[48] D.C. Code § 22-933(1).
[49] *Poole v. United States*, 929 A.2d 413, 415 (D.C. 2007) (finding sufficient evidence of "physical pain or injury" when appellant "put his knee into [the complaining witness's back] in an attempt to restrain [the

abuse of a vulnerable adult or elderly person statute clarifies that, whether or not it would constitute a physical injury by corporal means, causing offensive physical contact with bodily fluid or excrement is within the scope of the offense. This change clarifies and potentially fills a gap in the current statute.

Third, the revised criminal abuse of a vulnerable adult or elderly person statute requires a culpable mental state of recklessness as to the fact that the complainant is a vulnerable adult or elderly person. The current abuse of a vulnerable adult or elderly person statute does not specify what culpable mental state, if any, applies to the fact that the complaining witness is a vulnerable adult or elderly person.[50] There is no DCCA case law discussing if there is a culpable mental state for this element. However, the current enhancement for certain crimes committed against senior citizens provides a defense that the accused did not know or reasonably believed that the victim was not 65 years or older.[51] To resolve these ambiguities, the revised criminal abuse of a vulnerable adult or elderly person statute consistently requires a "recklessly" culpable mental state as to the fact that the complainant is a vulnerable adult or elderly person. The "recklessly" culpable mental state matches the culpable mental state for the fact that the complaining witness is under the age of 18 years in the revised criminal abuse of a minor and criminal neglect of a minor statutes (RCC §§ 22E-1501 and 22E-1502), and the "protected person" gradations in the revised assault statute (RCC § 22E-1202). A "recklessly" culpable mental state is also consistent with the culpable mental state requirements in the current enhancement for certain crimes committed against senior citizens.[52] This change improves the consistency and proportionality of the revised offense.

Fourth, the effective consent defense in RCC § 22E-40X limits liability under the revised criminal abuse of a vulnerable adult or elderly person statute. District statutes do not codify general defenses to criminal conduct. The current abuse of a vulnerable adult or elderly person statute does not address whether consent of the complainant is a defense to liability, although D.C. Code § 22-935 exempts from liability anyone who "provides or permits to be provided treatment by spiritual means through prayer alone in accordance with a religious method of healing, in lieu of medical treatment."[53] Longstanding case

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complaining witness]" and threatened appellant, and appellant suffered a contusion and abrasion and testified that he was "hurt.").

[50] The current neglect of a vulnerable adult or elderly person statute requires a culpable mental state of "intentionally or knowingly." D.C. Code § 22-933. Surprisingly, "vulnerable adult" or "elderly person" are not codified elements of the current criminal abuse of a vulnerable adult or elderly person offense in D.C. Code § 22-933, nor is proof that the complainant is a "vulnerable adult" or "elderly person" codified as an element in the offense's penalty provisions. D.C. Code §§ 22-933, 22-936.

[51] The current enhancement for crimes against senior citizens makes it an affirmative defense that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed." D.C. Code § 22-3601(c). Abuse of a vulnerable adult or elderly person is not one of the crimes to which the current senior citizens enhancement applies.

[52] "Reckless" is defined in RCC § 22E-206 and means that the accused must disregard a substantial risk that the complainant was 65 years of age or older. In the RCC, an accused that knew or reasonably believed that the complainant was not 65 years or older or could not have known or determined the age of the complainant, per the current enhancement for crimes against senior citizens, would not satisfy the culpable mental state of recklessness as to the age of the complaining witness. The accused would not consciously disregard a substantial risk that the complainant was 65 years of age or older.

[53] D.C. Code § 22-935.

law of the United States Court of Appeals District of Columbia Circuit (D.C. Cir.) in *Guarro v. United States* has recognized that consent is a defense to assault, at least in the case of a nonviolent sexual touching.[54] A recent DCCA opinion in *Woods v. United States*, however, held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly declined to rule on the effect of consent in other circumstances.[55] It is unclear whether this District case law for assault would apply to abuse of a vulnerable adult or elderly person. To resolve this ambiguity, the RCC effective consent defense clarifies when the complainant's "effective consent" or a person's belief that the complainant gave "effective consent" is a defense to RCC offenses against persons such as assault or criminal abuse of a vulnerable adult or elderly person. This change improves the clarity of the law and, to the extent it may result in a change, improves the proportionality of the offense by ensuring that consensual and legal activities are not criminalized.

Fifth, the revised criminal abuse of a vulnerable adult or elderly person statute incorporates the standard definitions for the terms "serious bodily injury" and "bodily injury" in RCC § 22E-701. The District's current abuse of a vulnerable adult or elderly person statute is graded, in part, based on whether "physical pain or injury" or "serious bodily injury" results.[56] The current statute, however, does not define these terms. The DCCA has interpreted "physical pain or injury" in the current abuse of a vulnerable adult or elderly person statute to include a contusion and an abrasion in a case where the complainant testified that he was "hurt,"[57] but did not provide a definition of either term. There is no DCCA case law interpreting "serious bodily injury" in the current abuse of a vulnerable adult or elderly person statute.[58] Instead of this ambiguity, the revised criminal abuse of a vulnerable adult or elderly person statute codifies and uses standard

[54] 237 F.2d 578, 581 (1956) ("Nevertheless the evidence in the instant case cannot support a conviction for assault unless it appears that there was no actual or apparent consent. Generally where there is consent, there is no assault. 1 Wharton, Criminal Law §§ 180, 751 (12th ed. 1932).").

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

[56] If "serious bodily injury or severe mental distress" results, the current abuse of a vulnerable adult offense has a maximum term of imprisonment of 10 years. D.C. Code § 22-936(b). If "permanent bodily harm or death" results, the current offense has a maximum term of imprisonment of 20 years. D.C. Code § 22-936(c). If the offense results in a lesser harm than "serious bodily injury," "severe mental distress," "permanent bodily harm," or death the current offense is a misdemeanor with a maximum term of imprisonment of 180 days. D.C. Code § 22-936(a).

[57] *Poole v. United States*, 929 A.2d 413, 415 (D.C. 2007) (finding sufficient evidence of "physical pain or injury" when appellant "put his knee into [the complaining witness's back] in an attempt to restrain [the complaining witness]" and threatened appellant, and appellant suffered a contusion and abrasion and testified that he was "hurt.").

[58] However, there is DCCA case law interpreting "serious bodily injury" in the current aggravated assault statute. "The current aggravated assault statute prohibits causing "serious bodily injury," but does not define the term. D.C. Code § 22-404.01. The DCCA has applied the definition of "serious bodily injury" that is codified in the District's current sexual abuse statutes to the aggravated assault statute. *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute."). The definition is "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." D.C. Code § 22-3001(7).

definitions of "serious bodily injury" and "bodily injury" per RCC § 22E-701. The revised definition of "serious bodily injury" is modified from the definition that the DCCA applies to the current aggravated assault statute[59] and would appear to encompass "permanent bodily harm" in the current abuse of a vulnerable adult or elderly person statute. It is unclear whether the revised definition otherwise changes "serious bodily injury" in the current statute. The revised definition of "bodily injury" in RCC § 22E-701 encompasses the limited DCCA case law interpreting "bodily injury" for the current abuse of a vulnerable adult or elderly person statute, as well as the alternative basis for liability in the current statute, that the conduct cause "physical pain."[60] This change improves the clarity, consistency, and proportionality of the revised abuse of a vulnerable adult or elderly person statute.

Sixth, the revised criminal abuse of a vulnerable adult or elderly person statute incorporates the standardized definition of "serious mental injury" in RCC § 22E-701. The current abuse of a vulnerable adult or elderly person statute grades, in part, based on whether "severe mental distress" resulted,[61] but the statute does not define the term and there is no DCCA case law. Instead of this ambiguity, RCC § 22E-701 defines "serious mental injury" as "substantial, prolonged harm to a person's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition." The revised criminal abuse of a minor and criminal neglect of a minor statutes also use the term "serious mental injury," which is modified from the District's current civil statutes for proceedings on child delinquency, neglect, or need of supervision.[62] This change improves the clarity and consistency of the revised offense.

Seventh, the revised criminal abuse of a vulnerable adult or elderly person statute requires a culpable mental state as to the resulting physical or mental injury. The current abuse of a vulnerable adult or elderly person statute requires culpable mental states of "intentionally or knowingly" as to the prohibited conduct.[63] However, the current offense's penalty gradations do not specify culpable mental states for whether the

[59] "The current aggravated assault statute prohibits causing "serious bodily injury," but does not define the term. D.C. Code § 22-404.01. The DCCA has applied the definition of "serious bodily injury" that is codified in the District's current sexual abuse statutes to the aggravated assault statute. *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute."). The definition is "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." D.C. Code § 22-3001(7).

[60] D.C. Code § 22-933(1) ("[i]nflicts or threatens to inflict physical pain or injury . . . by corporal means.").

[61] D.C. Code § 22-936(b) (making it a felony with a maximum term of imprisonment of 10 years if "serious bodily injury or severe mental distress" results).

[62] D.C. Code § 16-2301(31) ("The term 'mental injury' means harm to a child's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition.").

[63] D.C. Code § 22-933.

prohibited conduct "causes" "serious bodily injury or severe mental distress"[64] or "permanent bodily harm or death."[65] The DCCA has not determined whether there is a culpable mental state for the resulting physical or mental harm in the abuse of a vulnerable adult or elderly person statute. Unlike the current statute, the revised statute clarifies that a culpable mental state applies to the resulting physical or mental harm—either "recklessly" or "purposely." This change improves the clarity, completeness, and proportionality of the revised statute.

Eighth, the revised criminal abuse of a vulnerable adult or elderly person statute does not recognize as a distinct basis of liability causing "permanent bodily harm." The current abuse of a vulnerable adult or elderly person statute grades, in part, based on whether "permanent bodily harm" resulted,[66] providing a maximum term of imprisonment of 20 years for such conduct. The current statute does not define "permanent bodily harm" and there is no comparable grade in the District's current assault statutes. However, the current aggravated assault statute does prohibit "serious bodily injury"[67] and DCCA case law includes permanent bodily injury in the definition of "serious bodily injury."[68] To resolve this ambiguity, the revised criminal abuse of a vulnerable adult or elderly person statute grades, in part, on whether "serious bodily injury" occurred, as that term is defined in RCC § 22E-701. This change improves the clarity and consistency of the revised statute.

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

The revised criminal abuse of a vulnerable adult or elderly person statute clarifies the scope of the defense for religious prayer in lieu of medical treatment in the current abuse of a vulnerable adult or elderly person statute. Current D.C. Code § 22-935 exempts from liability for abuse of a vulnerable adult or elderly person anyone who "provides or permits to be provided treatment by spiritual means through prayer alone in accordance with a religious method of healing, in lieu of medical treatment."[69] However, for the spiritual healing exemption to apply, a person must have the "express consent" of the vulnerable adult or elderly person or act "in accordance with the practice of the vulnerable adult or elderly person."[70] There is no DCCA case law interpreting this

[64] D.C. Code § 22-936(b).
[65] D.C. Code § 22-936(c).
[66] D.C. Code § 22-936(c).
[67] D.C. Code § 22-404.01.
[68] The District's current aggravated assault statute prohibits causing "serious bodily injury," but does not define the term. D.C. Code § 22-404.01. The DCCA has applied the definition of "serious bodily injury" that is codified in the District's current sexual abuse statutes to the aggravated assault statute. *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute."). The definition is "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." D.C. Code § 22-3001(7).
[69] D.C. Code § 22-935.
[70] D.C. Code § 22-935.

exception. The revised criminal abuse of a vulnerable adult or elderly person statute clarifies that "effective consent" by the complainant, or reasonable belief that the complainant gave "effective consent," to the administration of religious prayer alone, is required. The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, a coercive threat, or deception. The prefatory language in subsection (d)(1) clarifies that any other general defenses under District law continue to be available to a defendant in an abuse of a vulnerable adult or elderly person statute prosecution. Subsection (d)(2) further clarifies the burden of proof for the defense, consistent with current District practice.[71] This change improves the clarity and completeness of the revised statute.

[71] D.C. Crim. Jur. Instr. § 9-320 ("The government must prove beyond a reasonable doubt that [name of complainant] did not voluntarily consent to the acts [or that [name of defendant] did not reasonably believe [name of complainant] was consenting].").

RCC § 22E-1504. Criminal Neglect of a Vulnerable Adult or Elderly Person.

Explanatory Note. *The RCC criminal neglect of a vulnerable adult or elderly person offense proscribes a broad range of conduct in which there is a risk of harm to a vulnerable adult or elderly person's bodily integrity or mental well-being. In addition to prohibiting a risk of harm to a vulnerable adult or elderly person, the RCC neglect of a vulnerable adult or elderly person offense prohibits failing to provide a vulnerable adult or elderly person with necessary items or care. The penalty gradations are primarily based on the type of physical or mental harm that is risked. Along with the revised criminal abuse of a vulnerable adult or elderly person offense, the revised criminal neglect of a vulnerable adult or elderly person offense replaces several offenses and provisions in the current D.C. Code: abuse of a vulnerable adult or elderly person;*[1] *neglect of a vulnerable adult or elderly person;*[2] *and the spiritual healing defense for abuse or neglect of a vulnerable adult or elderly person.*[3]

There are three degrees of criminal neglect of a vulnerable adult or elderly person. Each gradation requires that the accused must be "reckless as to the fact that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant who is a vulnerable adult or elderly person"[4] (subsection (a)(1) for first degree, subsection (b)(1) for second degree, and subsection (c)(1)) for third degree). Per the rule of construction in RCC § 22E-207, the "reckless" culpable mental state specified in subsection (a)(1) for first degree, subsection (b)(1) for second degree, and subsection (c)(1)) for third degree, applies to both the fact that the complainant has the specified responsibility to the complainant and the fact that the complainant is a vulnerable adult or elderly person. "Reckless" is a defined term in RCC § 22E-206 that here means the accused must disregard a substantial risk that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant and that the complainant is a vulnerable adult or elderly person. "As to the fact that" indicates that the accused must actually have the specified responsibility to the complainant and the complainant must actually be a vulnerable adult or elderly person.

Subsection (a)(2) specifies the prohibited conduct for first degree criminal neglect of a vulnerable adult or elderly person, the highest grade of the revised criminal neglect of a vulnerable adult or elderly person offense—creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience serious bodily injury or death. Per the rule of construction in RCC § 22E-207, the "reckless" culpable mental state in subsection (a)(1) applies to this requirement. "Reckless" is a defined term in RCC § 22E-206 that here means the accused must disregard a substantial risk that he or she created, or failed to mitigate or remedy, a substantial risk that the complainant would experience serious bodily injury or death. "Serious bodily injury" is a term defined in RCC § 22E-701 as injury involving a substantial risk of death, or protracted and obvious

[1] D.C. Code §§ 22-933, 22-936.
[2] D.C. Code §§ 22-934, 22-936.
[3] D.C. Code § 22-935.
[4] Such a duty of care to the complainant may arise, for example, from the actor being a teacher, doctor, or caretaker, depending on the facts of a case.

disfigurement, or protracted loss or impairment of the function of a bodily member or organ.

Subsection (b)(2)(A) specifies one type of prohibited conduct for second degree criminal neglect of a vulnerable adult or elderly person—creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience "significant bodily injury." "Significant bodily injury" is the intermediate level of bodily injury in the revised offenses against persons statutes and is defined in RCC § 22E-701 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone. Subsection (b)(2)(B) specifies the second type of prohibited conduct for second degree criminal neglect of a vulnerable adult or elderly person—creating, or failing to mitigate or remedy, a substantial risk that a child would experience "serious mental injury." "Serious mental injury" is a term defined in RCC § 22E-701 as "substantial, prolonged harm to a person's psychological or intellectual functioning." Per the rule of construction in RCC § 22E-207, the "reckless" culpable mental state in subsection (b)(1) applies to both creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience "significant bodily injury" or "serious mental injury." "Reckless" is a term defined in RCC § 22E-206 which, applied here, means being aware of a substantial risk that one's conduct will create, or fail to mitigate or remedy, a substantial risk that the complainant would experience "significant bodily injury" or "serious mental injury."

Subsection (c)(2) specifies the prohibited conduct for third degree criminal neglect of a vulnerable adult or elderly person—failing to make a reasonable effort to provide, food, clothing, or other items or care for the complainant. Subsection (c)(2) requires that the items or care be "essential to the physical health, mental health, or safety of the complainant." Per the rule of construction in RCC § 22E-207, the culpable mental state of "reckless" in subsection (c)(1) applies to all the elements in subsection (c)(2). "Reckless" is a term defined in RCC § 22E-206 which, applied here, means being aware of a substantial risk that one's conduct will fail to make a reasonable effort to provide the items or care and that the items or care are "essential to the physical health, mental health, or safety of the complainant."

Subsection (d) describes an offense-specific effective consent defense for religious prayer in lieu of medical treatment to the criminal neglect of a vulnerable adult or elderly person statute. Subsection (d)(1) specifies that the defense is in addition to any defenses otherwise applicable to the conduct at issue. Subsection (d)(1) requires that the complainant give effective consent, or that the actor reasonably belief that the complainant gave effective consent, to the conduct charged to constitute the offense. The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, a coercive threat, or deception. Subsection (d)(1)(B) requires that the conduct charged to constitute the offense is the administration of, or allowing the administration of, religious prayer alone, in lieu of medical treatment which the actor otherwise had a responsibility under civil law, to provide or allow. Subsection (d)(2) specifies the burden of proof for this defense.

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

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

Relation to Current District Law. *The revised criminal neglect of a vulnerable adult or elderly person statute changes current District law in four main ways.*

First, the revised criminal neglect of a vulnerable adult or elderly person statute is limited to conduct that does not actually harm a person. The current neglect of a vulnerable adult or elderly person statute requires a failure to discharge a duty to provide necessary care and services to a vulnerable adult or elderly person.[5] The penalties for the offense, however, partially grade the offense on actual harm to the vulnerable adult or elderly person,[6] and partially on a failure to discharge the required duty.[7] In contrast, the revised criminal neglect of a vulnerable adult or elderly person statute no longer grades the offense based on whether actual harm to the vulnerable adult or elderly person resulted. The revised statute is instead limited to creating, or failing to mitigate or remedy, a risk of harm to an elderly person or vulnerable adult, or a failure to provide necessary items or care. However, if physical or mental injury or death results, there still may be liability under the revised criminal abuse of a vulnerable adult or elderly person statute (RCC § 22E-1504), the revised assault statute (RCC § 22E-1202), or the revised homicide offenses[8] (RCC §§ 22E-1101, 22E-1102, 22E-1103). This change reduces unnecessary overlap between offenses and improves the consistency and proportionality of the revised offense.

Second, the revised criminal neglect of a vulnerable adult or elderly person statute applies a recklessness requirement rather than a reasonable person standard to whether items or care are essential for the well-being of the vulnerable adult or elderly person. The current neglect of a vulnerable adult or elderly person statute requires "that a

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[5] D.C. Code § 22-934.

[6] The higher gradations of the current statute require either "serious bodily injury or severe mental distress," with a maximum term of imprisonment of ten years, D.C. Code §§ 22-934, 22-936(b), or "permanent bodily harm or death," with a maximum term of imprisonment of 20 years, D.C. Code §§ 22-934, 22-936(c).

[7] D.C. Code §§ 22-934, 22-936(a) (stating that "[a] person who commits the offense of . . . criminal neglect of a vulnerable adult or elderly person shall" receive a maximum term of imprisonment of 180 days.").

[8] The current abuse of a vulnerable adult or elderly person statute prohibits, in part, "intentionally or knowingly impos[ing] unreasonable confinement or involuntary seclusion." D.C. Code § 22-933(3). In one gradation of the current offense, if the defendant "causes permanent bodily harm or death," there is a maximum term of imprisonment of 20 years. D.C. Code § 22-934(c). The current statute does not specify any culpable mental state as to causing death and there is no DCCA case law, meaning that current District law may apply strict liability. For example if, after a defendant cuts off an elderly person's phone lines, the elderly person falls and dies because he or she cannot call for help, a court could find that the defendant "caused" the elderly person's death, even if the defendant was unaware that there was a risk of death. It is unclear whether current District homicide laws would cover imposing "unreasonable confinement or involuntary seclusion" that leads to death, as in this scenario.
The revised criminal abuse of a vulnerable adult or elderly person statute no longer specifically prohibits "unreasonable confinement or involuntary seclusion," although this conduct appears to be covered under the revised criminal restraint offense (RCC § 22E-1404). However, the RCC has a revised negligent homicide offense (RCC § 22E-1103) that may cover this conduct, and, depending on the facts of the case, the revised manslaughter offense (RCC § 22E-1102) may cover it.

reasonable person would deem the items or care essential for the well-being of the vulnerable adult or elderly person."[9] It is unclear under the current statute what culpable mental state, if any, applies to the fact that the items or care are essential, although the statute's "reasonable person" standard may suggest a culpable mental state of negligence for this element. DCCA case law has not specifically addressed this culpable mental state, but has generally found that "wanton, reckless or willful indifference," two other culpable mental states specified in the current criminal neglect of a vulnerable adult or elderly person statute, requires something similar to recklessness.[10] In contrast, the revised criminal neglect of a vulnerable adult or elderly person statute eliminates the current statute's reasonable person requirement and applies a "recklessly" culpable mental state as defined in RCC § 22E-206. As applied in the revised statute, "recklessly" requires that a person is aware of a substantial risk that the items or care are "essential for the health or safety of a vulnerable adult or elderly person." This change improves the clarity and proportionality of the revised offense.[11]

Third, the effective consent defense in RCC § 22E-40X limits liability under the revised criminal neglect of a vulnerable adult or elderly person statute. District statutes do not codify general defenses to criminal conduct. The current neglect of a vulnerable adult or elderly person statute does not address whether consent of the complainant is a defense to liability, although current D.C. Code § 22-935 exempts from liability anyone who "provides or permits to be provided treatment by spiritual means through prayer alone in accordance with a religious method of healing, in lieu of medical treatment."[12] Longstanding case law of the United States Court of Appeals District of Columbia Circuit (D.C. Cir.) in *Guarro v. United States* has recognized that consent is a defense to assault, at least in the case of a nonviolent sexual touching.[13] A recent DCCA opinion in *Woods v. United States*, however, held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly declined to rule on the effect of consent in other circumstances.[14] It is unclear whether this District case law for assault would apply to neglect of a vulnerable adult or elderly person. To resolve this ambiguity, the RCC effective consent defense in RCC § 22E-40X clarifies when the complainant's "effective consent" or a person's belief that the complainant gave "effective consent" is a defense to RCC offenses against persons such as assault or criminal neglect of a vulnerable adult or elderly person. This change improves the clarity

[9] D.C. Code § 22-934.

[10] In *Tarpeh v. United States*, the DCCA held that "reckless indifference" requires not only "that the actor did not care about the consequences of his or her actions, but also that the actor was consciously aware of the risks involved in light of known alternative courses of action." *Tarpeh v. United States*, 62 A.3d 1266, 1271 (D.C. 2013).

[11] Although "essential for the health or safety of a vulnerable adult or elderly person" is an element of third degree of the revised criminal neglect of a vulnerable adult or elderly person statute, the issue also may arise in the other degrees of the offense that prohibit "a substantial risk" of specified physical and mental harms. In these degrees, the "recklessly" culpable mental state would encompass recklessness as to whether items or care were essential for the health or safety of the vulnerable adult or elderly person.

[12] D.C. Code § 22-935.

[13] 237 F.2d 578, 581 (1956) ("Nevertheless the evidence in the instant case cannot support a conviction for assault unless it appears that there was no actual or apparent consent. Generally where there is consent, there is no assault. 1 Wharton, Criminal Law §§ 180, 751 (12th ed. 1932).").

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

of the law and, to the extent it may result in a change, improves the proportionality of the offense by ensuring that consensual and legal activities are not criminalized.

Fourth, the revised criminal neglect of a vulnerable adult or elderly person statute no longer requires as a distinct element that the defendant fail to discharge a duty to provide necessary care and services. The current neglect of a vulnerable adult or elderly person statute requires that the defendant "fail[] to discharge a duty to provide care and services necessary to maintain the physical and mental health" of a vulnerable adult or elderly person. There is no case law regarding this phrase. Moreover, the D.C. Code does not specify any general defense for assault-type conduct committed with intent to fulfill a person's duty of care to another person, and there is no case law concerning such a general defense.[15] In contrast, the revised criminal neglect of a vulnerable adult or elderly person statute requires as an element of the offense only that the defendant have a responsibility under civil law for the health, welfare, or supervision of the complainant, is reckless as to having this responsibility, and commit otherwise criminal conduct. The RCC general justification defense for parents, guardians, and others per RCC § 22E-40X limits liability when an otherwise criminal act is justifiably committed because of the actor's duty of care to the complainant. Under this defense, once an actor's minimal burden of production is satisfied, the government must prove that the actor's conduct was a violation of his or her duty of care. Specifically, in a charge of criminal neglect of a vulnerable adult or elderly person, where an actor claims his or her conduct is in accord with his duty of care under RCC § 22E-40X, the government then would need to prove that his or her failure to provide essential items or care was a violation of the actor's duty of care. Consequently, the effect of removing as a distinct element of the revised statute that the defendant fail to discharge a duty to provide necessary care and services is simply that the burden of alleging that such a failure was not a violation of the actor's duty of care falls upon the actor. This change improves the clarity and consistency of the revised statute.

Beyond these four substantive changes to current District law, four other aspects of the revised criminal neglect of a vulnerable adult or elderly person statute may be viewed as a substantive change of law.

First, the revised criminal neglect of a vulnerable adult or elderly person statute requires a culpable mental state of recklessness as to the fact that the complainant is a vulnerable adult or elderly person. The current neglect of a vulnerable adult or elderly person statute is silent as to what culpable mental state, if any, applies to the fact that the complainant is a vulnerable adult or elderly person. There is no DCCA case law discussing the matter. However, the current neglect of a vulnerable adult or elderly person statute requires proof that the defendant "willfully or through a wanton, reckless, or willful indifference fails to discharge a duty" to a vulnerable adult or elderly person,

[15] The DCCA has recognized a "lesser-evils" or "necessity" type of justification defense, however, that may apply in situations where an actor commits an assault-type act on a complainant as part of his or her duty of care to the complainant (e.g., a caretaker who restrains his ward to keep the ward from running into traffic). *See Griffin v. United States*, 447 A.2d 776, 777 (D.C. 1982) ("In essence, the necessity defense exonerates persons who commit a crime under the "pressure of circumstances," if the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendants' breach of the law.").

which may imply awareness of the complainant's status which is the basis of the "duty." In a related statutory provision, the current enhancement for certain crimes committed against senior citizens provides a defense that the accused did not know or reasonably believed that the victim was not 65 years or older.[16] To resolve these ambiguities, the revised criminal neglect of a vulnerable adult or elderly person statute consistently requires a "reckless" culpable mental state as to the fact that the complainant is an elderly person or a vulnerable adult. The reckless culpable mental state requirement matches the culpable mental state required as to the fact that the complainant is under the age 18 years in the revised criminal abuse and criminal neglect of a minor statutes (RCC § 22E-1501 and § 22E-1502) and the "protected person" gradations in the revised assault statute (RCC § 22E-1202). A "reckless" culpable mental state is also consistent with the culpable mental state requirements in the current enhancement for certain crimes committed against senior citizens.[17] This change improves the consistency and proportionality of the revised offense.

Second, the revised criminal neglect of a vulnerable adult or elderly person statute requires a "substantial risk" of the specified physical or mental harm for liability. The current neglect of a vulnerable adult or elderly person statute requires a failure to discharge a duty to provide necessary care and services to a vulnerable adult or elderly person.[18] The penalties for the offense partially grade on a failure to discharge the required duty.[19] In such a situation, it appears that an actual risk of harm may not be necessary,[20] although failure to mitigate a risk has been the basis of liability in at least

[16] The current enhancement for crimes against senior citizens makes it an affirmative defense that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed." D.C. Code § 223601(c). Abuse of a vulnerable adult or elderly person is not one of the crimes to which the current senior citizens enhancement applies.

[17] The current enhancement for crimes against senior citizens makes it an affirmative defense that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed." D.C. Code § 223601(c). "Reckless" is defined in RCC § 22E-206 and means that the accused must disregard a substantial risk that the complainant was 65 years of age or older. In the RCC, an accused that knew or reasonably believed that the complainant was not 65 years or older or could not have known or determined the age of the complainant would not satisfy the culpable mental states of recklessness or knowledge as to the age of the complaining witness. The accused would not consciously disregard a substantial risk (recklessness) or be practically certain (knowledge) that the complainant was 65 years of age or older.
Criminal neglect of a vulnerable adult or elderly person is not one of the crimes to which the current senior citizens enhancement applies.

[18] D.C. Code § 22-934.

[19] D.C. Code §§ 22-934, 22-936(a) (stating that "[a] person who commits the offense of . . . criminal neglect of a vulnerable adult or elderly person shall" receive a maximum term of imprisonment of 180 days."). The higher gradations of the current statute require either "serious bodily injury or severe mental distress," with a maximum term of imprisonment of ten years, D.C. Code §§ 22-934, 22-936(b), or "permanent bodily harm or death," with a maximum term of imprisonment of 20 years, D.C. Code §§ 22-934, 22-936(c).

[20] For example, a caretaker who knowingly fails to discharge their duty to provide necessary medicine to a vulnerable person may be liable under the current statute even though the vulnerable person was not actually at risk of an adverse consequence due to the intervention of a third party.

one case.[21] The revised criminal neglect of a vulnerable adult or elderly person statute clarifies that the required risk must be "substantial." The "substantial" language is technically superfluous where recklessness is alleged because the "reckless" culpable mental state, as defined in RCC § 22E-206, also requires that a risk be "substantial" and the accused's conscious disregard of the risk be "clearly blameworthy." However, given that neglect offenses will often depend on the nature of the risk to the vulnerable adult or elderly person, the revised statute specifies the "substantial" requirement to clarify the statute, particularly where the defendant is alleged to act knowingly, intentionally, or purposely.[22] This change improves the clarity and consistency of the revised statute.

Third, the revised criminal neglect of a vulnerable adult or elderly person statute incorporates the standard definitions for the terms "serious bodily injury" and "significant bodily injury" in RCC § 22E-701. The District's current neglect of a vulnerable adult or elderly person statute is graded, in part, on whether "serious bodily injury," "permanent bodily harm," or a lesser, unspecified, physical harm results.[23] The current statute, however, does not define these terms. The DCCA has interpreted "physical pain or injury" in the current abuse of a vulnerable adult or elderly person statute to include a contusion and an abrasion in a case where the complainant testified that he was "hurt,"[24] but did not provide a general definition. There is no DCCA case law interpreting these terms for the current neglect of a vulnerable adult or elderly person statute. To resolve these ambiguities, the revised criminal neglect of a vulnerable adult or elderly person statute codifies and uses standard definitions of "serious bodily injury" and "significant bodily injury" per RCC § 22E-701. The revised definition of "serious bodily injury" is modified from the definition that the DCCA applies to the current aggravated assault statute.[25] The revised definition of "serious bodily injury" would appear to encompass

[21] *Jackson v. United States*, 996 A.2d 796, 797, 798 (D.C. 2010) (finding the evidence sufficient for criminal neglect of a vulnerable adult because "a reasonable factfinder could conclude that, under the statute, appellant failed to take steps that a 'reasonable person would deem essential for the well-being of the complainant' when appellant was involved in an altercation with the vulnerable adult, which left visible and significant injuries, and appellant did not inform his supervisor or file an incident report as required by his job duties).

[22] For example, where a caregiver gives an elderly person with cancer an experimental and dangerous drug prescribed by the elderly person's oncologist, the fact that the caregiver *knows* (i.e., is practically certain) that doing so will create a risk of serious bodily injury or death to the elderly person does not, by itself, establish first degree neglect of a vulnerable adult or elderly person. Rather, it would also have to be proven by the government, as an affirmative element of the offense, that this risk was *substantial* under the circumstances.

[23] If "serious bodily injury or severe mental distress" results, the current abuse of a vulnerable adult offense has a maximum term of imprisonment of 10 years. D.C. Code § 22-936(b). If "permanent bodily harm or death" results, the current offense has a maximum term of imprisonment of 20 years. D.C. Code § 22-936(c). If the offense results in a lesser harm than "serious bodily injury," "severe mental distress," "permanent bodily harm," or death, the current offense is a misdemeanor with a maximum term of imprisonment of 180 days. D.C. Code § 22-936(a).

[24] *Poole v. United States*, 929 A.2d 413, 415 (D.C. 2007) (finding sufficient evidence of "physical pain or injury" when appellant "put his knee into [the complaining witness's back] in an attempt to restrain [the complaining witness]" and threatened appellant, and appellant suffered a contusion and abrasion and testified that he was "hurt.").

[25] "The current aggravated assault statute prohibits causing "serious bodily injury," but does not define the term. D.C. Code § 22-404.01. The DCCA has applied the definition of "serious bodily injury" that is codified in the District's current sexual abuse statutes to the aggravated assault statute. *Nixon v. United*

"permanent bodily harm" in the current neglect of a vulnerable adult or elderly person statute, but it is unclear whether the revised definition otherwise changes "serious bodily injury" in the current statute. This change improves the clarity, consistency, and proportionality of the revised statute.

Fourth, the revised criminal neglect of a vulnerable adult or elderly person statute incorporates the standardized definition of "serious mental injury" in RCC § 22E-701. The current neglect of a vulnerable adult or elderly person statute grades, in part, based on whether "severe mental distress" resulted,[26] but the statute does not define the term. There is no DCCA case law interpreting "serious mental distress." RCC § 22E-701 defines "serious mental injury" as "substantial, prolonged harm to a person's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition." The revised criminal abuse of a minor and criminal neglect of a minor statutes also use the term "serious mental injury," which is modified from the District's current civil statutes for proceedings on child delinquency, neglect, or need of supervision.[27] This change improves the clarity and consistency of the revised offenses.

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

First, the revised criminal neglect of a vulnerable adult or elderly person statute specifies that "fail[ing] to mitigate" or "fail[ing] to remedy" a substantial risk is sufficient for liability. The current neglect of a vulnerable adult or elderly person statute criminalizes conduct that "fails to discharge a duty" to provide necessary care and services.[28] The revised statute clarifies that not only creating risks to a vulnerable adult or elderly person, but also failing to mitigate or remedy a substantial risk, is sufficient for liability. Under the general provision in RCC § 22E-202, omissions are equivalent to affirmative conduct and sufficient for liability for any offense in the RCC where the defendant had a duty of care to the complainant.[29] However, although technically

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States, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute."). The definition is "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." D.C. Code § 22-3001(7).

[26] D.C. Code § 22-936(b) (making it a felony with a maximum term of imprisonment of 10 years if "serious bodily injury or severe mental distress" results). In the revised neglect of a vulnerable adult or elderly person statute, risk of mental harm that does not satisfy the definition of "serious mental injury" may be covered by attempted criminal neglect of a vulnerable adult or elderly person, or as third degree abuse of a vulnerable adult or elderly person in RCC § 22E-1503.

[27] D.C. Code § 16-2301(31) ("The term 'mental injury' means harm to a child's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition.").

[28] D.C. Code § 22-934.

[29] This principle is reflected in the current version of the draft general provision on omission liability. See RCC § 202(c), (d) ("(c) 'Omission' means a failure to act when (1) a person is under a legal duty to act and (2) the person is either aware that the legal duty to act exists or, if the person lacks such awareness, the

superfluous, given that neglect of a vulnerable adult or elderly person offenses usually will involve an omission, the revised statute explicitly codifies "fail[ing] to remedy" or "fail[ing] to remedy" as a basis for liability. The change clarifies the revised statute.

Second, the revised criminal neglect of a vulnerable adult or elderly person statute clarifies the scope of the defense for religious prayer in lieu of medical treatment in the current abuse of a vulnerable adult or elderly person statute. Current D.C. Code § 22-935 exempts from liability for neglect of a vulnerable adult or elderly person anyone who "provides or permits to be provided treatment by spiritual means through prayer alone in accordance with a religious method of healing, in lieu of medical treatment."[30] However, for the spiritual healing exemption to apply, a person must have the "express consent" of the vulnerable adult or elderly person or act "in accordance with the practice of the vulnerable adult or elderly person."[31] There is no DCCA case law interpreting this exception. The revised criminal neglect of a vulnerable adult or elderly person statute clarifies that "effective consent" by the complainant, or reasonable belief that the complainant gave "effective consent," to the administration of religious prayer alone, is required. The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, a coercive threat, or deception. The prefatory language in subsection (d)(1) clarifies that any other general defenses under District law continue to be available to a defendant in an abuse of a vulnerable adult or elderly person statute prosecution. Subsection (d)(2) further clarifies the burden of proof for the defense, consistent with current District practice.[32] This change improves the clarity and completeness of the revised statute.

Third, the revised criminal neglect of a vulnerable adult or elderly person statute requires that the defendant have a "responsibility under civil law for the health, welfare, or supervision" of the vulnerable adult or elderly person and applies a recklessly culpable mental state to this element. The current neglect of a vulnerable adult or elderly person statute requires that the defendant "willfully or through a wanton, reckless, or willful indifference fails to discharge a duty" to provide necessary care and services to a vulnerable adult or elderly person. The extent of such care and services, however, is unclear under the statute, and "duty to provide care and services" is not statutorily defined. In addition, it is unclear as to whether any of these culpable mental states apply to the fact that the defendant has a duty to provide such care and services. There is no DCCA case law on point, but the DCCA has generally found that "wanton, reckless, or

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person is culpably unaware that the legal duty to act exists. (d) For purposes of this Title, a legal duty to act exists when: (1) The failure to act is expressly made sufficient by the law defining the offense; or (2) A duty to perform the omitted act is otherwise imposed by law.").

[30] D.C. Code § 22-935.

[31] D.C. Code § 22-935.

[32] D.C. Crim. Jur. Instr. § 9-320 ("The government must prove beyond a reasonable doubt that [name of complainant] did not voluntarily consent to the acts [or that [name of defendant] did not reasonably believe [name of complainant] was consenting].").

willful indifference" requires a mental state similar to recklessness.[33] To resolve these ambiguities, the revised statute requires that the defendant is reckless as to the fact he or she has a "responsibility under civil law for the health, welfare, or supervision" of the vulnerable adult or elderly person. While generally corresponding to the language of the current statute, including duties pertaining to "supervision" may slightly expand liability for failure to provide services or care. The RCC also applies a culpable mental state of recklessness to the fact that the complainant has a responsibility under civil law for the health, welfare, or supervision of the complainant because this matches the culpable mental state as to the fact that the complainant is a vulnerable adult or elderly person. Logically, the mental state as to the duty of care should match the mental state as to the attribute that gives rise to the duty. This change improves the clarity and completeness of the revised statute.

Fourth, the revised criminal neglect of a vulnerable adult or elderly person statute codifies a "reckless" culpable mental state, defined in RCC § 22E-206, with respect to creating or failing to mitigate or remedy a risk, or to provide essential care or items. The current neglect of a vulnerable adult or elderly person statute prohibits failing to discharge a duty to provide necessary care and services "willfully or through wanton, reckless or willful indifference,"[34] but does not define any of these terms. The DCCA in *Tarpeh v. United States* discussed the meaning of "reckless" under the statute and said that it is a "state of mind that falls somewhere between simple negligence . . . and an intentional or willful decision to cause harm to a person."[35] The court stated that to prove "reckless indifference" in the neglect of a vulnerable adult or elderly person statute, "the evidence, as found by the trier of fact, must show not only that the actor did not care about the consequences of his or her actions, but also that the actor was consciously aware of risks involved in light of known alternative courses of action."[36] In *Tarpeh,* the DCCA explicitly referred to the Model Penal Code definition of "reckless," which requires the defendant to "consciously disregard[] a substantial and *unjustified* risk that the material element exists or will result from his conduct."[37] The revised criminal neglect of a vulnerable adult or elderly person applies a "reckless" culpable mental state as defined in RCC § 22E-206, which is similar to the Model Penal Code.[38] This change improves the clarity of the revised statute.

Fifth, the revised criminal neglect of a vulnerable adult or elderly person statute requires a "recklessly" culpable mental state as to the risk of physical or mental injury. The current neglect of a vulnerable adult or elderly person statute requires proof that the defendant "willfully or through a wanton, reckless, or willful indifference fails to discharge a duty" to provide necessary care and services to a vulnerable adult or elderly person. However, the statute is unclear as to whether any of these culpable mental states

[33] In *Tarpeh v. United States*, the DCCA held that "reckless indifference" requires not only "that the actor did not care about the consequences of his or her actions, but also that the actor was consciously aware of the risks involved in light of known alternative courses of action." *Tarpeh v. United States*, 62 A.3d 1266, 1271 (D.C. 2013).
[34] D.C. Code § 22-934.
[35] *Tarpeh*, 62 A.2d at 1270.
[36] *Tarpeh*, 62 A.2d at 1270.
[37] *Tarpeh*, 62 A.2d at 1270 (emphasis in original).
[38] See Commentary to RCC § 22E-206.

applies to the fact that, per the penalty gradations, the neglect causes "serious bodily injury or severe mental distress"[39] or "permanent bodily harm or death."[40] DCCA case law has not specifically addressed whether a culpable mental state applies to the penalty gradations, but has found that "reckless indifference" with respect to the failure to provide care and services in the current offense requires something similar to recklessness.[41] The revised statute provides that the standard culpable mental state of "recklessly" applies to the resulting risk of physical or mental harm. This change improves the clarity and proportionality of the revised statute.

[39] D.C. Code § 22-936(b).
[40] D.C. Code § 22-936(c).
[41] In *Tarpeh v. United States*, the DCCA held that "reckless indifference" requires not only "that the actor did not care about the consequences of his or her actions, but also that the actor was consciously aware of the risks involved in light of known alternative courses of action." *Tarpeh v. United States*, 62 A.3d 1266, 1271 (D.C. 2013).

RCC § 22E-1601. Forced Labor or Services.

Explanatory Note. *This section establishes the forced labor or services offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly causing another person to engage in labor or services either by means of coercive threat or debt bondage. This offense replaces the forced labor offense in the current D.C. Code,[1] and attempt and penalty provisions relevant to that offense which are separately codified in the current D.C. Code.[2]*

Paragraph (a)(1) specifies that forced labor or services requires that an actor knowingly causes a person to engage in labor or services. The paragraph specifies that a "knowingly" culpable mental state applies, a defined term[3] which requires that the accused was practically certain that he or she would cause a person to engage in labor or services. The terms "labor" and "services" are defined under RCC § 22E-701.[4]

Paragraph (a)(2) specifies that forced labor or services requires that the accused cause another person to engage in labor or services either by means of a coercive threat or debt bondage. "Coercive threat" is defined under RCC § 22E-701, and is comprised of seven different forms of threats. "Debt bondage" is also defined under RCC § 22E-701, and requires that the person perform labor or services to pay off a real or alleged debt under one of three specified circumstances.[5] Per the rule of construction under RCC § 22E-207, the "knowingly" culpable mental state also applies to this element. The accused must be practically certain both that he or she is using coercive threats or debt bondage, and that the coercive or debt bondage *causes* the other person to engage in labor or services.

Subsection (b) specifies relevant penalties for the offense.

Subsection (c) provides penalty enhancements applicable to this offense. If a person commits forced labor or services and was reckless as to the complainant being under 18 years of age, an enhancement of one penalty class applies. "Reckless" is a defined term,[6] here requiring that the defendant was aware of a substantial risk that the complainant was under 18 years of age and such conduct deviated from a reasonable standard of care. Alternatively, if the actor held the complainant or caused the complainant to provide labor or services for a total of more than 180 days, the offense classification may be increased in severity by one class.[7] Per the rule of construction in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (c)(1) applies to the

[1] D.C. Code § 22-1832.
[2] D.C. Code § 22-1837.
[3] RCC § 22E-206(b).
[4] For further discussion on these terms, see Commentary to RCC § 22E-701.
[5] Debt bondage requires that complainant provides labor, services, or commercial sex acts to satisfy a debt and one of the following conditions apply: 1) the value of the labor, services, or commercial sex acts, as reasonably assessed, is not applied toward the liquidation of the debt; 2) the length and nature of the labor, services, or commercial sex acts are not respectively limited and defined; or 3) the amount of the debt does not reasonably reflect the value of the items or services for which the debt was incurred.
[6] RCC § 22E-206 (d).
[7] This enhancement may apply if the combined time in which a person was held and provided labor or services is greater than 180 days, even if the person did not provide labor or services for the entire time. If a person was held for 100 days, and provided labor or services for 81 days, this penalty enhancement would apply.

conduct in paragraph (c)(2). Even if both penalty enhancements are proven, the most the penalty can be increased is one class. The penalty enhancement under subsection (c) shall be applied in addition to any general penalty enhancements in RCC §§ 22E-605-608.

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

Subsection (e) specifies that threats of ordinary and legal employment actions are not a basis for liability under the forced labor or services statute. Such threats, which otherwise might satisfy the requirement of a coercive threat, may be a sufficient basis for other human trafficking offenses.[8]

Relation to Current District Law. *The revised forced labor or services statute changes current District law in three main ways.*

First, by reference to the RCC's "coercive threats" definition, the forced labor or services statute does not provide liability for causing another to provide labor or services by fraud or deception. The current statutory definition of "coercion" includes "fraud or deception,"[9] and by extension the current forced labor or services statute includes using fraud or deception to cause a person to provide labor or services. By contrast, the RCC's "coercive threats" definition does not include fraud or deception,[10] and such conduct is not a sufficient basis for forced labor or services liability. A person who uses deception or fraud to cause another person to engage in labor or services has not committed forced labor or services unless that person also uses one of the other coercive means listed in the RCC's definition or holds another person in debt bondage.[11] While using deception to cause another to engage in labor or services is wrongful, it does not warrant equal punishment to using coercive threats or debt bondage and could provide major felony liability for common employment disputes.[12] Rather, a person who causes another to provide labor or services through fraud or deception may still be liable under the RCC's revised fraud[13] statute, a property offense with penalties based on the economic harm suffered. This change improves the penalty proportionality of the revised offense.

Second, by reference to the RCC's "coercive threats" definition, the revised forced labor or services offense criminalizes restricting another person's access to a controlled substance that the person owns or to prescription medication that the person owns. The current D.C. Code statutory definition of "coercion" in the human trafficking

[8] Threats that go beyond ordinary and legal employment actions are subject to liability. For example, the exception under this provision would not apply to a store manager who threatens to fire an employee unless that employee agrees to work for 24 hours without respite.

[9] D.C. Code § 22-1831 (3)(D).

[10] RCC § 22E-701.

[11] Forced labor may involve deceptive or fraudulent conduct *in addition* to other coercive means. For example, a person who initially lures a laborer with the false promise of high wages, and then coerces the laborer to provide labor or services under threat of bodily injury could be convicted under the RCC's forced labor statute. *E.g.*, *United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004).

[12] For instance, under the current statutory definition of "coercion," a person may be liable for forced labor or services, subject to a 20 year maximum imprisonment, for falsely stating the terms of an employee's advancement eligibility or scope of work duties at the time of hiring.

[13] RCC §22E-2201. The revised fraud statute criminalizes taking property of another by means of deception. The term "property" is defined as "anything of value" including "services[.]" RCC § 22E-701.

chapter provides liability for "facilitating or controlling" a person's access to any controlled substance or addictive substance. These terms are not defined by statute and have not been interpreted by the DCCA. By contrast, the revised forced labor or services offense only provides liability for threatening to restrict a person's access to controlled substances that the person owns or prescription medication that the person owns.[14] Restricting a person's access to a controlled substance or prescription medication that the person does not yet own does not constitute this form of per se coercive threat.[15] Similarly, restricting a person's access to an addictive substance that is not a controlled substance or prescription medication also does not constitute this form of per se coercive threat. This change likely eliminates liability for compensating someone with a controlled substance or prescription medication as part of an otherwise clear and consensual transaction,[16] and precludes arguments that an employer's attempts to limit an employee's access to legal and readily available addictive substances like tobacco or alcohol constitute forced labor or services.[17] However, in some circumstances, such conduct may still fall within another per se form of coercive threat or the catch-all form of coercive threat. [18] Eliminating the facilitation of access to any addictive substance as a form of coercive threat prevents the possibility of criminalizing relatively less coercive conduct.[19] This change improves the clarity and proportionality of the revised statute.

Third, the revised forced labor or services offense authorizes enhanced penalties if the accused was reckless as to whether the complainant was under 18 years of age. The current forced labor offense does not authorize enhanced penalties based on the age of the complainant. The D.C. Code includes a general penalty enhancement for "crimes of violence" committed against persons under the age of 18, but forced labor is not currently listed in the definition of a "crime of violence."[20] By contrast, the revised forced labor or services offense provides a penalty enhancement based on the complainant being a minor. This change improves the consistency and proportionality of the revised statutes.

Five other changes to the forced labor statute may constitute a substantive change to current District law.

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[14] A person can satisfy this subsection by providing a controlled substance, so long as that person explicitly or implicitly threatens that his or her access to those substances will be limited. For example, a person can behave coercively by giving heroin to a heroin addict to compel him to behave in a particular way if the person causes the addict to fear that his access to heroin will be limited in the future.

[15] For example, a drug trafficker refusing to sell a controlled substance to a person does not constitute this form of coercive threat.

[16] For example, compensating a person with a controlled substance may constitute "facilitation" under the current forced labor statute due to the definition of "coercion."

[17] For example, an employer who predicates a person's employment on not smoking tobacco or drinking alcohol may be liable for "controlling" the employee's access to the substance.

[18] For example, if a person is severely addicted to a controlled substance, and relies on the actor as the sole provider of that substance, threatening to restrict the person's access to that substance may in some cases constitute a coercive threat under the catch all provision.

[19] For example, under current law inducing a person who is a regular tobacco user to perform any service by offering cigarettes in exchange arguably constitutes forced labor, an offense punishable by up to 20 years imprisonment. In addition, although alcohol is an addictive substance, it is not a controlled substance and thus is readily available. Facilitating a person's access to alcohol is not inherently coercive, as it is relatively easy for a person to obtain alcohol by other means, as compared to controlled substances.

[20] D.C. Code § 22-1331 (4).

First, by reference to the RCC's definitions of "labor" and "services", the revised forced labor or services offense specifically excludes causing a person to engage in commercial sex acts. The current D.C. Code forced labor statute and relevant definitions refer generally to labor and services without specifying whether commercial sex acts are included. Neither DCCA case law nor legislative history addresses the matter.[21] However, it is notable that the D.C. Code human trafficking statutes sometimes appear to use the term "labor" as if it did not include commercial sex acts.[22] By contrast, the revised definitions of "labor" and "services" explicitly exclude commercial sex acts, and the revised forced labor or services statute's use of those definitions explicitly excludes the use of coercion or debt bondage to cause another to engage in commercial sex acts. Such conduct instead is criminalized under the RCC's forced commercial sex offense.[23] This change improves the clarity and consistency of the revised offenses, and reduces unnecessary overlap.

Second, by reference to the RCC's definition of "coercive threats," forced labor or services includes causing a person to engage in labor or services by threatening that any person will "commit any criminal offense against persons" or "property offense[.]"[24] The current "coercion" definition does not explicitly include threats to "commit any criminal offense against persons" but does include threats of "force" and "threats of physical restraint," conduct that appears to constitute the criminal offenses of assault, kidnapping, or criminal restraint. In addition, the current statutory definition of "coercion" generally includes "serious harm or threats of serious harm," which broadly covers "any harm . . . that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm."[25] The revised definition of "coercive threats" and the RCC crime of forced labor or services together specify that a threat to commit any criminal offense against persons is categorically a basis for liability, even if it would otherwise be unclear whether the crime would constitute "serious harm" under the residual clause in paragraph (2)(G) of the coercion definition. This change improves the clarity and consistency of the revised statutes.

Third, the revised statute specifies that threats of ordinary and legal employment actions are not a basis for liability under the forced labor or services statute. The current D.C. Code "coercion" definition includes "serious harm," which is defined as "any harm . . . that is sufficiently serious under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or

[21] At least one federal circuit court has held that the federal forced labor statute includes coercing another person into engaging in commercial sex acts. *United States v. Kaufman*, 546 F.3d 1242, 1260 (10th Cir. 2008) (holding that the term "labor" as used in the federal forced labor statute includes induced nudity and sexual acts recorded on video).

[22] *E.g.*, D.C. Code § 22-1833, entitled "Trafficking in labor or commercial sex acts" includes as an element that, "Coercion will be used or is being used to cause the person to provide labor or services or to engage in a commercial sex act". The specification of both "labor" and "commercial sex act" in the offense suggests the former does not include the latter.

[23] RCC § 22E-1602.

[24] RCC § 22E-701.

[25] D.C. Code § 22-1831 (7).

to continue to perform labor, services, or commercial sex acts to avoid incurring that harm."[26] There is no relevant DCCA case law as to whether legal employment actions could be sufficient to compel a reasonable person to perform labor or services. The revised statute prevents liability for forced labor or services where the coercion consists only of ordinary and legal employer demands. Such conduct does not warrant criminalization as a serious felony. This change improves the clarity and proportionality of the revised statute.

Fourth, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in labor or services for a total of more than 180 days. The D.C. Code forced labor, trafficking in labor or commercial sex, and sex trafficking of children statutes are subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[27] However, the current statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in labor or services in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities, the revised statute specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in labor or services for a total number of days exceeds that180. This change clarifies and may improve the proportionality of the revised statute.

Fifth, the revised offense allows for offense-specific penalty enhancements and general penalty enhancements. The current D.C. Code forced labor, trafficking in labor or commercial sex, and sex trafficking of children statutes are subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[28] However, neither this penalty enhancement nor other general penalty enhancements defined in the D.C. Code applicable to human trafficking specify how the enhancements interrelate—e.g., whether multiple enhancements can be applied, and to what effect. DCCA case law does not specifically address the relationship between the penalty enhancements applicable to human trafficking statutes specifically, and the D.C. Code provisions concerning repeat offender enhancements,[29] hate crime enhancements,[30] and pretrial release penalty enhancements.[31] To resolve this ambiguity, the revised statute specifies that the revised statute's penalty enhancements apply in addition to any general penalty enhancements based on RCC § 22E-605 Limitations on Penalty Enhancements, § 22E-606 Repeat Offender Penalty Enhancements, § 22E-607 Hate Crime Penalty Enhancement, or § 22E-608 Pretrial Release Penalty Enhancements. This change improves the clarity and may improve the proportionality of the revised statute.

One other change to the forced labor statute is clarificatory, and is not intended to change current District law.

[26] *Id.*

[29] D.C. Code §§ 22-1804; 22-1804a.
[30] D.C. Code §§ 22-3701; 22-3702; 22-3703.
[31] D.C. Code § 23-1328.

The revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[32] "Actor" is a defined term[33], which means "a person accused of any offense." The term "person" is also a defined term[34], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[32] D.C. Code § 22-1832.
[33] RCC § 22E-701.
[34] RCC § 22E-701.

RCC § 22E-1602. Forced Commercial Sex.

Explanatory Note. *This section establishes the forced commercial sex offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly causing a person to engage in a commercial sex act by means of coercive threat, or through debt bondage. There is no analogous offense under the current human trafficking chapter, although conduct constituting forced commercial sex may violate the current forced labor statute. This offense also replaces aspects of several offenses in chapter 27 of the current D.C. Code, including: conduct to "compel" or attempt to compel a person into prostitution under the pandering statute;*[1] *compelling an individual to live life or prostitution against his or her will;*[2] *and causing a spouse or domestic partner "by force, fraud, coercion, or threats…to lead a life of prostitution."*[3] *To the extent that certain statutory provisions authorizing extended periods of supervised release*[4] *apply to the current forced labor or services statute, these provisions are replaced in relevant part by the revised offensive forced commercial sex offense.*

Paragraph (a)(1) specifies that forced commercial sex requires that an actor knowingly causes the complainant to engage in a commercial sex act with another person.[5] The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the accused was practically certain that he or she would cause another

[1] D.C. Code §22-2705. The pandering statute makes it a crime to "cause, compel . . . or attempt to cause or compel . . . any individual . . . to engage in prostitution[.]" The precise effect on D.C. law is unclear, as the D.C. Court of Appeals has not clearly defined what constitutes "compelling" a person to engage in prostitution. It is possible that some coercive means that would constitute "compelling" under the pandering statute do not fall within the revised "coercive threat" definition. In addition, the pandering statute provides for enhanced penalties when the person caused or compelled to engage in prostitution is under the age of 18. D.C. Code §22-2705 (2). The penalty provision under the RCC's forced commercial sex statute replaces this provision in the current pandering statute.

[2] D.C. Code § 22-2706. This statute makes it a crime to "by threats or duress, to detain any individual against such individual's will, for the purpose of prostitution or a sexual act or sexual contact, or to compel any individual against such individual's will, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact." This conduct may also be criminalized under the RCC's kidnapping statute, RCC § 22E-1401 or criminal restraint statute, RCC § 22E-1402.

[3] D.C. Code § 22-2708. This statute makes it a crime to "by force, fraud, intimidation, or threats, places or leaves, or procures any other person or persons to place or leave, a spouse or domestic partner in a house of prostitution, or to lead a life of prostitution[.]" This conduct will be criminalized under the RCC's forced commercial sex statute. However, the RCC's forced commercial sex statute is narrower than § 22-2708. The forced commercial sex statute does not criminalize causing another person to provide commercial sex acts by means of deception or fraud.

[4] D.C. Code § 24-403.01(b)(4) (" In the case of a person sentenced for an offense for which registration is required by the Chapter 40 of Title 22, the court may, in its discretion, impose a longer term of supervised release than that required or authorized by paragraph (2) or (3) of this subsection, of: . . . **(A)** Not more than 10 years[.]" D.C. Code §22-4001(8) defines "registration offense" to include "Any offense under the District of Columbia Official Code that involved a sexual act or sexual contact without consent or with a minor[.]" To the extent the current forced labor or services offense covers sexual acts or contacts without consent, D.C. Code § 22-403.01 may authorize an extended period of supervised release.

[5] An actor who uses a coercive threat to compel a person to engage in a commercial sex act with *the actor* himself or herself may be subject to liability under sex assault offenses defined under Chapter 13.

person to engage in a commercial sex act. The term "commercial sex act" is defined under RCC § 22E-701.[6]

Paragraph (a)(2) specifies that forced commercial sex requires that the actor cause the complainant to engage in a commercial sex act by means of a coercive threat or debt bondage. "Coercive threat" is defined under RCC § 22E-701 and includes multiple per se types of threats, as well as a flexible standard referring to a threat of any harm sufficiently serious to cause a reasonable person in the complainant's situation to comply.[7] "Debt bondage" is also defined under RCC § 22E-701 and requires that the person perform labor or services to pay off a real or alleged debt under one of three specified circumstances.[8] Per the rule of construction under RCC § 22E-207, the "knowingly" culpable mental state also applies to this element. The accused must be practically certain both that he or she is using coercive threats or debt bondage, and that the coercive threat or debt bondage *causes* the other person to engage in a commercial sex act.

Subsection (b) specifies relevant penalties for the offense.

Subsection (c) provides penalty enhancements applicable to this offense. Paragraph (c)(1) specifies that if a person commits forced commercial sex and was reckless as to the complainant being under 18 years of age, an enhancement of one penalty class applies. "Reckless" is a defined term,[9] here requiring that the accused was aware of a substantial risk that the complainant was under 18 years of age and such conduct deviated from a reasonable standard of care. Alternatively, paragraph (c)(1) also specifies that if a person commits forced commercial sex, and in fact, the complainant is under the age of 12, an enhancement of one penalty class applies. The term "in fact" specifies that no culpable mental state is required as to the complainant being under the age of 12. Paragraph (c)(2) specifies that if the actor held the complainant or caused the complainant to engage in commercial sex acts for a total of more than 180 days, the offense classification may be increased in severity by one class.[10] Per the rule of construction in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (c)(1) applies to the conduct in paragraph (c)(2). Even if more than one penalty enhancement is proven, the most the penalty can be increased is one class. The penalty enhancement under subsection (c) shall be applied in addition to any general penalty enhancements in RCC §§ 22E-605-608.

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

Relation to Current District Law. *The RCC's forced commercial sex act offense changes current District law in three main ways.*

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[6] For further discussion of these terms, see Commentary to RCC § 22E-1601.
[7] For further discussion of this term, see Commentary to RCC § 22E-701.
[8] For further discussion of this term, see Commentary to RCC § 22E-701.
[9] RCC § 22E-206.
[10] This enhancement may apply if the combined time in which a person was held and engaged in commercial sex acts is greater than 180 days, even if the person did not engage in commercial sex acts for the entire time. If a person was held for 100 days, and engaged in commercial sex acts for 81 days, this penalty enhancement would apply.

First, RCC forced commercial sex act creates a standardized penalty and enhancements for coercing or using debt bondage to cause a person to engage in a commercial sexual act. Although the current human trafficking chapter does not have a separate forced commercial sex offense, conduct constituting forced commercial sex could be charged under several current Chapter 27 offenses, with maximum sentences ranging from five years[11] to twenty years.[12] In contrast, the revised forced commercial sex act provides a single penalty, with applicable enhancements. This change improves the consistency and proportionality of the revised statutes.

Second, by reference to the RCC's "coercive threats" definition, the forced commercial sex statute criminalizes restricting another person's access to a controlled substance that the person owns or to prescription medication that the person owns. The current D.C. Code statutory definition of "coercion" in the human trafficking chapter provides liability for "facilitating or controlling" a person's access to any controlled substance or addictive substance. These terms are not defined by statute and have not been interpreted by the DCCA. By contrast, the forced commercial sex offense only provides liability for threatening to restrict a person's access to controlled substances that the person owns or prescription medication that the person owns.[13] Restricting a person's access to a controlled substance or prescription medication that the person does not yet own does not constitute this form of per se coercive threat.[14] Similarly, restricting a person's access to an addictive substance that is not a controlled substance or prescription medication also does not constitute this form of per se coercive threat. This change likely eliminates liability for compensating someone with a controlled substance or prescription medication as part of an otherwise clear and consensual transaction,[15] and precludes arguments that an actor's attempts to limit an another person's access to legal and readily available addictive substances like tobacco or alcohol constitute forced commercial sex.[16] However, in some circumstances, such conduct may still fall within another per se form of coercive threat or the catch-all form of coercive threat.[17] Eliminating the facilitation of access to any addictive substance as a form of coercive threats prevents the possibility of criminalizing relatively less coercive conduct.[18] This change improves the clarity and proportionality of the revised statute.

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[11] D.C. Code § 22-2705.

[12] D.C. Code § 22-2706.

[13] A person can satisfy this subsection by providing a controlled substance, so long as that person explicitly or implicitly threatens that his or her access to those substances will be limited. For example, a person can behave coercively by giving heroin to a heroin addict to compel him to behave in a particular way if the person causes the addict to fear that his access to heroin will be limited in the future.

[14] For example, a drug trafficker refusing to sell a controlled substance to a person does not constitute this form of coercive threat.

[15] For example, compensating a person with a controlled substance may constitute "facilitation" under the current forced labor statute due to the definition of "coercion."

[16] For example, an actor who limits a person's access to tobacco or alcohol may be liable for "controlling" the person's access to the substance.

[17] For example, if a person is severely addicted to a controlled substance, and relies on the actor as the sole provider of that substance, threatening to restrict the person's access to that substance may in some cases constitute a coercive threat under the catch all provision.

[18] For example, under current law inducing a person who is a regular tobacco user to perform any service by offering cigarettes in exchange arguably constitutes forced labor, an offense punishable by up to 20

Third, the revised forced commercial sex offense authorizes enhanced penalties if the accused was reckless as to whether the complainant was under 18 years of age, or if the complainant was, in fact, under 12 years of age. It is unclear if the current forced labor and services statute criminalizes forced commercial sex acts, but even if it does, the current forced labor and services statute offense does not authorize enhanced penalties based on the age of the complainant. The D.C. Code includes a general penalty enhancement for "crimes of violence" committed against persons under the age of 18, but forced labor or services is not currently not a "crime of violence."[19] By contrast, the revised trafficking in commercial sex offense provides a penalty enhancement based on recklessness as to whether the complainant was under the age of 18, or based on strict liability if the complainant was under the age of 12. This change improves the consistency and proportionality of the revised statutes.

Eight other changes to the forced commercial sex statute may constitute a substantive change to current District law that improve the clarity, consistency, and proportionality of the revised offense, and eliminate overlap with other offenses.

First, by reference to the RCC's definition of "coercive threats," the forced commercial sex statute does not provide liability for causing another to engage in commercial sex by fraud or deception. The current forced labor offense criminalizes using "coercion to cause person to provide labor or services"[20] and "coercion" is defined to include "fraud or deception."[21] If commercial sex acts fall within the definition of "labor or services," then under current law using fraud or deception to cause a person to engage in commercial sex acts constitutes forced labor. However, the current code does not specify whether "labor or services" includes commercial sex acts, and there is no relevant DCCA case law. The RCC's "coercive threats" definition does not include fraud or deception,[22] and such conduct is not a sufficient basis for forced commercial sex liability. A person who uses deception or fraud to cause another person to engage in commercial sex has not committed forced commercial sex unless that person also uses one of the other coercive means listed in the RCC's definition or holds another person in debt bondage.[23] While using deception to cause another to engage in commercial sex is wrongful, it does not warrant equal punishment to using other means of coercion or debt bondage and could provide major felony liability for what amount to disputes over payments for consensual commercial sex.[24] Rather, a person who causes another to engage in commercial sex through fraud or deception may still be liable under the RCC's

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years imprisonment. In addition, although alcohol is an addictive substance, it is not a controlled substance and thus is readily available. Facilitating a person's access to alcohol is not inherently coercive, as it is relatively easy for a person to obtain alcohol by other means, as compared to controlled substances.

[19] D.C. Code § 22-1331 (4).

[20] D.C. Code § 22-1832.

[21] D.C. Code § 22-1831.

[22] RCC § 22E-1601.

[23] Forced commercial sex may involve deceptive or fraudulent conduct *in addition* to other coercive means. For example, if a person initially lures a sex worker with the false promise of high wages, and then coerces the person to provide labor under threat of bodily injury could be convicted under the RCC's forced commercial sex statute. *E.g.*, *United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004).

[24] For instance, under the current statutory definition of "coercion," a person would coerce another if he or she causes that person to engage in a commercial sex act by a lie about how much would be paid.

revised fraud[25] statute, a property offense with penalties based on the economic harm suffered. This change improves the penalty proportionality of the revised statutes.

Second, by reference to the RCC's definition of "coercive threats" the forced commercial sex offense includes causing a person to engage in a commercial sex act by threatening that any person will "commit any criminal offense against persons" or "property offense[.]"[26] The current "coercion" definition does not explicitly include threats to "commit any criminal offense against persons" but does include threats of "force, threats of force, physical restraint, or threats of physical restraint," conduct that appears to constitute the criminal offenses of assault or kidnapping. In addition, the current statutory definition of "coercion" generally includes "serious harm or threats of serious harm," which broadly covers "any harm . . . that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm."[27] By contrast, the revised definition of "coercive threats" and the RCC crime of forced commercial sex together specify that a threat to commit any offense against persons or property offense is categorically a basis for liability, even if it would otherwise be unclear whether the crime would constitute "serious harm" under the residual clause in paragraph (2)(G) of the current coercion definition. This change improves the clarity and consistency of the revised statutes.

Third, by reference to the revised definitions of "coercive threats" and "debt bondage," the RCC forced commercial sex act offense specifies what types of conduct constitute a crime when used to compel a person to engage in prostitution. Various offenses under Chapter 27 of the current D.C. Code make it a crime to "compel" a person to "engage in prostitution"[28]; "by threats or duress, to detain any individual against such individual's will for the purpose of prostitution or a sexual act or sexual contact"[29]; to "compel any individual, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact"[30]; or to use "force, fraud, intimidation, or threats" to "place[] or leave[] . . . a spouse or domestic partner in a house of prostitution, or to lead a life of prostitution[.]"[31] The current D.C. Code does not define the terms "threats," "duress," "detain," "force," "fraud," or "intimidation" for the as used in Chapter 27, and there is no relevant D.C. Court of Appeals (DCCA) case law interpreting these terms. In contrast, the RCC precisely defines the meaning of coercive threats and debt bondage, and clearly defines what means of compelling a person to engage in a commercial sex act constitutes a criminal offense. This change improves the clarity and consistency of the revised statutes.

Fourth, the RCC forced commercial sex act offense requires a person to act with a "knowing" culpable mental state. Statutes under Chapter 27[32] that are replaced in whole

[25] RCC §22E-2201. The revised fraud statute criminalizes taking property of another by means of deception. The term "property" is defined as "anything of value" including "services[.]" RCC § 22E-701.
[26] RCC § 22E-701.
[27] D.C. Code § 22-1831 (7).
[28] D.C. Code § 22-2705.
[29] D.C. Code § 22-2706.
[30] *Id*.
[31] D.C. Code § 22-2708.
[32] D.C. Code § 22-2705; D.C. Code § 22-2706; D.C. Code 22-2708.

or in part by the RCC's forced commercial sex offense do not specify culpable mental states, and there is no relevant DCCA case law on this issue. In contrast, the RCC forced commercial sex act offense specifies one consistent, defined culpable mental state. Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[33] This change improves the clarity, consistency, and proportionality of the revised statutes.

Fifth, the RCC forced commercial sex act offense requires only a single commercial sexual act for liability. Offenses under Chapter 27 criminalize detaining a person "for the purpose of prostitution,"[34] or compelling a person to "lead a life or prostitution,"[35] and make no reference to the number of occasions in which a person is compelled to engage in prostitution. There is no relevant DCCA case law on the unit of prosecution for these offenses, and it appears that compelling a person to engage in prostitution numerous times may constitute only a single violation of these statutes. In addition, it is possible that coercing a person to engage in a commercial sex act may constitute forced labor under the current statute.[36] However, the current forced labor statute does not specify whether commercial sex acts constitute labor or services, and if they do, whether multiple commercial sex acts may be prosecuted as more than one instance of forced labor. In contrast, the RCC forced commercial sex act offense provides liability for each separate commercial sexual act. This change improves the clarity and proportionality of the revised statutes.[37]

Sixth, the RCC forced commercial sex statute requires that the accused caused the complainant to engage in a commercial sex act *with another person.* It is unclear if the current forced labor or services statute criminalizes coerced commercial sex, and if it does, whether the accused must have caused the complainant engage in a commercial sex act with someone other than the accused. There is no relevant DCCA case law. To resolve this ambiguity, the revised statute specifies that the offense requires that the accused caused the person to engage in a commercial sex act with another person. This change improves the clarity of the revised statute, and reduces unnecessary overlap.

Seventh, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in labor or services for a total of more than 180 days. The D.C. Code forced labor, trafficking in labor or commercial sex, and sex trafficking of children statutes are subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[38] However, the current

[33] *See*, *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[34] D.C. Code § 22-2706.
[35] *Id*.
[36] D.C. Code § 22-1832.
[37] Under the revised offense, a person who uses a coercive threat or debt bondage to compel another person to engage in more than one commercial sex act may be convicted for multiple counts of forced commercial sex. However, whether multiple convictions are permitted in a given case is governed by the merger analysis set for under RCC § 22E-214.

statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in labor or services in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities, the revised statute specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in commercial sex acts for a total number of days exceeds that 180. This change clarifies and may improve the proportionality of the revised statute.

Eighth, the revised offense allows for offense-specific penalty enhancements and general penalty enhancements. The current D.C. Code forced labor, trafficking in labor or commercial sex, and sex trafficking of children statutes are subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[39] However, neither this penalty enhancement nor other general penalty enhancements defined in the D.C. Code applicable to human trafficking specify how the enhancements interrelate—e.g., whether multiple enhancements can be applied, and to what effect. DCCA case law does not specifically address the relationship between the penalty enhancements applicable to human trafficking statutes specifically, and the D.C. Code provisions concerning repeat offender enhancements,[40] hate crime enhancements,[41] and pretrial release penalty enhancements.[42] To resolve this ambiguity, the revised statute specifies that the revised statute's penalty enhancements apply in addition to any general penalty enhancements based on RCC § 22E-605 Limitations on Penalty Enhancements, § 22E-606 Repeat Offender Penalty Enhancements, § 22E-607 Hate Crime Penalty Enhancement, or § 22E-608 Pretrial Release Penalty Enhancements. This change improves the clarity and may improve the proportionality of the revised statute.

Three changes to the forced commercial sex offense statute are clarificatory in nature and not intended to substantively change current District law.

First, the forced commercial sex offense explicitly criminalizes as a human trafficking offense causing a person to engage in commercial sex acts by means of coercive threat or debt bondage. It is unclear whether the current forced labor statute criminalizes the use of coercion or debt bondage to cause a person to engage in commercial sex acts. The current forced labor offense requires that the accused "use coercion to cause a person to provide labor or services" or to "keep any person in debt bondage."[43] However, the current D.C. Code does not specify whether "labor or "services" include commercial sex acts. "Labor" is currently defined as "work that has economic or financial value," and "services" is currently defined as "legal or illegal duties or work done for another, whether or not compensated." [44] There is no relevant D.C. DCCA case law. The current D.C. Code, however, contains several prostitution-related offenses that do appear to criminalize coercing a person to engage in commercial

[40] D.C. Code §§ 22-1804; 22-1804a.
[41] D.C. Code §§ 22-3701; 22-3702; 22-3703.
[42] D.C. Code § 23-1328.
[43] D.C. Code § 22-1832.
[44] D.C. Code § 22-1831.

sex acts.[45] The revised statute, however, specifies that the use of coercive threats to cause a person to engage in commercial sex is not only criminal, but a human trafficking offense. There is no clear justification for distinguishing the harm of using coercive threats to cause a person perform commercial sex when the complainant is a person who other times chooses to engage in commercial sex work from someone who has not engaged in such work. This change improves the clarity, organization, and proportionality of the revised statutes.

Second, the RCC defines a "commercial sex act" as "any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person."[46] Chapter 27 defines prostitution as "a sexual act or contact with another person in return for giving or receiving anything of value."[47] The RCC's definition of "commercial sexual act" definition is essentially equivalent to the current Chapter 27 definition of prostitution. The RCC's definition of "commercial sex act" is not intended to differ in any substantive way from the current code's definition of "prostitution."

Third, the revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[48] "Actor" is a defined term[49], which means "a person accused of any offense." The term "person" is also a defined term[50], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[45] D.C. Code §22-2705; D.C. Code §22-2706; D.C. Code §22-2708.
[46] RCC § 22E-701.
[47] D.C. Code § 22-2701.01(3).
[48] D.C. Code § 22-1832.
[49] RCC § 22E-701.
[50] RCC § 22E-701.

RCC § 22E-1603. Trafficking in Labor or Services.

Explanatory Note. *This section establishes the trafficking in labor or services offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly recruiting, enticing, housing, transporting, providing, obtaining, or maintaining another person, with intent that, as a result, anyone will cause that person to provide labor or services by means of coercive threat or debt bondage. Trafficking persons for commercial sex acts is criminalized under the separate trafficking in commercial sex offense. The RCC's trafficking in labor or services offense, along with the RCC's trafficking in commercial sex offense[1], replaces the trafficking in labor or commercial sex acts statute[2] under the current D.C. Code.*

Paragraph (a)(1) specifies that trafficking in labor or services requires that an actor knowingly recruits, entices, houses, transports, provides, obtains, or maintains by any means, a person. The words entice, transport, provide, obtain, and maintain by any means are intended to have the same meaning as under current law. The word "houses" is intended to include provision of shelter, even if only temporarily. Paragraph (a)(1) specifies that a "knowingly" culpable mental state applies, which requires that the accused was practically certain that he or she would entice, house, transport, provide, obtain, and maintain a person.

Paragraph (a)(2) specifies that the person must have acted "with intent that" the trafficked person will be caused, as a result, to provide labor or services by means of a coercive threat or debt bondage. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certaint that the trafficked person will be caused, as a result, to provide labor or services by means of a coercive threat or debt bondage. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the trafficked person actually performs labor or services, only that the actor believed to a practical certainty that he or she would do so. The words "as a result" require a nexus between the trafficking activity, and the labor or services that the trafficked person will perform. Housing, transporting, etc. a person in a manner that is unrelated to that person providing labor or services is not criminalized under this section, even if the actor was practically certain that the person would be caused to provide labor or services by means of coercive threat or debt bondage.[3]

Subsection (b) specifies relevant penalties for the offense.

Subsection (c) provides penalty enhancements applicable to this offense. If a person commits trafficking in labor or services and was reckless as to the complainant being under 18 years of age, an enhancement of one penalty class applies. "Reckless" is a defined term,[4] here requiring that the defendant was aware of a substantial risk that the

[1] RCC § 22E-1604.
[2] D.C. Code § 22-1833.
[3] For example, if a taxi driver gives a ride to a person running an errand, practically certain that the next day that person will be coerced into performing labor, if there is no relationship between that errand and the labor the person will perform, the taxi driver cannot be held liable for trafficking in labor or services.
[4] RCC § 22E-206 (d).

complainant was under 18 years of age and such conduct deviated from a reasonable standard of care. Alternatively, if the complainant was held or provides services for more a total of more than 180 days, the offense classification may be increased in severity by one class.[5] Per the rule of construction in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (c)(1) applies to the conduct in paragraph (c)(2). Even if both penalty enhancements are proven, the most the penalty can be increased is one class. The penalty enhancement under subsection (c) shall be applied in addition to any general penalty enhancements in RCC §§ 22E-605-608.

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

Relation to Current District Law. *The trafficking in labor or services offense changes current District law in six main ways.*

First, by reference to the RCC's definitions of "labor" and "services", the revised offense excludes liability for trafficking persons who will engage in commercial sex acts. The current trafficking in labor or commercial sex acts offense criminalizes trafficking persons who will engage in labor, services, *or* commercial sex acts.[6] In contrast, the RCC re-organizes the current trafficking in labor or commercial sex acts into two separate offenses. This change improves the organization of the revised offense.

Second, by reference to the RCC's "coercive threat" definition, the trafficking in labor or services statute does not provide liability for trafficking a person who will be caused to provide labor or services by fraud or deception. The current statutory definition of "coercion" includes "fraud or deception,"[7] and by extension the current trafficking in labor or commercial sex acts statute references using fraud or deception to cause a person to provide labor or service. By contrast, the RCC's "coercive threat" definition does not include fraud or deception,[8] and trafficking a person who will be tricked into performing labor or services is not a sufficient basis for liability under the revised trafficking in labor or services offense. The revised offense only provides liability for trafficking a person who will be caused to provide labor or services under threat of one of the means listed in the RCC's definition of "coercive threats," or by subjecting the person to debt bondage.[9] While using deception to cause another to engage in labor or services is wrongful, it does not warrant equal punishment to using other means of coercion or debt bondage and could provide major felony liability for

[5] This enhancement may apply if the combined time in which a person was held and provided labor or services is greater than 180 days, even if the person did not provide labor or services for the entire time. If a person was held for 100 days, and provided labor or services for 81 days, this penalty enhancement would apply.
[6] D.C. Code § 22-1833.
[7] D.C. Code § 22-1831 (3)(D).
[8] RCC § 22E-701.
[9] Trafficking in labor or services may involve deceptive or fraudulent conduct *in addition* to other coercive means. For example, a person who traffics a laborer knowing that he or she was initially lured with the false promise of high wages, and will be coerced into providing labor under threat of bodily injury could be convicted under the RCC's trafficking in labor or services statute. *E.g.*, *United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004).

common employment disputes and those engaged in such schemes.[10] Rather, a person who encourages or assists a person who causes another to provide labor or services through fraud or deception may still be liable as an accomplice[11] under the RCC's revised fraud[12] statute, a property offense with penalties based on the economic harm suffered. This change improves the penalty proportionality of the revised statute.

Third, by reference to the RCC's "coercive threat" definition, the revised trafficking in labor or services offense criminalizes trafficking when the coercion at issue is restricting another person's access to a controlled substance that the person owns or to prescription medication that the person owns. The current D.C. Code statutory definition of "coercion" in the human trafficking chapter provides liability for "facilitating or controlling" a person's access to any addictive substance. These terms are not defined by statute and have not been interpreted by the DCCA. By contrast, the revised trafficking in labor or services offense only provides liability for trafficking a person who will caused to provide labor or services under threat of restricting access to controlled substances that the person owns or prescription medication that the person owns. Restricting a person's access to a controlled substance or prescription medication that the person does not yet own does not constitute this form of per se coercive threat.[13] Similarly, restricting a person's access to an addictive substance that is not a controlled substance or prescription medication also does not constitute this form of per se coercive threat. This change likely eliminates liability for trafficking someone knowing that they will be compensated with a controlled substance or prescription medication as part of an otherwise clear and consensual transaction,[14] and precludes arguments that trafficking an employee knowing that an employer seeks to limit the employee's access to legal and readily available addictive substances like tobacco or alcohol constitutes trafficking in labor or services.[15] However, in some circumstances, such conduct may still fall within another per se form of coercive threat or the catch-all form of coercive threat.[16] Eliminating liability for trafficking where the harm is the facilitation of access to any addictive substance as a form of coercion prevents the possibility of criminalizing

[10] For instance, under the current statutory definition of "coercion," a person may be liable for trafficking in labor or commercial sex acts, subject to a [] year maximum imprisonment, for transporting a laborer to a job, knowing that the employer at the time of hire falsely stated the rate of pay or work duties that will be expected.

[11] RCC § 22E-210.

[12] RCC §22E-2201. The revised fraud statute criminalizes taking property of another by means of deception. The term "property" is defined as "anything of value" including "services[.]" RCC § 22E-701.

[13] For example, a drug trafficker refusing to sell a controlled substance to a person does not constitute this form of coercive threat.

[14] For example, compensating a person with a controlled substance may constitute "facilitation" under the current forced labor statute due to the definition of "coercion."

[15] For example, an employer who predicates a person's employment on not smoking tobacco or drinking alcohol may be liable for "controlling" the employee's access to the substance, and a person knowingly recruiting an employee into such circumstances may be liable for trafficking.

[16] For example, if a person is severely addicted to a controlled substance, and relies on the actor as the sole provider of that substance, threatening to restrict the person's access to that substance may in some cases constitute a coercive threat under the catch all provision.

relatively less coercive conduct.[17] This change improves the clarity and proportionality of the revised statute.

Fourth, the revised trafficking in labor or services offense requires that the accused acted *with intent* that the trafficked person will be caused to provide labor or services by means of coercive threat or debt bondage. The current statute includes acting "with reckless disregard of the fact that" coercion will be used to cause the person to provide labor or services. By contrast, the revised statute requires that the actor was practically certain that the complainant will be caused to perform labor or services by means of a coercive threat or debt bondage.[18] Requiring that the accused was at least practically certain that the person will be caused to provide labor or services by means of coercive threat or debt bondage may avoid disproportionate penalties for persons who were unaware that the person would be coerced into providing labor or services.[19] This change improves the proportionality of the revised statute.

Fifth, the revised trafficking in labor or services offense requires that an actor's trafficking activity occur with intent that the complainant *as a result will* provide labor or services. The current D.C. Code trafficking in labor or commercial sex acts statute does not specify any relationship between the transporting, housing, etc., and the performance of labor or services. Consequently, it appears that there is criminal liability when a person transports, houses, etc. a person in a manner that is entirely unrelated to the coerced labor or services.[20] The current D.C. Code statute also states that it applies when "coercion will be used or is being used."[21] By contrast, the revised statute requires a causal relationship between the trafficking activity, and the person performing labor or services. The actor's trafficking conduct need not be the sole or primary cause of the complainant being coerced by a threat or debt bondage, but there must be a causal link to a future result.[22] This revision excludes persons who may provide assistance to a

[17] For example, under current law inducing a person who is a regular tobacco user to perform any service by offering cigarettes in exchange arguably constitutes coercion, and knowingly recruiting a person into such employment an offense punishable by up to 20 years imprisonment. In addition, although alcohol is an addictive substance, it is not a controlled substance and thus is readily available. Facilitating a person's access to alcohol is not inherently coercive, as it is relatively easy for a person to obtain alcohol by other means, as compared to controlled substances.

[18] For example, if a taxi driver overhears his passenger make comments which suggest that upon arrival at her destination, she may be coerced into performing labor or services, the driver is not guilty of trafficking in labor or services if the driver is only aware of a substantial risk, but not practically certain, that the passenger will be coerced into engaging labor or services.

[19] Under the rule of imputation of knowledge for deliberate ignorance set forth in RCC § 22E-208, an actor who traffics a person with recklessness that the person will be caused to provide labor or services by means of coercive threat or debt bondage may be held liable, if the actor avoided confirming or failed to investigate whether the trafficked person will be coerced into providing labor or services, with the purpose of avoiding criminal liability.

[20] For example, if a taxi driver gives a ride to a person running an errand, knowing that the next day that person will be coerced into performing labor, if there is no relationship between that errand and the labor the person will perform, the taxi driver cannot be held liable for trafficking in labor or services.

[21] D.C. Code § 22-1833.

[22] The result may be imminent or in the distant future, so long as the actor's conduct is causally linked and other elements of the offense are met. For example, an actor who drives people in a van to a District work site and believes to a practical certainty that as a result they will perform commercial labor or services by coercive threats, either immediately or weeks later, may be guilty of trafficking in labor or services.

complainant (e.g. housing, meals) that are unrelated to the coerced acts.[23] This change improves the proportionality of the revised criminal code.

Sixth, the revised trafficking in labor or services offense authorizes enhanced penalties if the accused was reckless as to whether the complainant was under 18 years of age. The current trafficking in labor or commercial sex acts offense does not authorize enhanced penalties based on the age of the complainant. The D.C. Code includes a general penalty enhancement for "crimes of violence" committed against persons under the age of 18, but trafficking in labor is currently not a "crime of violence."[24] By contrast, the revised trafficking in labor or services offense provides a penalty enhancement based on the complainant being a minor. This change improves the consistency and proportionality of the revised statutes.

In addition, the revised trafficking in labor offense makes three other changes that may constitute a substantive change to current District law.

First, by reference to the RCC's definition of "coercive threat," trafficking in labor or services includes causing a person to engage in labor or services by threatening that any person will "commit any criminal offense against persons" or any "property offense."[25] The current "coercion" definition does not explicitly include threats to "commit any criminal offense against persons" but does include threats of "force, threats of force, physical restraint, or threats of physical restraint," conduct that appears to constitute the criminal offenses of assault or kidnapping. In addition, the current statutory definition of "coercion" generally includes "serious harm or threats of serious harm," which broadly covers "any harm . . . that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm."[26] The revised definition of "coercive threat" and the RCC crime of trafficking in labor or services together specify that trafficking a person with intent that any person will use threats to commit any criminal offense against persons or property offense to compel labor or services is categorically a basis for liability, even if it would otherwise be unclear whether the threat would constitute "serious harm" under the residual clause in paragraph (2)(G) of the coercion definition. This change improves the clarity and consistency of the revised statutes.

Second, the revised trafficking in labor or services statute replaces the word "harbor" with "houses." The current D.C. Code trafficking statute refers to "harboring" as one of many types of predicate conduct, including "recruit, entice, harbor, transport, provide, obtain, or maintain." "Harboring" is not statutorily defined, and there is no relevant D.C. Court of Appeals (DCCA) case law. To resolve this ambiguity, in the revised statute the word "houses" replaces the word "harbor." The RCC reference to

[23] For example, there is not the required causal link where a waiter in a public restaurant serves a meal to a person, believing (due to an overheard conversation) to a practical certainty that the person will perform labor or services under coercive threat later that week. Also, there would not be a causal link to a future act of labor or services, or liability for trafficking in labor or services for a shelter driver who transports persons known to have performed labor or services by coercive threats to a shelter.
[24] D.C. Code § 22-1331 (4).
[25] RCC § 22E-701.
[26] D.C. Code § 22-1831 (7).

"houses" may be narrower than "harbor,"[27] although the term "houses" is intended to broadly refer to the provision of physical shelter, including temporary shelter. This change clarifies and may improve the proportionality of the revised statute.

Third, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in labor or services for a total of more than 180 days. The D.C. Code trafficking in labor or services statute is subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[28] However, the current statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in labor or services in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities, the revised statute specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in labor or services for a total number of days exceeds that 180. This change clarifies and may improve the proportionality of the revised statute.

One other change to the trafficking in labor or services statute is clarificatory, and is not intended to substantively change current District law.

The revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[29] "Actor" is a defined term[30], which means "a person accused of any offense." The term "person" is also a defined term[31], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[27] The verb form of the word "harbor" is defined by Meriam-Webster's Dictionary as, "to give shelter or refuge to[.]" https://www.merriam-webster.com/dictionary/harbor
[28] D.C. Code §22-1837 (a)(2).
[29] D.C. Code § 22-1832.
[30] RCC § 22E-701.
[31] RCC § 22E-701.

RCC § 22E-1604. Trafficking in Commercial Sex.

Explanatory Note. *This section establishes the trafficking in commercial sex offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly recruiting, enticing, housing, transporting, providing, obtaining, or maintaining another person, with intent that, as a result, the person will be caused to engage in a commercial sex act by means of coercive threat or debt bondage. The RCC's trafficking in commercial sex offense, along with the RCC's trafficking in labor or services offense[1], replaces the trafficking in labor or commercial sex acts statute[2] under the current D.C. Code. The revised offense also replaces portions of the pandering statute[3] the compelling an individual to live life or prostitution against his or her will statute,[4] and the abducting or enticing a child from his or her home for purposes of prostitution; harboring such child statute[5] in Chapter 27 of the current D.C. Code. To the extent that certain statutory provisions authorizing extended periods of supervised release[6] apply to the current trafficking in labor or commercial sex acts statute, these provisions are replaced in relevant part by the revised trafficking in commercial sex acts statute.*

Paragraph (a)(1) specifies that trafficking in commercial sex requires that an actor knowingly recruits, entices, houses, transports, provides, obtains, or maintains by any means, the complainant. The words entice, transport, provide, obtain, and maintain by any means are intended to have the same meaning as under current law. The word "houses" is intended to include provision of shelter, even if only temporarily. Paragraph (a)(1) specifies that a "knowingly" culpable mental state applies, which requires that the accused was practically certain that he or she would entice, house, transport, provide, obtain, or maintain the complainant.

Paragraph (a)(2) specifies that the actor must have acted with intent that the complainant will be caused, as a result, to provide a "commercial sex act" by means of a coercive threat or debt bondage. The term "commercial sex act" is a defined term.7

[1] RCC § 22E-1603.
[2] D.C. Code § 22-1833.
[3] D.C. Code § 22-2705. The pandering statute makes it a crime for "any parent, guardian, or other person having legal custody of the person of an individual, to consent to the individual's being taken, detained, or used by any person, for the purpose of prostitution or a sexual act or sexual contact." This conduct will be criminalized under the RCC's trafficking in commercial sex statute.
[4] D.C. Code § 22-2706. This statute makes it a crime to "by threats or duress, to detain any individual against such individual's will, for the purpose of prostitution or a sexual act or sexual contact, or to compel any individual against such individual's will, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact." This conduct may also be criminalized under the RCC's kidnapping statute, RCC § 22E-1401 or criminal restraint statute, RCC § 22E-1402.
[5] D.C. Code § 22-2704.
[6] D.C. Code § 24-403.01(b)(4) (" In the case of a person sentenced for an offense for which registration is required by the Chapter 40 of Title 22, the court may, in its discretion, impose a longer term of supervised release than that required or authorized by paragraph (2) or (3) of this subsection, of: . . . **(A)** Not more than 10 years[.]" D.C. Code §22-4001(8) defines "registration offense" to include "Any offense under the District of Columbia Official Code that involved a sexual act or sexual contact without consent or with a minor[.]" To the extent the current trafficking in labor or commercial sex acts offense involves sexual acts or contacts without consent, D.C. Code § 22-403.01 may authorize an extended period of supervised release.
[7] RCC § 22E-701.

"Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that the complainant will be caused to perform a commercial sex act by means of a coercive threat or debt bondage. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the trafficked person actually performs a commercial sex act, only that the actor believed to a practical certainty that he or she would do so. The words "as a result" require a nexus between the trafficking activity, and the labor or services that the trafficked person will perform. Housing, transporting, etc. a person in a manner that is unrelated to that person providing labor or services is not criminalized under this section, even if the actor was practically certain that the person would be caused to provide labor or services by means of coercive threat or debt bondage.8 The words "as a result" require a nexus between the trafficking activity, and the commercial sex act that the complainant will perform. Housing, transporting, etc. a person in a manner that is unrelated to that person providing labor or services is not criminalized under this section, even if the actor was practically certain that the complainant would be caused to engage in a commercial sex act by means of coercive threat or debt bondage.9 This paragraph also requires that the actor had intent that the complainant would be caused engage in a commercial sex act with someone other than the actor.10

Subsection (b) specifies relevant penalties for the offense.

Subsection (c) provides penalty enhancements applicable to this offense. Paragraph (c)(1) specifies that if a person commits trafficking in commercial sex and was reckless as to the complainant being under 18 years of age, an enhancement of one penalty class applies. "Reckless" is a defined term,[11] here requiring that the defendant was aware of a substantial risk that the complainant was under 18 years of age and such conduct deviated from a reasonable standard of care. Alternatively, paragraph (c)(1) also specifies that if a person commits trafficking in commercial sex, the complainant was, in fact, under the age of 12, an enhancement of one penalty class applies. The term "in fact" specifies that no culpable mental state is required if the complainant was under the age of 12. Paragraph (c)(2) specifies that if the actor held the complainant or caused the complainant to engage in commercial sex acts for a total of more than 180 days, the offense classification may be increased in severity by one class.[12] Per the rule of construction in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (c)(1) applies to the conduct in paragraph (c)(2). Even if more than one penalty

[8] For example, if a taxi driver gives a ride to a person running an errand, practically certain that the next day that person will be coerced into performing labor, if there is no relationship between that errand and the labor the person will perform, the taxi driver cannot be held liable for trafficking in labor or services.

[9] For example, if a taxi driver gives a ride to a person running an errand, knowing that the next day that person will be coerced into engaging in a commercial sex act, if there is no relationship between that errand and the commercial sex act, the taxi driver cannot be held liable for trafficking in commercial sex.

[10] An actor who traffics a person with intent that the person engage in a commercial sex act with *the actor* may be subject to liability under sex assault offenses defined under Chapter 13.

[11] RCC § 22E-206.

[12] This enhancement may apply if the combined time in which a person was held and provided labor or services is greater than 180 days, even if the person did not provide labor or services for the entire time. If a person was held for 100 days, and provided labor or services for 81 days, this penalty enhancement would apply.

enhancement is proven, the most the penalty can be increased is one class. The penalty enhancement under subsection (c) shall be applied before any general penalty enhancements in RCC §§ 22E-605-608.

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

Relation to Current District Law. *The trafficking in commercial sex statute changes current District law in seven main ways.*

First, the RCC trafficking in commercial sex offense is codified in a separate and distinct manner from the offense of trafficking in labor or services. The D.C. Code currently criminalizes in one statute trafficking persons who will engage in labor, services, *or* commercial sex acts.[13] In contrast, the RCC re-organizes the current trafficking in labor or commercial sex acts into two separate offenses and clarifies that commercial sex acts are not part of the revised definitions of "labor" and "services." This change improves the organization of the revised offenses.

Second, by reference to the RCC's "coercive threats" definition, the trafficking in commercial sex statute does not provide liability for trafficking a person who will be caused to engage in a commercial sex act by means of fraud or deception. The current statutory definition of "coercion" includes "fraud or deception,"[14] and by extension the current trafficking in in labor or commercial sex acts statute references using fraud or deception to cause a person to engage in a commercial sex act. By contrast, the RCC's "coercive threat" definition does not include fraud or deception,[15] and trafficking a person will be tricked into performing commercial sex is not a sufficient basis for liability under the revised trafficking in commercial sex offense. The revised offense only provides liability for trafficking a person who will be caused to engage in a commercial sex act under threat of one of the means listed in the RCC's definition of "coercive threat," or by subjecting the person to debt bondage.[16] While using deception to cause another to engage in commercial sex is wrongful, it does not warrant equal punishment to using other means of coercion or debt bondage.[17] Rather, a person who encourages or assists a person who causes another to provide commercial sex through fraud or deception may still be liable as an accessory[18] under the RCC's revised fraud[19] statute, a

[13] D.C. Code § 22-1833.
[14] D.C. Code § 22-1831 (3)(D).
[15] RCC § 22E-701.
[16] Trafficking in commercial sex may involve deceptive or fraudulent conduct *in addition* to other coercive means. For example, a person who traffics a worker knowing that he or she was initially lured with the false promise of high wages, and will also be coerced into engaging in commercial sex acts under threat of bodily injury may be convicted under the RCC's trafficking in commercial sex statute. *E.g.*, *United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004).
[17] For instance, under the current statutory definition of "coercion," a person may be liable for trafficking in labor or commercial sex acts, subject to a [] year maximum imprisonment, for transporting a laborer to a job, knowing that the employer at the time of hire falsely stated the rate of pay or work duties that will be expected.
[18] RCC § 22E-210.
[19] RCC § 22E-2201. The revised fraud statute criminalizes taking property of another by means of deception. The term "property" is defined as "anything of value" including "services[.]" RCC § 22E-701.

property offense with penalties based on the economic harm suffered. This change improves the penalty proportionality of the revised statute.

Third, by reference to the RCC's "coercive threat" definition, the revised trafficking in commercial sex offense criminalizes trafficking when the coercion at issue is restricting another person's access to a controlled substance that the person owns or to prescription medication that the person owns. The current D.C. Code statutory definition of "coercion" in the human trafficking chapter provides liability for "facilitating or controlling" a person's access to any addictive substance, and by extension the current trafficking in labor or commercial sex acts statute references facilitating or controlling access to addictive substances to cause a person to engage in a commercial sex act. These terms are not defined by statute and have not been interpreted by the DCCA. By contrast, the revised trafficking in commercial sex offense only provides liability for trafficking a person who will caused to provide a commercial sex act under threat of restricting access to controlled substances that the person owns or prescription medication that the person owns. Restricting a person's access to a controlled substance or prescription medication that the person does not yet own does not constitute this form of coercive threat.[20] Restricting a person's access to an addictive substance that is not a controlled substance or prescription medication also does not constitute this form of coercive threat. This change eliminates liability for trafficking someone knowing that they will be compensated with a controlled substance or prescription medication as part of an otherwise clear and consensual transaction,[21] and precludes arguments that trafficking a person knowing that someone will seek to limit that person's access to legal and readily available addictive substances like tobacco or alcohol constitutes trafficking in commercial sex acts.[22] However, in some circumstances, such conduct may still fall within another per se form of coercive threat or the catch-all form of coercive threat.[23] Eliminating liability for trafficking where the harm is the facilitation of access to any addictive substance as a form of coercion prevents the possibility of criminalizing relatively less coercive conduct.[24] These changes improve the clarity and proportionality of the revised statute.

Fourth, the revised trafficking in commercial sex offense requires that the accused acted *with intent* that the complainant will be caused to engage a commercial sex act by

[20] For example, a drug trafficker refusing to sell a controlled substance to a person does not constitute this form of coercive threat.

[21] For example, compensating a person with a controlled substance may constitute "facilitation" under the current forced labor statute due to the definition of "coercion."

[22] For example, a person who recruits someone to perform commercial sex acts, knowing that another will predicate performance of the commercial sex work on not smoking tobacco or drinking alcohol may be liable for "controlling" the employee's access to the substance, and may be liable for trafficking.

[23] For example, if a person is severely addicted to a controlled substance, and relies on the actor as the sole provider of that substance, threatening to restrict the person's access to that substance may in some cases constitute a coercive threat under the catch all provision.

[24] For example, under current law inducing a person who is a regular tobacco user to perform any service by offering cigarettes in exchange arguably constitutes coercion, and knowingly recruiting a person into such employment an offense punishable by up to [] years imprisonment. In addition, although alcohol is an addictive substance, it is not a controlled substance and thus is readily available. Facilitating a person's access to alcohol is not inherently coercive, as it is relatively easy for a person to obtain alcohol by other means, as compared to controlled substances.

means of coercive threat or debt bondage. The current statute includes acting "with reckless disregard of the fact that" coercion or debt bondage will be used to cause the person to engage in a commercial sex act. By contrast, the revised statute requires that the actor was practically certain that the complainant will be caused to engage in a commercial sex act by means of a coercive threat or debt bondage.[25] Requiring that the accused was at least practically certain that the person will be caused to engage in a commercial sex act by means of coercive threat or debt bondage avoids disproportionate penalties for persons who were unaware that the person would be coerced into providing labor or services.[26] This change improves the proportionality of the revised statute.

Fifth, the revised trafficking in commercial sex offense requires that an actor's trafficking activity occur with intent that the complainant *as a result will* provide a commercial sex act. The current D.C. Code trafficking in labor or commercial sex acts statute does not specify any relationship between the transporting, housing, etc., and the performance of labor or services. Consequently, it appears that there is criminal liability when a person transports, houses, etc. a person in a manner that is entirely unrelated to the coerced labor or services.[27] The current D.C. Code statute also states that it applies when "coercion will be used or is being used."[28] By contrast, the revised statute requires a causal relationship between the trafficking activity, and the person performing a commercial sex act. The actor's trafficking conduct need not be the sole or primary cause of the complainant being coerced by a threat or debt bondage, but there must be a causal link to such a future result.[29] This revision excludes persons who may provide assistance to a complainant (e.g. housing, meals) that are unrelated to the coerced acts.[30] This change improves the proportionality of the revised criminal code.

Sixth, the revised trafficking in commercial sex offense authorizes enhanced penalties if the accused was reckless as to whether the complainant was under 18 years of

[25] For example, if a taxi driver overhears his passenger make comments which suggest that upon arrival at her destination, she may be coerced into performing a commercial sex act, the driver is not guilty of trafficking in commercial sex if the driver is only aware of a substantial risk, but not practically certain, that the passenger will be coerced into engaging in a commercial sex act.

[26] Under the rule of imputation of knowledge for deliberate ignorance set forth in RCC § 22E-208, an actor who traffics a person with recklessness that the person will be caused to engage in a commercial sex act by means of coercive threat or debt bondage may be held liable, if the actor avoided confirming or failed to investigate whether the trafficked person will be coerced into engaging a commercial sex act, with the purpose of avoiding criminal liability.

[27] For example, if a taxi driver gives a ride to a person running an errand, knowing that the next day that person will be coerced into performing a commercial sex act, if there is no relationship between that errand and the commercial sex act that the person will perform, the taxi driver cannot be held liable for trafficking in commercial sex.

[28] D.C. Code § 22-1833.

[29] The result may be imminent or in the distant future, so long as the actor's conduct is causally linked and other elements of the offense are met. For example, an actor who drives people in a van to a District house and believes to a practical certainty that as a result they will perform commercial sex acts by coercive threats, either immediately or weeks later, may be guilty of trafficking in commercial sex.

[30] For example, there is not the required causal link where a waiter in a public restaurant serves a meal to a person, believing (due to an overheard conversation) to a practical certainty that the person will perform a commercial sex act under coercive threat later that week. Also, there would not be a causal link to a future commercial sex act, or liability for trafficking in commercial sex for a shelter driver who transports persons known to have performed commercial sex acts by coercive threats to a shelter.

age, or if the complainant was, in fact, under 12 years of age. The current trafficking in labor or commercial sex acts offense does not authorize enhanced penalties based on the age of the complainant. The D.C. Code includes a general penalty enhancement for "crimes of violence" committed against persons under the age of 18, but trafficking in labor or commercial sex acts is not currently not a "crime of violence."[31] By contrast, the revised trafficking in commercial sex offense provides a penalty enhancement based on recklessness as to whether the complainant was under the age of 18, or based on strict liability if the complainant was under the age of 12. This change improves the consistency and proportionality of the revised statutes.

Seventh, by reference to the revised definitions of "coercive threat" and "debt bondage," the RCC trafficking in commercial sex offense specifies what types of conduct are sufficient to "compel" a person to engage in prostitution.[32] Under Chapter 27, the current code makes it a crime "by threats or duress, to detain any individual against such individual's will for the purpose of prostitution or a sexual act or sexual contact"[33] or to "compel any individual, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact,"[34] or to "forcibly abduct a child under 18 from his or her home or usual abode, or from the custody and control of the child's parents or guardian."[35] The current code also makes it a crime to use "force, fraud, intimidation, or threats" to "place[] or leave[] . . . a spouse or domestic partner in a house of prostitution, or to lead a life of prostitution[.]"[36] The current code does not define the terms "threats," "duress," "detain," "force," "forcibly," "fraud," or "intimidation," and there is no relevant D.C. Court of Appeals (DCCA) case law interpreting these terms. In contrast, the RCC trafficking in commercial sex act offense precisely defines the meaning of coercive threat or debt bondage, and clearly define what means of compelling a person to engage in a commercial sex act constitutes a criminal offense. This change improves the clarity and consistency of revised statutes.

Eighth, the RCC trafficking in commercial sex offense requires a person to act with a "knowing" culpable mental state. Statutes under Chapter 27[37] that are replaced in whole or in part by the RCC's forced commercial sex offense do not specify culpable mental states, and there is no relevant DCCA case law on this issue. In contrast, the RCC forced commercial sex act offense specifies one consistent, defined culpable mental state of knowing. Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[38] This change improves the clarity and consistency of the criminal code, and improves the proportionality of penalties.

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[31] D.C. Code § 22-1331 (4).
[32] D.C. Code § 22-2706.
[33] *Id*.
[34] *Id*.
[35] D.C. Code §22-2704.
[36] D.C. Code § 22-2708.
[37] D.C. Code § 22-2704; D.C. Code § 22-2705; D.C. Code 22-2706.
[38] *See, Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

Ninth, the RCC trafficking in commercial sex offense creates a standardized penalty and enhancements. The offenses under Chapter 27 that are replaced by the RCC's trafficking in commercial sex offense allow for a variety of penalties. Depending on which Chapter 27 offense a defendant was prosecuted under, conduct that would constitute trafficking in commercial sex could be subject to maximum penalties ranging from five years[39] to 20 years.[40] In contrast, the RCC forced commercial sex offense applies a consistent penalty and enhancements. This change improves the consistency of the criminal code, and proportionality of the revised statutes.

Beyond these nine changes to current District law, four other aspects of the revised trafficking in commercial sex acts may constitute a substantive change to current District law.

First, by reference to the RCC's definition of "coercive threat," trafficking in commercial sex includes trafficking a person, with intent that, as a result, the person will be compelled to engage in a commercial sex act under threat that any person will "commit any criminal offense against persons . . . or property offenses[.]"[41] The current "coercion" definition does not explicitly include threats to commit any offenses against persons or property offenses but does include threats of "force, threats of force, physical restraint, or threats of physical restraint," conduct that appears to constitute the criminal offenses of assault or kidnapping. In addition, the current statutory definition of "coercion" generally includes "serious harm or threats of serious harm," which broadly covers "any harm . . . that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm."[42] The revised definition of "coercive threats" and the RCC crime of forced commercial sex together specify that a threat to commit any criminal offense against persons or property offense is categorically a basis for liability, even if it would otherwise be unclear whether the crime would constitute "serious harm" under the residual clause in paragraph (2)(G) of the coercion definition. This change improves the clarity and consistency of the revised statutes.

Second, the revised trafficking in commercial sex statute replaces the word "harbor" with "houses." The current D.C. Code trafficking statute refers to "harboring" as one of many types of predicate conduct, including "recruit, entice, harbor, transport, provide, obtain, or maintain." "Harboring" is not statutorily defined, and there is no relevant D.C. Court of Appeals (DCCA) case law. To resolve this ambiguity, in the revised statute the word "houses" replaces the word "harbor." The RCC reference to "houses" may be narrower than "harbor,"[43] although the term "houses" is intended to broadly refer to the provision of physical shelter, including temporary shelter. This change clarifies and may improve the proportionality of the revised statute.

[39] D.C. Code § 22-2705.
[40] D.C. Code § 22-2704.
[41] RCC § 22E-701.
[42] D.C. Code § 22-1831 (7).
[43] The verb form of the word "harbor" is defined by Meriam-Webster's Dictionary as, "to give shelter or refuge to[.]" https://www.merriam-webster.com/dictionary/harbor

Third, the revised trafficking in commercial sex statute requires that the accused had intent that the complainant would be caused to engage in a commercial sex act *with another person.* The current statute does not specify whether the accused must have intent that the complainant engage in a commercial sex act with someone other than the accused, and there is no relevant DCCA case law. In contrast, the revised statute specifies that the accused must have had intent that the complainant would engage in a commercial sex act with someone other than the accused. This change improves the clarity of the revised criminal code, and reduces unnecessary overlap.

Fourth, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in commercial sex acts for a total of more than 180 days. The D.C. Code trafficking in labor or commercial sex statute is subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[44] However, the current statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in commercial sex acts in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities, the revised statute specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in commercial sex acts for a total number of days exceeds that 180. This change clarifies and may improve the proportionality of the revised statute.

In addition, one change to the trafficking in commercial sex statute is clarificatory, and not intended to substantively change current District law.

The revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[45] "Actor" is a defined term[46], which means "a person accused of any offense." The term "person" is also a defined term[47], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[44] D.C. Code §22-1837 (a)(2).
[45] D.C. Code § 22-1832.
[46] RCC § 22E-701.
[47] RCC § 22E-701.

RCC § 22E-1605. Sex Trafficking of Minors.

Explanatory Note. *This section establishes the sex trafficking of minors offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly recruiting, enticing, housing, transporting, providing, obtaining, or maintaining another person, with intent that, as a result, the person will be caused to engage in a commercial sex act, and with recklessness as to that person being under the age of 18. The revised sex trafficking in minors offense replaces the current sex trafficking of children statute[1] and part of the abducting or enticing a child from his or her home for purposes of prostitution; harboring such child statute.[2] To the extent that certain statutory provisions authorizing extended periods of supervised release[3] apply to the current sex trafficking of children statute, these provisions are replaced in relevant part by the revised sex trafficking of minors statute.*

Paragraph (a)(1) specifies that sex trafficking of minors requires that a person knowingly recruits, entices, houses, transports, provides, obtains, or maintains by any means, another person. The words entice, transport, provide, obtain, and maintain by any means are intended to have the same meaning as under current law. The word houses is intended to include provision of shelter, even if only temporarily. Paragraph (a)(1) specifies that a "knowingly" culpable mental state applies, which requires that the accused was practically certain that he or she would entice, house, transport, provide, obtain, or maintain another person.

Paragraph (a)(2) specifies that sex trafficking of minors requires that the accused acted "with intent that" the trafficked person, as a result, would be caused to engage in a commercial sex act with another person. The term "commercial sex act" is a defined term.4 "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that the complainant would be caused to engage in a commercial sex act with another person. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the trafficked person actually performs a commercial sex act, only that the actor believed to a practical certainty that he or she would do so. The words "as a result" require a nexus between the trafficking activity, and the commercial sex act that the trafficked person will perform. Housing, transporting, etc. a person in a manner that is unrelated to that person providing labor or services is not criminalized under this section, even if the actor was practically certain that the person would be caused to engage in a commercial

[1] D.C. Code § 22-1834.
[2] D.C. Code § 22-2704.
[3] D.C. Code § 24-403.01(b)(4) (" In the case of a person sentenced for an offense for which registration is required by the Chapter 40 of Title 22, the court may, in its discretion, impose a longer term of supervised release than that required or authorized by paragraph (2) or (3) of this subsection, of: . . . **(A)** Not more than 10 years[.]" D.C. Code §22-4001(8) defines "registration offense" to include "Any offense under the District of Columbia Official Code that involved a sexual act or sexual contact without consent or with a minor[.]" To the extent the current sex trafficking of children offense offense covers sexual acts or contacts with a minor, D.C. Code § 22-403.01 may authorize an extended period of supervised release.
[4] RCC § 22E-701.

sex act.[5] This paragraph requires that the actor had intent that the complainant would be caused engage in a commercial sex act with someone other than the actor.[6]

Paragraph (a)(3) specifies that sex trafficking of minors requires that the accused was reckless as to the trafficked person being under the age of 18. This paragraph specifies that a "reckless" culpable mental state applies, which requires that the accused consciously disregarded a substantial risk that the trafficked person is under the age of 18.

Subsection (b) specifies relevant penalties for the offense.

Subsection (c) provides a penalty enhancement applicable to this offense. If the accused recklessly held the complainant, or caused the complainant to provide commercial sex acts for a total of more than 180 days, the offense classification may be increased in severity by one class.[7] The penalty enhancement under subsection (c) shall be applied before any general penalty enhancements in RCC §§ 22E-605-608.

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

Relation to Current District Law. *The RCC's sex trafficking of minors offense changes current District law in one main way with respect to the current sex trafficking of minors offense. Also, to the extent it replaces current D.C. Code § 22-2704, the revised sex trafficking of minors offense changes current District law in three main ways.*

First, the revised sex trafficking of minors statute requires proof that a person was reckless as to the person trafficked being under 18. Subsection (a) of the current sex trafficking of children offense requires the actor to be "knowing or in reckless disregard of the fact that the person has not attained the age of 18 years," but does not define the culpable mental state terms.[8] However, subsection (b) of the current statute further states that "In a prosecution… in which the defendant had a reasonable opportunity to observe the person recruited, enticed… or maintained, the government need not prove that the defendant knew that the person had not attained the age of 18 years."[9] Consequently, the current statute's drafting is ambiguous as to whether "recklessness" always suffices to prove liability (as appears to be stated in subsection (a)) or whether a knowing culpable mental state always is required for liability except where there is a reasonable opportunity to view the complainant (as appears to be stated in subsection (b)). There is no case law on point, however legislative history indicates that the latter interpretation of the statute is correct,[10] and recklessness as to the complainant's age is insufficient for liability except

[5] For example, if a taxi driver gives a ride to a person running an errand, knowing that the next day that person will be coerced into engaging in a commercial sex act, if there is no relationship between that errand and the commercial sex act, the taxi driver cannot be held liable for trafficking in commercial sex.

[6] An actor who traffics a person with intent that the person engage in a commercial sex act with *the actor* may be subject to liability under sex offenses defined under Chapter 13.

[7] This enhancement may apply if the combined time in which a person was held and engaged in commercial sex acts is greater than 180 days, even if the person did not engage in commercial sex acts for the entire time. If a person was held for 100 days, and engaged in commercial sex acts for 81 days, this penalty enhancement would apply.

[8] D.C. Code § 22-1834.

[9] D.C. Code § 22-1834 (b).

[10] Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-70 "Prohibition Against Human Trafficking Amendment Act of 2010" at 8. March 9, 2010.

when the actor has a reasonable opportunity to observe the complainant. Notably, D.C. Code § 22-2704 requires that the trafficked person is under the age of 18, but does not specify a culpable mental state for this element, and there is no relevant DCCA case law. In contrast, the RCC sex trafficking of minors statute requires a culpable mental state of recklessness, a defined term, and omits the limitation about a reasonable opportunity to observe the child. It is not clear why reasonable observation, uniquely, is treated as being such strong evidence of age that the a lower culpable mental state is required where there is such an opportunity.[11] Requiring recklessness as to a complainant being under 18 years of age is consistent with similar age-based circumstances required in other offenses in the RCC and current D.C. Code. This change improves the clarity and consistency of the revised statute.

Second, the revised sex trafficking of minors statute specifies that a "knowingly" mental state applies to result elements of the offense. A knowing culpable mental state already is required for the similar sex trafficking of children offense.[12] However, D.C. Code § 22-2704 also makes it a crime to "secrete" or "harbor" a child under the age of 18 "for the purposes of prostitution."[13] The current code does not specify any culpable mental state for these elements of D.C. Code § 22-2704, and there is no relevant D.C. Court of Appeals (DCCA) case law. In contrast, the revised sex trafficking of minors statute specifies that the accused must knowingly recruit, entice, harbor, transport, provide, obtain, or maintain by any means, another person. This change improves the clarity and consistency of the revised statutes.

Third, the revised sex trafficking of minors statute specifies that the accused act "with intent" that the trafficked person will be caused to engage in a commercial sex act. A knowing culpable mental state is required for the current sex trafficking of children offense.[14] However, D.C. Code § 22-2704 requires that the accused secrete or harbor another person "for the purposes of prostitution." D.C. Code § 22-2704 does not further specify the meaning of "for the purposes" or specify (other) culpable mental states, and there is no relevant DCCA case law. In contrast, the revised sex trafficking of minors statute specifies that the accused must act "with intent" that the person will be caused to engage in a commercial sex act. This change improves the clarity and consistency of the revised statutes.

("Section 104 Creates the crime of sex trafficking of children. A child is defined as under the age of 18 for commercial sex. The prosecution does not have to prove that coercion was used or that the defendant had actual knowledge of the minor's age. However, if the defendant did not have an opportunity to observe the victim, the government needs to prove the defendant had actual knowledge of the victim's age.").

[11] On the one hand, a reasonable opportunity to observe the complainant does not mean that an actor still could not reasonably mistake the complainant's age as being significantly older than 17 years old. On the other hand, other circumstances may provide an actor equally strong evidence of the complainant's age, even though he or she is never seen—e.g. a report from a trusted source as to the complainant apparently being a minor.

[12] D.C. Code § 22-1834. ("It is unlawful for an individual or a business knowingly to recruit, entice, harbor, transport, provide, obtain, or maintain by any means a person who will be caused as a result to engage in a commercial sex act knowing or in reckless disregard of the fact that the person has not attained the age of 18 years.").

[13] D.C. Code § 22-2704 (a)(2).

[14] D.C. Code § 22-1834.

Fourth, the revised sex trafficking of minors statute includes a penalty enhancement if the trafficked person was held or provides commercial sex acts for more a total of more than 180 days. The current sex trafficking of children offense contains this penalty enhancement.[15] However, D.C. Code § 22-2704 does not provide for heightened penalties. In contrast, the revised sex trafficking in minors statute allows that the offense classification may be increased by one class if the trafficked person is held or caused to engage in commercial sex act for more than 180 days. This change improves the proportionality and consistency of the revised statutes.

Beyond these four changes to current District law, two other aspect of the revised sex trafficking of minors may constitute a substantive change to current District law.

First, the revised sex trafficking of minors statute requires that the accused had intent that the complainant would be caused to engage in a commercial sex act *with another person.* The current statute does not specify whether the accused must have intent that the complainant engage in a commercial sex act with someone other than the accused, and there is no relevant DCCA case law. To resolve this ambiguity, the revised statute specifies that the accused must have had intent that the complainant will engage in a commercial sex act with someone other than the accused. This change improves the clarity of the revised statute, and reduces unnecessary overlap.

Second, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in commercial sex acts for a total of more than 180 days. The D.C. Code sex trafficking of children statute is subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[16] However, the current statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in commercial sex acts in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities the revised statute specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in commercial sex acts for a total number of days exceeds that 180. This change clarifies and may improve the proportionality of the revised statute.

[15] D.C. Code § 22-1834.
[16] D.C. Code §22-1837 (a)(2).

RCC § 22E-1606. Benefiting from Human Trafficking.

Explanatory Note. *This section establishes the benefitting from human trafficking offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly obtaining any benefit or property by participating in an association of two or more persons, with recklessness that the group is engaged in forced commercial sex, trafficking in commercial sex, sex trafficking of minors, forced labor, or trafficking labor or services. The offense is divided into two penalty grades, depending on whether the benefit arose from a group's commission of forced commercial sex, sex trafficking, or sex trafficking of minors; or forced labor or trafficking in labor or services. The benefitting from human trafficking offense replaces the benefitting financially from human trafficking statute*[1] *in the current D.C. Code.*

Paragraph (a)(1) specifies that first degree benefitting from human trafficking requires that the accused knowingly obtains any financial benefit or property. The term financial benefit includes services or intangible financial benefits. The term "property" is a defined term,[2] which includes anything of value. The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the accused was practically certain that he or she would obtain a financial benefit or property.

Paragraph (a)(2) specifies that the accused must have obtained the property or financial benefit through participation in a group of two or more persons. The group may be comprised, at a minimum, of the accused and one other person.[3] The group need not have a united purpose and the members need not reach an agreement as would be required for a criminal conspiracy. The members must only be associated in fact. Per the rule of construction under RCC § 22E-207, the "knowingly" culpable mental state also applies to this element. The accused must be practically certain both that he or she is participating in a group of two or more persons, and that it is through that group association that he or she obtained the property or financial benefit.

Paragraph (a)(3) specifies that for first degree benefitting from human trafficking, the accused must have been reckless as to the group engaging in conduct that, in fact, constitutes either forced commercial sex under RCC § 22E-1602, trafficking in commercial sex under RCC 22E-1604, or sex trafficking of minors under RCC § 22E-1605. The "reckless" culpable mental state requirement here means that the accused consciously disregarded a substantial risk that the group was engaged in the conduct that, in fact, constituting forced commercial sex, trafficking in commercial sex, or sex trafficking of minors. The use of "in fact" indicates that the actor need not have any culpable mental state as to what the specific elements of the predicate crimes are or that they have been satisfied. It is not required that all members of the group, including the accused, actually engaged in conduct constituting either of these offenses.[4] However, the

[1] D.C. Code §22-1836.
[2] RCC § 22E-701.
[3] This element may be satisfied in a case involving a single business comprised of two people who are engaged in human trafficking.
[4] For example, if a motel owner receives payment from a customer, with recklessness that the other person is using the hotel room to coerce people into engaging in commercial sex acts, the motel owner could be convicted of benefitting from human trafficking even though the hotel owner did not directly cause any one to engage in commercial sex acts by means of coercive threats or debt bondage. *See, Ricchio v. McLean*,

accused's participation in the group must in some way be related to the conduct that constitutes forced commercial sex, trafficking in commercial sex, or sex trafficking of minors.[5]

Paragraph (b)(1) specifies that second degree benefitting from human trafficking requires that the accused knowingly obtains any financial benefit or property. The term financial benefit includes services or intangible financial benefits. The term "property" is a defined term,[6] which includes anything of value. The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the accused was practically certain that he or she would obtain a financial benefit or property.

Paragraph (b)(2) specifies that the accused must have obtained the property or financial benefit through participation in a group of two or more persons. The group may be comprised, at a minimum, of the accused and one other person. The group need not have a united purpose and the members need not reach an agreement as would be required for a criminal conspiracy. The members must only be associated in fact. Per the rule of construction under RCC § 22E-207, the "knowingly" culpable mental state also applies to this element. The accused must be practically certain both that he or she is participating in a group of two or more persons, and that it is through that group association that he or she obtained the property or financial benefit.

Paragraph (b)(3) specifies that for second degree benefitting from human trafficking, the accused must have been reckless as to the group engaging in conduct that, in fact, constitutes either forced labor or services under RCC 22E-1601 or trafficking in labor or services under RCC 22E-1603. The "reckless" culpable mental state requirement here means that the accused consciously disregarded a substantial risk that the group was engaged in the conduct that, in fact, constituting either forced labor or trafficking in labor or services. The use of "in fact" indicates that the actor need not have any culpable mental state as to what the specific elements of the predicate crimes are or that they have been satisfied. It is not required that all members of the group, including the accused, actually engaged in conduct constituting either of these offenses.[7] However,

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853 F.3d 553, 556 (1st Cir. 2017) (motel owner was "associated" and obtained benefit when he rented a room to person who used that room to coerce women into performing commercial sex acts); *see generally*, John Cotton Richmond, *Human Trafficking: Understanding the Law and Deconstructing Myths*, 60 St. Louis U. L.J. 1, 9 (2015).

[5] For example, if A is on a bowling team with B, who engages in sex trafficking, and B uses proceeds of the sex trafficking to pay for uniforms for the bowling team, A is not guilty of benefitting from human trafficking even if he is aware that the uniforms were paid for by human trafficking. *See, United States v. Afyare*, 632 F. App'x 272, 286 (6th Cir. 2016) (unpublished opinion) (holding that the *group* of which the accused is a part must engage in human trafficking).

[6] RCC § 22E-701.

[7] For example, if a building owner receives rent payment from a customer, with recklessness that the other person is using the building to run a sweatshop in which people are coerced into providing labor, the building owner could be convicted of benefitting from human trafficking even though the hotel owner did not directly cause anyone to provide labor by means of coercive threats or debt bondage. *See, Ricchio v. McLean*, 853 F.3d 553, 556 (1st Cir. 2017) (motel owner was "associated" and obtained benefit when he rented a room to person who used that room to coerce women into performing commercial sex acts); *see generally*, John Cotton Richmond, *Human Trafficking: Understanding the Law and Deconstructing Myths*, 60 St. Louis U. L.J. 1, 9 (2015).

the accused's participation in the group must in some way be related to the conduct that constitutes forced labor or trafficking in labor or services.[8]

Subsection (c) specifies the penalties applicable to this offense.

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

Relation to Current District Law. *The revised benefitting from human trafficking offense changes current District law in one main way.*

The revised benefitting from human trafficking offense is divided into two penalty grades depending on whether the group engaged in conduct constituting forced commercial sex, sex trafficking, or sex trafficking of minors; or forced labor or trafficking in labor or services. The current benefitting financially from human trafficking offense only has one penalty grade, regardless of the predicate conduct. By contrast, the revised offense distinguishes benefits obtained from forms of human trafficking that involve commercial sex, and those that involve labor or services. Dividing the offense into two penalty grades improves the proportionality of the revised offense. This change improves the proportionality of the revised offense.

Two changes to the benefitting from human trafficking offense statute are clarificatory in nature and is not intended to substantively change current District law.

First, the revised statute no longer refers to participation in a "venture," and instead requires that the accused participated in a group of two or more persons. Omission of the word "venture" is clarificatory in nature and is not intended to change current District law.

Second, the revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[9] "Actor" is a defined term[10], which means "a person accused of any offense." The term "person" is also a defined term[11], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[8] For example, if A is on a bowling team with B, who engages in forced labor, B uses proceeds of the forced labor to pay for uniforms for the bowling team, A is not guilty of benefitting from human trafficking even if he is aware that the benefits are paid for by forced labor. *See*, *United States v. Afyare*, 632 F. App'x 272, 286 (6th Cir. 2016) (unpublished opinion) (holding that the *group* of which the accused is a part must engage in human trafficking).

[9] D.C. Code § 22-1832.

[10] RCC § 22E-701.

[11] RCC § 22E-701.

RCC § 22E-1607. Misuse of Documents in Furtherance of Human Trafficking.

Explanatory Note. *This section establishes the misuse of documents in furtherance of human trafficking offense ("misuse of documents") for the Revised Criminal Code (RCC). This offense requires that the accused knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported government identification document of another person, with intent to restrict the person's liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex act by that person. The misuse of documents in furtherance of human trafficking offense replaces the unlawful conduct with respect to documents in furtherance of human trafficking statute[1] in the current D.C. Code.*

Paragraph (a)(1) specifies that misuse of documents requires that the accused knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported government identification document of another person, including a passport or other immigration document. The terms "destroys," "conceals," "removes," "confiscates," and "actual or purported government identification document" are intended to have the same meaning as under current law. "Possess" is a defined term per RCC § 22E-701 meaning "holds or carries on one's person; or has the ability and desire to exercise control over." The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the accused was practically certain both that an actual or purported document was involved, and that he or she would destroy, conceal, remove, confiscate, or possesses the document.

Paragraph (a)(2) specifies that misuse of documents requires that the accused acted "with intent to" restrict the person's liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex acts by that person. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that he or she would restrict the person's liberty to move or travel. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually succeeded in restricting the person's liberty to move or travel, only that he or she believed to a practical certainty that he or she would.

Subsection (b) specifies the penalty applicable to this offense.

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

Relation to Current District Law. *The revised misuse of documents offense changes current District law in one main way.*

The revised misuse of documents offense requires that the accused destroys, conceals, removes, confiscates, or possesses any actual or purported *government* identification document, specifically including passports and immigration documents. The current statute refers broadly to "any actual or purported government identification document, including a passport or other immigration document, or any other actual or

[1] D.C. Code §22-1835.

purported document."[2] There is no relevant DCCA case law construing these terms, although legislative history refers to "official papers."[3] By contrast, the revised offense clarifies that this offense only applies to government-issued identification documents, including immigration documents.[4] Misuse of other documents with intent to restrict someone's freedom of movement may constitute another crime under the RCC.[5] This change improves the clarity of the revised statute.

Three aspects of the revised misuse of documents offense may constitute substantive changes to current District law.

First, the revised misuse of documents offense specifies that the offense requires "knowingly" destroying, concealing, removing, confiscating, or possessing a government identification document. The current statute clearly requires that the destruction, concealing, etc. of a document be done "knowingly," but the statute is ambiguous whether the "knowingly" mental state applies also to the nature of the document as a form of government identification. D.C. Court of Appeals (DCCA) case law does not address the issue.[6] By contrast, the revised offense clarifies the culpable mental state as to the nature of the document. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[7] This change improves the clarity of the revised statute.

Second, the revised misuse of documents offense specifies that the offense requires that that the accused acted "with intent" to restrict the person's liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex acts by that person. The current statute does not specify any culpable mental state for this element, but merely requires that the accused acted "*to* prevent or restrict, or attempt to prevent or restrict . . . the person's liberty to move or travel[.]"[8] Case law does not address the issue. By contrast, the revised offense clarifies that the actor must act with intent to restrict movement. The phrase with intent to means that the person believes to a practical certainty that the complainant would be restricted in their movement, but actual proof of restriction is not required. "With intent" more clearly communicates the mental state requirement and encompasses the conduct indicated by the "attempt to" prong of the current statute. Anytime a person acts with intent to restrict a person's liberty, that person has also acted with intent to attempt to restrict a person's liberty. This change improves the clarity and consistency of the revised statute.

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[2] D.C. Code §22-1835.

[3] Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-70 "Prohibition Against Human Trafficking Amendment Act of 2010" at 8. March 9, 2010.

[4] For example, destroying a person's employee identification badge issued by a private employer does not constitute misuse of documents.

[5] See, e.g., § 22E-1402. Criminal Restraint (attempted); § 22E-2102 Unauthorized use of property.

[6] Although the statute and DCCA case law do not specify a culpable mental state, the Redbook Jury Instruction states that defendant must have "knowingly" destroyed, concealed, removed, or possessed an identification document. D.C. Crim. Jur. Instr. § 4-513.

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

[8] D.C. Code § 22-1835.

Third, the revised statute omits the words "without lawful authority." The current statute's covered conduct is, "knowingly to destroy, conceal, … document, of any person to prevent or restrict, or attempt to prevent or restrict, *without lawful authority*, the person's liberty to move or travel…" There is no case law interpreting the phrase "without lawful authority." In the RCC, if a person actually has the lawful authority to engage in conduct covered by the revised statute, general defenses would apply to this conduct the same as any other conduct that otherwise would appear to be a crime. This change improves the clarity of the revised statute.

Other changes are clarificatory and are not intended to substantively change current District law.

First, the revised statute requires that the accused act with intent to restrict a person's liberty to move or travel. The current statute criminalizes acting with intent to prevent or "restrict . . . the person's liberty to move or travel[.]" It is unclear what it means to "prevent" a person's liberty to move or travel. The word "restrict" as used in the revised statute is intended to cover all conduct that would constitute "preventing" a person's freedom to move or travel.

Second, the revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[9] "Actor" is a defined term[10], which means "a person accused of any offense." The term "person" is also a defined term[11], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[9] D.C. Code § 22-1832.
[10] RCC § 22E-701.
[11] RCC § 22E-701.

RCC § 22E-1608. Commercial Sex with a Trafficked Person.

Explanatory Note. *This section establishes the commercial sex with a trafficked person offense for the Revised Criminal Code (RCC). The commercial sex with a trafficked person offense is divided into two penalty gradations. Both grades require that the accused knowingly engage in a commercial sex act, and the penalty grades are distinguished based on the presence of one or more additional circumstances relating to whether the other party to the commercial sex act had been coerced or trafficked, and whether the other party was under the age of 18. There is no analogous offense under current District law. The current D.C. Code does not distinctly criminalize engaging in commercial sex acts with human trafficking victims.* [1] *To the extent that certain statutory provisions authorizing extended periods of supervised release*[2] *would apply to the commercial sex with a trafficked person, these provisions are replaced in relevant part by the revised commercial sex with a trafficked person statute.*

Subsection (a) establishes the elements for first degree commercial sex with a trafficked person. Paragraph (a)(1) specifies that the accused must engage in a "commercial sex act," a defined term.[3] The paragraph specifies that a "knowingly" culpable mental state applies, a defined term[4] which here requires that the defendant was practically certain that he or she is engaged in a commercial sex act.

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[1] It is possible that some conduct that constitutes first and second degree commercial sex with a trafficked person in the RCC could be prosecuted under the current D.C. Code as sexual abuse under an accomplice theory. Under this theory, by making a payment, the patron/accomplice would have encouraged the principal to coerce the commercial sex act, with the purpose to encourage the principal to succeed in coercing the commercial sex act.

It also is possible that some conduct that constitutes second degree commercial sex with a trafficked person in the RCC could also be prosecuted under the current D.C. Code as either first or second degree child sexual abuse, or first or second degree sexual abuse of a minor. A patron who engages in a commercial sex act with a person under 16 years of age would be guilty of either first degree child sexual abuse (if a sexual act) or second degree child sexual abuse (if a sexual contact). A patron who engages in a commercial sex act with a person 16 or 17 years of age would be guilty of sexual abuse of a minor, however, only if he or she is in a "significant relationship" (e.g. a teacher, religious leader, or uncle) to the minor. Conduct constituting second degree commercial sex with a trafficked person may also be prosecuted under a variety of other sex offenses (e.g. misdemeanor sexual abuse of a child or minor; sexual abuse of a secondary education student) in the current D.C. Code in some circumstances.

However, no current D.C. Code offenses distinctly account for the fact that a minor who engaged in commercial sex was trafficked, or that a person of any age engaged in commercial sex was trafficked by means of coercive threat or debt bondage.

[2] D.C. Code § 24-403.01(b)(4) (" In the case of a person sentenced for an offense for which registration is required by the Chapter 40 of Title 22, the court may, in its discretion, impose a longer term of supervised release than that required or authorized by paragraph (2) or (3) of this subsection, of: . . . **(A)** Not more than 10 years[.]" D.C. Code §22-4001(8) defines "registration offense" to include "Any offense under the District of Columbia Official Code that involved a sexual act or sexual contact without consent or with a minor[.]" To the extent the commercial sex with a trafficked person statute covers sexual acts or contacts without consent, D.C. Code § 22-403.01 would authorize an extended period of supervised release.

[3] RCC § 22E-701

[4] RCC § 22E-206 (b).

Paragraph (a)(2) specifies that first degree commercial sex with a trafficked person requires that a "coercive threat," or "debt bondage," both defined terms,[5] was used to cause the other person to engage in the commercial sex act with the accused. The paragraph specifies that a "knowingly" culpable mental state applies, a defined term[6] which here requires that the accused was practically certain that a coercive threat or debt bondage was used to cause the other person to engage in the commercial sex act.

Paragraph (a)(3) specifies that first degree sex trafficking patronage requires that the accused was reckless as to whether the other person was under the age of 18, or, in fact, the complainant was under 12 years of age. "Recklessness," a defined term,[7] here requires that the defendant consciously disregarded a substantial risk that that was clearly blameworthy that the other person was under the age of 18. "In fact" is a defined term that here means no culpable mental state need be proven if the complainant is under 12 years of age.

Subsection (b) establishes the elements for second degree sex trafficking patronage. Paragraph (b)(1) specifies that the defendant must engage in a commercial sex act. The paragraph specifies that a "knowingly" culpable mental state applies, a defined term[8] which here requires that the defendant was practically certain that he or she is engaged in a commercial sex act.

Paragraph (b)(2) specifies that two forms of second degree commercial sex with a trafficked person. Subparagraph (b)(2)(A) requires that a "coercive threat," or "debt bondage," both defined terms[9], was used to cause the other person to engage in the commercial sex act with the accused. The paragraph specifies that a "knowingly" culpable mental state applies, a defined term[10] which here requires that the accused was practically certain that a coercive threat or debt bondage was used to cause the other person to engage in the commercial sex act. Subparagraph (b)(2)(B) requires that the other person had been recruited, enticed, housed, transported, provided, obtained, or maintained for the purpose of causing the person to submit to or engage in the commercial sex act. The paragraph specifies that a "knowingly" culpable mental state applies, a defined term[11] which here requires that the accused was practically certain that the other person had been recruited, enticed, housed, transported, provided, obtained, or maintained for the purpose of causing the person to submit to or engage in the commercial sex act. Subparagraph (b)(2)(B) also requires that the accused was reckless that the complainant was under the age of 18, or was, in fact, under the age of 12. When the complainant was under the age of 18, a "reckless" culpable mental state applies, which requires that the accused consciously disregarded a substantial risk that that was clearly blameworthy that the complainant was under the age of 18. When the complainant was under the age of 12, the term "in fact" specifies that no culpable mental state is required.

[5] RCC § 22E-701.
[6] RCC § 22E-206 (b).
[7] RCC § 22E-206 (d).
[8] RCC § 22E-206 (b).
[9] RCC § 22E-701.
[10] RCC § 22E-206 (b).
[11] RCC § 22E-206.

Relation to Current District Law. *The commercial sex with a trafficked person offense changes current District law by criminalizing the knowingly engaging in a commercial sex act with a victim of trafficking in commercial sex, forced commercial sex, or sex trafficking of minors.*

This offense fills an unnecessary gap in current District law. Under the current D.C. Code, engaging in commercial sex acts with another, with knowledge that the other person has been coerced into engaging in the commercial sex act, or was trafficked for the purposes of engaging in commercial sex acts, is not distinctly criminalized.

RCC § 22E-1609. Forfeiture.

Explanatory Note. *This section establishes forfeiture rules for property involved in violations of offenses under this chapter. In addition to any penalties authorized by statutes in this chapter, a court may order any actors convicted of an offense under this chapter to forfeit property used or intended to be used to commit or facilitate commission of an offense under this chapter, or any property obtained as a result of commission of an offense under this chapter. The revised statute replaces the current forfeiture statute applicable to human trafficking offenses.*[1]

Relation to Current District Law. *The forfeiture statute makes changes current District law in one main way.*

The revised statute provides judicial discretion in determining whether and to what extent to require forfeiture. The current statute states that "the court shall order…" forfeiture. There is no DCCA case law on point, although generally the DCCA has recognized constitutional restrictions on asset forfeiture that are excessive.[2] By contrast, the revised statute states that "the court may order…" forfeiture. Providing judicial discretion allows the court to determine a proportionate forfeiture, conscientious of constitutional and sub-constitutional considerations of what would be an excessive loss.

One change is clarificatory and is not intended to substantively change current District law.

The revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[3] "Actor" is a defined term[4], which means "a person accused of any offense." The term "person" is also a defined term[5], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[1] D.C. Code § 22-1838.
[2] Any forfeiture must be proportional under the excessive fines clause of the U.S. Constitution. *One 1995 Toyota Pick-Up Truck v. District of Columbia*, 718 A.2d 558, 560-61 (D.C. 1998).
[3] D.C. Code § 22-1832.
[4] RCC § 22E-701.
[5] RCC § 22E-701.

RCC § 22E-1610. Reputation or opinion evidence.

Explanatory Note. *This section establishes evidentiary rules that prohibits the use of reputation or opinion evidence of past sexual behavior of an alleged victim in prosecutions for forced commercial sex, as prohibited by RCC § 22E-1602, trafficking in commercial sex, as prohibited by RCC § 22E-1604; sex trafficking of minors, as prohibited by § 22E-1605; benefitting from human trafficking, as prohibited by § 22E-1606; and commercial sex with a trafficked person, as prohibited by RCC § 22E-1608.. This section is nearly identical to current D.C. Code § 22-1839, but has been amended to apply to prosecutions of forced commercial sex and commercial sex with a trafficked person, which are not currently criminalized under the human trafficking chapter.*

Relation to Current District Law. *The revised reputation or opinion evidence statute changes current District law in one main way.*

The revised reputation or opinion evidence statute bars evidence of past sexual behavior of an alleged victim in prosecutions for forced commercial sex, as prohibited under RCC § 22E-1602 and commercial sex with a trafficked person, as prohibited under RCC § 22E-1608. Under current law, coercing a person to engage in a commercial sex act and engaging in a commercial sex act with a trafficked person are not separately criminalized. However, the current reputation or opinion evidence statute applies to prosecutions for "trafficking in commercial sex," "sex trafficking of children," and "benefitting financially from human trafficking[.]"[1] By contrast, the revised reputation or opinion evidence statute clarifies that it also applies to prosecutions of the RCC's forced commercial sex and commercial sex with a trafficked person offenses. It would be inconsistent to bar reputation or opinion evidence of an alleged victim's past sexual behavior in prosecutions for other offenses, but allow them in a prosecution for forced commercial sex or commercial sex with a trafficked person. This change improves the consistency and proportionality of the revised statute.

One aspect of the revised reputation or opinion evidence statute may constitute a substantive change to current District law.

The revised statute states that when a "person" is accused of an offense listed in the statute, reputation or opinion evidence of the past sexual behavior of the alleged victim is not admissible. The RCC defines "person" to include businesses and other legal persons.[2] The current statute only refers to a person being accused of an offense, but that term is not defined.[3] It is unclear whether the current statute applies in cases in which a *business* is accused of an offense listed in the statute, and there is no relevant D.C. Court of Appeals case law on point. By contrast, the revised statute clarifies that the reputation or opinion evidence rules apply when a business is accused of offenses listed under the statute. This change improves the clarity and consistency of the revised statute.

[1] D.C. Code § 22-1839.
[2] RCC § 22E-701.
[3] Cf. D.C. Code §22-3201 (2A). "'Person' means an individual (whether living or dead), trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government department, agency, or instrumentality, or any other legal entity.

One change to the revised statute is clarificatory in nature and is not intended to substantively change District law. The current statute cross references statutes in the current D.C. Code. The revised statute changes the cross references other statutory provisions to match the revised human trafficking offenses in the RCC. The RCC evidentiary rule applies to RCC §§ 22E-1602, 22E-1604, 22E-1605, and 22E-1608, instead of current D.C. Code §§ 22-1833, 22-1834, and 22-1836. This is a technical change that does not otherwise change the reputation or opinion evidence statute.

RCC § 22E-1611. Civil action.

Explanatory Note. *This section authorizes victims of offenses under RCC § 22E-1601, § 22E-1602, § 22E-1603, § 22E-1604, § 22E-1605, § 22E-1606, § 22E-1607, and § 22E-1608 to bring a civil action in D.C. Superior Court for damages and injunctive relief. This section is nearly identical to current D.C. Code § 22-1840. This section is nearly identical to current D.C. Code § 22-1804, but has been amended to authorize victims of all trafficking offenses included in the RCC to bring a civil action, and to change the statute of limitations.*

This section authorizes a victim of any offense under RCC §§ 22E-1601, 22E-1602, 22E-1603, 22E-1604, 22E-1605, 22E-1606, 22E-1607, or 22E-1608 to bring a civil action against any person who may be charged as a perpetrator of that offense. It is not required that the defendant in the civil action has actually been charged or convicted of that offense. This language shall not be construed to limit civil liability for other entities that may be held vicariously liable, even if they did not directly engage in conduct constituting an offense under this chapter.[1]

Relation to Current District Law. *The revised civil action statute changes current District law in two main ways.*

First, the revised civil action authorizes victims of commercial sex with a trafficked person as defined under RCC § 22E-1608 to bring a civil action. There is no analogous offense under current law, and accordingly the current civil action statute does not authorize victims of this offense to bring a civil action. By contrast, the revised civil action statute allows victims of commercial sex with a trafficked person to bring civil actions. It would be inconsistent to authorize civil actions for violations of other human trafficking offenses, but not the victims of commercial sex with a trafficked person offense. This change improves the consistency of the revised statute.

Second, the revised civil action statute changes the statute of limitations for bringing civil actions under this section. The current statute says that the statute of limitations shall not begin to run until the plaintiff knew, or reasonably should have known, of any act constituting a human trafficking offense, or if the plaintiff is a minor, until the plaintiff reaches the age of majority, whichever is later. By contrast, the revised civil statute extends the time within which a victim can bring a civil action if the offense occurred when the victim was under the age of 35, and generally allows civil suits to be brought within 5 years of when the victim knew, or should have known, of the offense. This revision expands the period in which victims of trafficking offenses may bring civil actions in accordance with changes under the Sexual Abuse Statute of Limitations Elimination Amendment Act of 2017. This change improves the proportionality and consistency of the revised statute.

[1] *See*, *Boykin v. District of Columbia*, 484 A.2d 560, 561–62 (D.C. 1984) ("Under the doctrine of *respondeat superior*, an employer may be held liable for the acts of his employees committed within the scope of their employment.") (citing *Penn Central Transportation Co. v. Reddick*, 398 A.2d 27, 29 (D.C.1979)).

In addition to these two changes, two other revisions may constitute substantive changes to current District law.

The revised civil action authorizes victims of forced commercial sex as defined under RCC § 22E-1602 to bring a civil action. The current code does not explicitly criminalize forced commercial sex, and it is unclear whether the use of coercion or debt bondage to compel a person to engage in a commercial sex act constitutes forced labor or services under the current statute. Therefore, it is unclear whether the current civil action statute provides a civil cause of action if a person uses coercive threats or debt bondage to compel a person to engage in a commercial sex act. It would be inconsistent to authorize civil actions for violations of other human trafficking offenses, but not the victims of the forced commercial sex offense. This change improves the consistency of the revised criminal code.

Secondly, the revised civil action statute specifies that a victim of a trafficking offense may bring a civil action against any person who may be charged as a perpetrator of that offense. The current statute does not specify against whom civil actions may be brought, and there is no relevant DCCA case law. This revision clarifies that victims of an offense under this chapter may bring a civil action against a person who may be charged as a perpetrator of that offense.

In addition, one change to the revised statute is clarificatory in nature and is not intended to substantively change District law.

The revised statute changes cross references to other statutory provisions to match the revised human trafficking offenses in the RCC. The current statute cross references statutes in the current D.C. Code. The revised statute authorizes victims of offenses defined under RCC §§ 22E-1601, 22E-1602, 22E-1603, 22E-1604, 22E-1605, 22E-1606, 22E-1607, and 22E-1608. This is a technical change that does not otherwise change the civil action statute.

RCC § 22E-1612. Limitation on Liabilities and Sentencing for RCC Chapter 16 Offenses.

Explanatory Note. *The Limitations on Liability and Sentencing for RCC Chapter 16 Offenses ("limitations on liability statute") provides three limitations on liability to offenses under this chapter. [First, it prohibits a defendant from being convicted of two or more Chapter 16 offenses that arise from a single act or course of conduct. The statute prevents the imposition of multiple punishments for the commission of substantively similar, overlapping human trafficking offenses in order to improve sentencing proportionality. The RCC statute concerns only the sentencing stage of criminal proceedings and does not preclude a defendant from being charged with, or a jury being instructed on, two or more offenses under Chapter 16. If more than one Chapter 16 offense arise from a single act or course of conduct, the offenses shall merge in accordance with the rules and procedures established under RCC § 214 (d)-(e).] Second, the limitations on liability statute bars charging a person as an accomplice to a Chapter 16 offense, if the principal had previously committed a Chapter 16 offense against that person. Third, the limitations on liability statute bars charging a person with conspiracy to commit a Chapter 16 offense if another party to the conspiracy had previously committed a Chapter 16 offense against that person.*

[Subsection (a) codifies a statutory requirement of merger for human trafficking offenses. This requirement is categorical, barring multiple convictions for any combination of offenses in Chapter 16 whenever they arise from the same course of conduct.[1] This provision supersedes the general merger principles set forth by RCC § 214(a),[2] although the merger provided for in this section is subject to the rules and procedures established in RCC § 214(d)-(e). Whenever two or more convictions for Chapter 16 offenses merge under this section, the offense that remains shall—pursuant to RCC § 214(d)—be: (1) the most serious offense among the offenses in question; or (2) if the offenses are of equal seriousness, any offense that the court deems appropriate.[3] Additionally, RCC § 22E-1612 only limits—in accordance with RCC § 214(e)—the entry of a final judgment of liability. This means that a person may be found guilty of two or more Chapter 16 offenses that merge under this section.[4] 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.[5]]

[1] As a general rule, two offenses arise from the same course of conduct when—at minimum—a single act or omission by the defendant satisfies the requirements of liability for each. However, multiple charges may be based on a series of related acts or omissions yet still arise from the same course of conduct.

[2] *See also*, RCC § 212(b) (establishing that merger is ultimately a matter of legislative intent).

[3] 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] RCC § 22E-1612 should not be construed as in any way constraining the number of Chapter 16 offenses over which the fact finder may deliberate.

[5] *See* Commentary on RCC § 212(e) ("This clarification is intended to provide D.C. Superior Court judges with sufficient leeway to continue their current practice of entering judgment on all counts for which the defendant has been convicted, thereby leaving merger issues to the D.C. Court of Appeals for resolution on direct review, should they so choose.")

Subsection (b) bars charging a person as an accomplice to a Chapter 16 offense if the principal had previously committed a Chapter 16 offense against that person. This subsection only bars accomplice liability, and victims of trafficking offenses may still be charged and convicted as principals.

Subsection (c) bars charging a person with conspiracy to commit a Chapter 16 offense if any party to the conspiracy had previously committed a Chapter 16 offense against that person. This subsection only bars charges of conspiracy to commit a Chapter 16 offense, and victims of trafficking offenses may still be charged and convicted with actually committing or attempting to commit a Chapter 16 offense.[6]

Relation to Current District Law. *The limitations on liability statute changes current District law in three main ways.*

[First, the RCC's limitations on liability statute changes current law by categorically barring convictions for offenses under Chapter 16 that arise from a single act or course of conduct. The current human trafficking statutes do not have a statutory provision that addresses merger. The current code prohibits consecutive sentences for violations of the trafficking in labor or commercial sex[7] and sex trafficking of children statutes[8] statute that arise from a single incident, but does not address multiple convictions or consecutive sentences for any other offenses under chapter 16.[9] There is no D.C. Court of Appeals (DCCA) case law on whether any of the current human trafficking related offenses merge when they arise from a single act or course of conduct. However, it is likely that under the court's current test for determining whether offenses merge, at least some current human trafficking offenses would *not* merge.[10] The revised

[6] Subsections (b) and (c) recognize that in many instances, victims of human trafficking offenses are highly vulnerable and may be co-opted by perpetrators into assisting in committing further trafficking offenses. Although these victims may not necessarily be able to satisfy a common law duress defense, they often have diminished culpability, and imposing accomplice or conspiracy liability may be disproportionately severe. These subsections seek to balance protections for vulnerable victims of human trafficking offenses who are co-opted by perpetrators, while still permitting criminal liability for persons who commit trafficking offenses as principals. Other jurisdictions have enacted provisions limiting liability for victims of trafficking offenses. E.g., N.M. Stat. Ann. § 30-52-1 ("In a prosecution pursuant to this section, a human trafficking victim shall not be charged with accessory to the crime of human trafficking."). In addition, the Reporter's Notes accompanying the American Law Institute's draft for sexual assault and related offense for the Model Penal Code notes that some human trafficking victim's advocates say that "enforcement practices often traumatize victims and expose them to even greater hardship and danger." Council Draft No. 8 (Dec. 17, 2018). The note cites to 22 U.S.C. § 7101(b)(19) which states that "Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked[.]"

[7] D.C. Code § 22-1833.

[8] D.C. Code § 22-1834.

[9] D.C. Code § 22-1837. For example, the current code does not explicitly prohibit multiple convictions or consecutive sentences for forced labor and trafficking in labor that arise from a single act or course of conduct.

[10] The DCCA currently applies the *Blockburger* "elements test" to determine if two offenses that arise from a single act or course of conduct should merge. *Byrd v. United States*, 598 A.2d 386 (D.C. 1991). Under this approach, if it possible to commit one offense without necessarily committing the other, the offenses do not merge. Using this test, it is likely that at least some offenses under current human trafficking offenses would not merge. For example, the current forced labor offense requires that the defendant use coercion or debt bondage to cause a person to provide labor or services. D.C. Code § 22-1832.

statute eliminates the possibility of receiving multiple convictions under Chapter 16 based on a single act or course of conduct which, even if sentenced to run concurrently, may lead to unnecessary collateral consequences. This change improves the proportionality of the revised statutes.]

Second, the RCC's limitation on liability statute changes current law by barring charging a person as an accomplice to a Chapter 16 offense if prior to that offense, the principal committed a Chapter 16 offense against that person. Under current law, there are no restrictions on accomplice liability for victims of trafficking offenses. By contrast, this revision prevents criminal liability for victims of offenses under this chapter who subsequently aid or assist principals in committing additional offenses under this chapter. This subsection only bars accomplice liability, and victims of trafficking offenses may still be charged and convicted as principals. This change recognizes the vulnerability many victims of human trafficking have to further manipulation that may fall short of a general defense of duress. This revision improves the proportionality of the revised statute.

Third, the RCC's limitation on liabilities statute changes current law by barring charging a person with conspiracy to commit an offense under Chapter 16 if prior, a party to the conspiracy had committed a Chapter 16 offense against that person. Under current law, there are no restrictions on conspiracy liability for victims of trafficking offenses. By contrast, this revision prevents criminal liability for victims of offenses under this chapter who subsequently conspire with parties that previously committed a trafficking offense against that person. This subsection only bars charges of conspiracy to commit a Chapter 16 offense, and victims of trafficking offenses may still be charged and convicted with actually committing or attempting to commit a Chapter 16 offense. This change recognizes the vulnerability many victims of human trafficking have to further manipulation that may fall short of a general defense of duress. This revision improves the proportionality of the revised statute.

Trafficking in labor or commercial sex acts requires that the defendant traffic a person, with recklessness as to whether the complainant coercion or debt bondage is being used *or will be used* to cause the person to provide labor. D.C. Code §22-1833. There is no requirement under the trafficking offense that the defendant anyone actually uses coercion to compel a person to provide labor. Therefore, it is possible to commit trafficking in labor or commercial sex acts without necessarily committing forced labor or services. Under the DCCA's current merger analysis, it is likely that a person could be convicted of both forced labor and trafficking in labor or commercial sex acts based on a single act or course of conduct.

COMMENTARY SUBTITLE III.
PROPERTY OFFENSES

RCC § 22E-2001. Aggregation to Determine Property Offense Grades.

Explanatory Note. *For specified offenses in the Revised Criminal Code (RCC), this section permits the government to aggregate the values, amounts of damage, or quantities of property involved in a single scheme or course of conduct in order to bring one charge of a more serious grade, instead of multiple charges of a less serious grade. Aggregation is permitted regardless of whether the property was taken, transferred, etc. from one person or several, provided that the taking, transferring, etc. was pursuant to one scheme or course of conduct. The revised aggregation to determine property offense grades statute ("aggregation statute") replaces the "Aggregation of amounts received to determine grade of offense" statute*[1] *in the current D.C. Code.*

Relation to Current District Law. *The revised aggregation statute changes current District law in one main way.*

The revised aggregation statute expands the number of offenses for which values and quantities of property may be aggregated to fourteen. Under the current aggregation statute only six statutes are subject to aggregation.[2] The eight RCC offenses[3] added in the revised aggregation statute comprise all the property offenses in the RCC which have more than one gradation based on the quantity, value, or damage done to property. Some of the added offenses seem particularly likely to involve a scheme or systematic course of conduct involving multiple properties.[4] The expansion of offenses subject to the aggregation statute improves the administrative efficiency and proportionality of these offenses.

Beyond this one main change to current District law, one other aspect of the revised aggregation statute may be viewed as a substantive change in law.

The revised aggregation statute refers generally to "the values, amounts of damage, or quantities of the property involved in the scheme or systematic course of conduct." The current aggregation statute refers to property "received pursuant to" a scheme or systematic course of conduct in a violation of a specified offense. There is no case law interpreting this phrase in the current statute. The revised aggregation statute's

[1] D.C. Code § 22-3202 ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.").

[2] D.C. Code § 22-3202 ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.").

[3] The eight offenses are: § 22E-2105 Unlawful Creation or Possession of a Recording; § 22E-2203 Check Fraud; § 22E-2204 Forgery; § 22E-2206 Unlawful Labeling of a Recording; § 22E-2208 Financial Exploitation of a Vulnerable Adult; § 22E-2301 Extortion; § 22E-2401 Possession of Stolen Property; § 22E-2403 Alteration of Motor Vehicle Identification Number; and § 22E-2503 Criminal Damage to Property.

[4] E.g., § 22E-2403 Alteration of Motor Vehicle Identification Number, which specifically applies not only to motor vehicles but to motor vehicle parts, in part targets fences of stolen property similar to the trafficking in stolen property offense.

reference to "the values, amounts of damage, or quantities of the property in the scheme or systematic course of conduct" is intended to cover all the ways in which property may be the subject of one of the listed crimes, not just "receives."[5] This revision clarifies the aggregation statute and improves the proportionality of the referenced offenses.

The remaining changes to the revised aggregation statute are clarificatory in nature and do not substantively change District law.

First, the revised aggregation statute clarifies that the amounts that are relevant in aggregation are based on the property involved in the crime. "Property" is a defined term per RCC 22E-701 that means "anything of value," and includes goods, services, and cash. In many offenses, it is the values of the relevant property that may be aggregated.[6] For some offenses, however, it is the quantity of property, not the value, which may be aggregated.[7] In still other offenses, it is the amount of damage that may be aggregated.[8]

Second, the revised aggregation statute states that aggregation is only for a single scheme or systematic course of conduct in violation of any one of the listed offenses. The current aggregation statute clearly refers to aggregation being for "determining the grade of *the* offense and the sentence for *the* offense" (emphasis added).[9] There is no case law on point. The revised statute clarifies that only property involved in a scheme or systematic course of conduct for one offense may be aggregated.

[5] There is no indication in the legislative history or otherwise that the use of the word "receives" was intended to omit property that was stolen or part of a fraudulent scheme that a person exercised control over, transferred, paid for, etc., but never "received."

[6] For example, if a thief watching an unattended table walks by and commits theft under RCC § 22E-2101 by taking a coat and a purse left at the table, those items may be aggregated as being stolen pursuant to the same act or course of conduct. The value of those items would be added together to determine the appropriate grade of theft.

[7] For example, a person who, in violation of unlawful creation or possession of a recording (UCPR) per RCC § 22E-2105, one afternoon unlawfully makes 60 copies of one sound recording and 60 copies of different sound recording as part of the same act or course of conduct, may be charged with felony UCPR instead of two misdemeanor charges of UCPR pursuant to the revised aggregation statute. The number of recordings would be added together to determine the appropriate grade of UCPR.

[8] For example, if a person throws a rock through a display case, breaking multiple glass objects in violation of criminal damage to property (CDP) per RCC § 22E-2503, those items may be aggregated as being damaged pursuant to the same act or course of conduct. The amount of damage to each item would be added together to determine the appropriate grade of CDP. (See Commentary to RCC § 22E-2503).

[9] D.C. Code § 22-3202 ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft)… *or* § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense."(emphasis added)).

RCC § 22E-2002. Definition of "Person" for Property Offenses.

Explanatory Note. *This section codifies a definition of "person" for property offenses in Subtitle III of Title 22E to include not only natural persons, but corporate and other legal entities. The provision replaces the current statutory definition of "person" in D.C. Code § 22-3201(2A),*[1] *applicable to Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and provisions in Chapter 32 of the current Title 22, and D.C. Code § 45-604, to the extent that D.C. Code § 45-604 may apply to provisions currently in Chapter 32 of the current Title 22 of the D.C. Code.*

The revised definition of "person" applies to all offenses and provisions that refer to "person" in Subtitle III of Title 22E (Property offenses). The revised definition of "person" codifies a close-ended list of natural persons and non-human legal entities such as trusts, estates, companies, etc.

Relation to Current District Law. *The RCC definition of "person" for property offenses makes no substantive changes to current District law but does make one possible substantive change to District law.*

The RCC definition of "person" for property offenses clarifies that legal entities are considered to be persons for purposes of property offense provisions. The RCC definition of "person" in RCC § 22E-2002 is substantively identical to the current statutory definition of "person" in D.C. Code § 22-3201(2A),[2] applicable to Theft, Fraud, Stolen Property, Forgery, and Extortion offenses, and applies to the revised statutes in Subtitle II of Title 22E,which generally correspond to provisions in Chapter 32 of Title 22. However, offenses and provisions in Chapter 32 of the current Title 22 also are subject to a definition of "person" in D.C. Code § 45-604[3] that applies to the entire D.C. Code and refers only to the possible inclusion of "partnerships and corporations, unless such construction would be unreasonable…". There is no case law on either D.C. Code § 22-3201(2A) or D.C. Code § 45-604. To resolve any conflict with the definition of "person" in D.C. Code § 45-604, the revised statute specifically excludes consideration of the definition in D.C. Code § 45-604. This change clarifies the revised statute.

One other change to the revised statute is clarificatory in nature and is not intended to substantively change District law.

The RCC definition of "person" replaces "government department, agency, or instrumentality" in the current definition of "person" in D.C. Code § 22-3201(2A) with "government," and "government instrumentality." This language is consistent with other

[1] 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.").
[2] D.C. Code 22-3201(2A).
[3] 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.").

RCC provisions,[4] but does not change the meaning of the statute which reaches any "any other legal entity."[5]

[4] RCC § 22E-4203. Blocking a Public Way.
[5] D.C. Code 22-3201(2A).

RCC § 22E-2101. Theft.

Explanatory Note. *This section establishes the revised theft offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes a broad range of conduct in which there is an intent to deprive another of property without an owner's consent. The penalty gradations are primarily based on the value of the property involved in the crime. The revised theft offense replaces the theft statute*[1] *in the current D.C. Code.*

Subsection (a)(1) specifies the prohibited conduct for first degree theft—takes, obtains, transfers, or exercises control over the property of another. "Property" is a defined term in in RCC § 22E-701 that means an item of value and includes goods, services, and cash. "Property of another" is a defined term in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the defendant cannot infringe upon, regardless of whether the defendant also has an interest in that property. Subsection (a)(1) specifies a culpable mental state of "knowingly." Per the rule of construction in RCC § 22E-207, the "knowingly" mental state in subsection (a)(1) applies to all of the elements in subsection (a)(1)—takes, obtains, transfers, or exercises control over the property of another. "Knowingly" is a defined term in RCC § 22E-206 that here requires the defendant to be aware to a practical certainty that his or her conduct takes, obtains, transfers, or exercises control over property that is "property of another."

Subsection (a)(2) states that the proscribed conduct must be done "without the consent of an owner." "Consent" is a defined term in RCC § 22E-701 that means "a word or action that indicates, expressly or implicitly, agreement to particular conduct or a particular result" and given by a person that is generally competent to do so. Any indication of agreement that satisfies the definition of "consent," even if obtained by deception, coercive threat, or physical force, negates the element "without the consent of an owner" and the accused is not guilty of theft. However, there may be liability under the RCC fraud offense (RCC § 22E-2101) or the RCC extortion offense (RCC § 22E-2301) if the taking was committed by deception, a coercive threat, or physical force. "Owner" is defined to mean a person holding an interest in property with which the actor is not privileged to interfere. Per the rule of construction in RCC § 22E-207, the "knowingly" mental state in subsection (a)(1) also applies to subsection (a)(2), here requiring the accused to be aware to a practical certainty that he or she lacks the consent of an owner.

Subsection (a)(3) requires that the defendant had an "intent to deprive" that owner of property. "Deprive" is a defined term meaning that the other person is unlikely to recover the property, or that it will be withheld permanently or long enough to lose a substantial portion of its value or benefit. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would "deprive" the other person of the property. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to

[1] D.C. Code § 22-3211.

prove that such a deprivation actually occurred, only that the defendant believed to a practical certainty that a deprivation would result.

The requirements in subsections (b)(1) - (b)(3) (second degree theft), subsections (c)(1) - (c)(3) (third degree theft), subsections (d)(1) - (d)(3) (fourth degree theft), and subsections (e)(1) - (e)(3) (fifth degree theft) are the same as those in subsections (a)(1) - (a)(3) for first degree theft. The theft gradations differ only in the requirements as to the amount and type of property at issue. Each of these gradations refers to "value," a defined term in RCC § 22E-701 that generally means the fair market value of property, although, as will be discussed, some gradations of the RCC theft offense have additional bases for liability.

The various gradation requirements for theft are in subsection (a)(4) (first degree theft), subsection (b)(4) (second degree theft), subsection (c)(4) (third degree theft), subsection (d)(4), and subsection (e)(4) (fifth degree theft). Each of these subsections uses "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Per RCC § 22E-207, "in fact" applies to any result element or circumstance element that is modified by the phrase "in fact."

Subsection (a)(4) specifies that first degree theft requires that "in fact" the property has a value of $250,000 or more. The defendant is strictly liable as to the value of the property.

For second degree theft, subsection (b)(4)(A) requires "in fact" that the property has a value of $25,000 or more. The defendant is strictly liable as to the value of the property. Subsection (b)(4)(B) specifies an additional basis for liability for second degree theft—that the property is a motor vehicle and has a value of $25,000 or more. "Motor vehicle" is defined in RCC § 22E-701 as a vehicle designed to be propelled only by an internal-combustion engine or electricity. The defendant is strictly liable as to whether the property is a motor vehicle and as to the value of the motor vehicle.

For third degree theft, subsection (c)(4)(A) requires "in fact" that the property has a value of $2,500 or more. The defendant is strictly liable as to the value of the property. Subsection (c)(4)(B) specifies an additional basis for liability for third degree theft—that the property "in fact" is a motor vehicle. "Motor vehicle" is defined in RCC § 22E-701 as a vehicle designed to be propelled only by an internal-combustion engine or electricity. The defendant is strictly liable as to whether the property is a motor vehicle. Subsection (c)(4)(C) specifies the final basis for liability for third degree theft—that the property "in fact" is taken from a complainant in specified circumstances. Per subsection (c)(4)(C)(i), the complainant holds or carries the property on his or her person, or, per subsection (c)(4)(C)(ii) the complainant has the ability and desire to exercise control over the property and it is within his or her immediate physical control. The defendant is strictly liable as to whether the complainant holds or carries the property on his or her person or the complainant has the ability and desire to exercise control over the property and it is within his or her immediate physical control.

Subsection (d)(4) specifies that fourth degree theft requires that "in fact" the property has a value of $250 or more. The defendant is strictly liable as to the value of the property.

Subsection (e)(4) specifies that fifth degree theft requires that "in fact" the property has any value. The defendant is strictly liable as to the property having any value.

Subsection (f) codifies an exception to liability for fare evasion. Conduct that violates D.C. Code § 35-252 is not a violation of theft.

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

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

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

First, the revised theft offense no longer includes conduct that constitutes "obtaining property by trick," "false pretense," "deception," "false token," or "larceny by trick."[2] Under current law, such conduct is criminalized both as theft[3] and fraud.[4] Currently, a defendant may be convicted of both theft and fraud based on the same act or course of conduct, even though he or she must be concurrently sentenced for these convictions.[5] In contrast, in the RCC, conduct that constitutes "obtaining property by trick," "false pretense," "deception," or "larceny by trick" is criminalized only in RCC § 22E-2201, the revised fraud offense. Conduct previously known as "larceny by trust," "embezzlement," or obtaining property by "tampering" remains part of theft, except insofar as such conduct involves obtaining consent by deception and is therefore part of the revised fraud statute (RCC § 22E-2201). This revision reduces unnecessary overlap among offenses and improves the proportionality of the revised theft and fraud statutes.

Second, the revised theft offense eliminates as a separate means of proving liability for theft that the defendant have an intent to "appropriate"[6] property. Currently, District law defines "appropriate" as "to take or make use of without authority or right."[7] As applied to the current theft statute, the definition of "appropriate" means that any unauthorized taking or use of property, no matter how brief, can suffice for a theft conviction and is punishable the same as the more serious intent to interfere with property that is required by "with intent to deprive."[8] In contrast, in the RCC, conduct that is punishable under "with intent to appropriate" in the current theft statute instead will be punished under the revised unauthorized use of property offense in section RCC § 22E-2102. This revision improves the proportionality of the revised theft offense and reduces the overlap that currently exists between theft and theft-related offenses such as unauthorized use of a motor vehicle,[9] receiving stolen property,[10] and taking property

[2] D.C. Code § 22-3211(a)(3).
[3] D.C. Code § 22-3211.
[4] D.C. Code § 22-3221.
[5] D.C. Code § 22-3203. However, even if the imprisonment sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences.
[6] D.C. Code § 22-3211(b)(2).
[7] D.C. Code § 22-3201(1).
[8] D.C. Code §§ 22-3201(2); 22-3211(b)(1).
[9] D.C. Code § 22-3215.
[10] D.C. Code § 22-3232.

without right,[11] which either require a lesser intent or no intent with regards to the defendant's level of interference with property.

Third, the revised theft statute increases the number and type of grade distinctions, grading primarily based on the value of the property. The current theft offense is limited to two gradations based solely on value.[12] In contrast, the revised theft offense has a total of five gradations which span a much greater range in value, with a value of $250,000 or more being the most serious grade, and include two gradations for theft of a motor vehicle. Second degree theft includes theft of a motor vehicle with a value of $25,000 or more, and third degree theft includes theft of any motor vehicle. Effectively, these gradations allow for theft of low-value motor vehicles to be treated as higher value property, with correspondingly greater penalties than they would otherwise receive if treated as fourth or fifth degree theft. This special treatment of low-value motor vehicles recognizes that such vehicles are often targeted for theft. The increase in gradations, differentiated by offense seriousness, improves the proportionality of the offense. The gradations in the revised offense also create consistency with the dollar-value distinctions in related theft and fraud offenses.

Fourth, the revised theft statute criminalizes as property crimes the non-violent taking of any property (third degree theft) or a motor vehicle (second degree theft and third degree theft) from the actual possession of another person or from within his or her immediate physical control. The District's current robbery[13] and carjacking[14] statutes criminalize takings of property from the immediate actual possession of another person[15] "by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear." The DCCA has interpreted the current robbery statute to include taking property that was not on the complainant's person[16] and taking property without the complainant's knowledge,[17] when the only "force or violence" involved was the force of moving the object taken.[18] It appears that the current carjacking statute has a

[11] D.C. Code § 22-3213.

[12] First degree theft involves property with a value of $1,000 or more and is punished as a serious felony; second degree theft involves property valued at less than $1,000 and is a misdemeanor. D.C. Code § 22-3212.

[13] D.C. Code § 22-2801.

[14] D.C. Code § 22-2803.

[15] The DCCA has defined "immediate actual possession" under the robbery statute as "the area within which the victim can reasonably be expected to exercise some physical control over the property." *Sutton v. United States*, 988 A.2d 478, 485 (D.C. 2010). *See also*, *Beaner v. United States*, 845 A.2d 525, 532-33 (D.C. 2004) (holding that the term "immediate actual possession," as used in the carjacking statute was borrowed from the robbery statute, includes a car that was several feet from the owner when it was taken).

[16] *Spencer v. United States*, 73 App. D.C. 98 (D.C. Cir. 1940) (affirming robbery conviction when defendant took cash from person's pants, which were resting on a chair at the foot of a bed that defendant was using at the time); *Ulmer v. United States*, 649 A.2d 295, 298 (D.C. 1994).

[17] *Spencer v. United States*, 73 App. D.C. 98 (D.C. Cir. 1940) (affirming robbery conviction when defendant took cash from person's pants, which were resting on a chair at the foot of a bed that defendant was using at the time); *Ulmer v. United States*, 649 A.2d 295, 298 (D.C. 1994).

[18] District case law states that any taking from the immediate actual possession of another person satisfies the "by force or violence" requirement in the current robbery statute. *See, e.g.*, *Turner v. United States*, 16 F.2d 535, 536 (D.C. Cir. 1926) ("[T]he requirement for force is satisfied within the sense of the statute by an actual physical taking of the property from the person of another, even though without his knowledge and consent, and though the property be unattached to his person.").

similar scope.[19] While the DCCA has suggested that there is a limit to sudden or stealthy seizures or snatchings under the current robbery statute due to the statutory "by force or violence" requirement, the precise contours of this limit have not been articulated.[20] In contrast, the RCC criminalizes as property crimes all non-violent takings of any property (third degree theft) or a motor vehicle (second degree theft and third degree theft) from the actual possession of another person or from within his or her immediate physical control, instead of as robbery or carjacking offenses against persons. Taking an object from the actual possession or immediate physical control of another person without his or her knowledge, or with only minor touching that does not cause bodily injury or involve overpowering physical force, merits less severe punishment than takings that involve physical harm or criminal menacing.

This revision leads to several additional changes to current District law. 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[21] or to penalty

[19] Unlike the clear case law on robbery, whether current District law on carjacking extends liability to takings that occur without a criminal menace or use of force is not firmly established in District case law. However, the statutory language regarding "sudden or stealthy seizure, or snatching" that requires no use of force or criminal menace is identical in the current robbery and carjacking statutes. And, in at least one case, the DCCA, ruling on other issues, appears to have upheld a carjacking conviction on facts that involved a sudden and stealthy seizure with no apparent criminal menace, use of physical force, or bodily injury. *See Young v. United States*, 111 A.3d 13, 14 (D.C. 2015) (affirming multiple convictions for carjacking, first degree theft, and unauthorized use of a motor vehicle based on the defendant's taking a car with keys in it while the owner was standing nearby).

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

[21] The current robbery statute is subject to enhanced penalties for committing robbery "while armed" with or "having readily available" a dangerous weapon. D.C. Code § 22-4502. In most non-violent takings of property from the actual possession of another person or from within his or her immediate physical control, the defendant will not be "armed" with a dangerous weapon and will only have it "readily available." Regardless, under current law, the entire enhancement in D.C. Code § 22-4502 applies to the current robbery statute. The current D.C. Code has a separate armed carjacking offense for committing carjacking "while armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, dirk, bowie

enhancements for the status of the complainant[22] 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 for possession of a dangerous weapon in such circumstances under other provisions in the RCC.[23] Second, third degree of the revised theft statute punishes attempted non-violent takings of property from the actual possession of another person or from within his or her immediate physical control consistent with other criminal attempts. The D.C. Code currently codifies a penalty for attempted robbery[24] that differs from the general penalty for attempted crimes, but there is no clear rationale for such special attempt penalties in robbery as compared to other offenses. Under the revised theft statute, the General Part's attempt provisions[25] specify what must be proven to establish attempt liability and establish penalties for attempted theft consistent with other offenses. Third, the revised theft statute requires a person to act "knowingly" with respect to taking or exercising control over a motor vehicle and whether the motor vehicle satisfies the RCC definitions of "property" and "property of another." The current carjacking statute requires only that a person acts "recklessly" with respect to the taking or exercise of control over the motor vehicle,[26] although it is unclear in the legislative history whether the Council intended this culpable mental state.[27]

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knife, butcher knife, switch-blade knife, razor, blackjack, billy, or metallic or other false knuckles)." D.C. Code § 22-2803(b)(1). Despite this offense, both carjacking and armed carjacking are subject to the additional penalty in D.C. Code § 22-4502 for committing the offenses "while armed" or "having readily available" a dangerous weapon.

However, DCCA case law in the context of the District's current assault with a dangerous weapon offense (ADW) suggests that the while armed enhancement in D.C. Code § 22-4502(a)(1) may not be applied to the current armed carjacking offense because it overlaps with an element of the offense. The DCCA has held that ADW may not be enhanced with the current "while armed" enhancement in D.C. Code § 22-4502(a)(1) because each provision requires the use of a "dangerous weapon." *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982) ("The government concedes that [current D.C. Code § 22-4502(a)(1)] may not apply to ADW since [ADW] provides for enhancement and is a more specific and lenient provision."); *see also Gathy v. United States*, 754 A.2d 912, 916 n.5 (D.C. 2000) ("In *McCall* we held that section [current D.C. Code § 22-4502(a)(1)] could not be applied to a charge of ADW because the use of 'a dangerous weapon' is already included as an element of *that* offense, so that 'ADW while armed'-*i.e.*, assault with a dangerous weapon while armed with a dangerous weapon-would be redundant.").

[22] The District's protection of District public officials statute penalizes various actions, including taking the property of any District official or employee while in the course of his or her duties or on account of those duties. D.C. Code § 22-851(c). The District has penalty enhancements for robbery when the complainant is: a minor (D.C. Code §§ 22-3611; 23-1331(4)); a senior citizen (D.C. Code § 22-3601); a taxicab driver (D.C. Code §§ 22-3751; 22-3752); a transit operator or Metrorail station manager (D.C. Code §§ 22-3751.01; 22-3752); or a member of a citizen patrol (D.C. Code § 22-3602). The District has penalty enhancements for carjacking when the complainant is: a minor (D.C. Code §§ 22-3611; 23-1331(4)); a senior citizen (D.C. Code § 22-3601); a taxicab driver (D.C. Code §§ 22-3751.01; 22-3752); and a transit operator or Metrorail station managers (D.C. Code §§ 22-3751.01; 22-3752).

[23] *See, e.g.*, [RCC § 22E-XXXX possession of an unregistered firearm]. In addition, an actor may face an enhanced penalty under RCC § 22E-607, the hate crime penalty enhancement, if he or she targets the complainant because of a characteristic such as his or her sex.

[24] D.C. Code § 22-2802 (making attempted robbery punishable with a maximum term of imprisonment of three years).

[25] RCC § 22E-301.

[26] D.C. Code § 22-2803(a)(1).

[27] The legislative history of the current carjacking statute does not discuss why a recklessly mental state was adopted. The committee report makes no mention of recklessness, and actually states that the statute

DCCA case law and current District practice suggest that the offense requires the property to be of another.[28] Requiring a "knowingly" culpable mental state is consistent with the culpable mental state in other RCC property offenses,[29] which generally require that the defendant act knowingly with respect to the elements of the offense, as is requiring that the motor vehicle be "property" and "property of another," as those terms are defined in the RCC.[30] Collectively, these revisions improve the consistency of the revised theft statute with other offenses and the proportionality of penalties.

Fifth, the revised theft offense eliminates the special recidivist theft penalty set forth in current D.C. Code § 22-3212(c).[31] The current recidivist theft penalty provides

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"[d]efines the offenses of carjacking and armed carjacking as the knowing and/or forceful taking from another the possession of that person's motor vehicle." Committee Report to the Carjacking Prevention Act of 1993, Bill 10-16 at 3.

[28] Redbook 4.302 ("S/he took [attempted to take] the [insert type of motor vehicle] without right to it;") ("The 'without right to it' language refers to the defendant's lack of a lawful claim to the motor vehicle, such as ownership. *See Allen v. United States*, 697 A.2d 1 (D.C. 1997) (listing as one of the elements of carjacking as the taking "of a person's vehicle," implying the taking of a vehicle owned by someone other than the defendant); *see also Pixley v. United States*, 692 A.2d 438 (D.C. 1997) (making no distinction between robbery and carjacking on the issue of actual ownership; thus, implying that a defendant could not be guilty of carjacking if he was the lawful owner of the motor vehicle).").

[29] There are two additional changes in current District law for carjacking that are related to culpable mental states. First, the revised theft statute requires an intent to deprive. Current District law does not have such a requirement for carjacking. In the RCC, a non-violent taking of a motor vehicle without intent to deprive would be criminalized under either the unauthorized use of property statute (RCC § 22E-2102) or unauthorized use of a motor vehicle statute (RCC § 22E-2103). Second, the revised theft statute requires that the defendant know that he or she lack the consent of the owner. As this commentary discusses later, District practice supports requiring lack of consent as an element of carjacking. The current carjacking statute requires a "knowingly or recklessly" culpable mental state, but it is unclear how the DCCA would construe these mental states in relation to the lack of consent of the owner, particularly when this element is not in the current statute. The current unauthorized use of a motor vehicle statute, for example, requires "without the consent of the owner," but does not contain any culpable mental states. D.C. Code § 22-3215(b). DCCA case law, however, requires a "knowing" mental state for this element. *Moore v. United States*, 757 A.2d 78, 82 (D.C. 2000) (stating as an element "at the time the appellant took, used, operated or removed the vehicle he knew he that he did so without the consent of the owner.") (citations omitted); *Mitchell v. United States*, 985 A.2d 1136 (D.C. 2009); *Jackson v. United States*, 600 A.2d 90, 93 (D.C. 1991) ("[T]here is a fourth element of the offense which requires the government to prove at the time the defendant used the vehicle, he *knew* he did so without the consent of the owner." (emphasis in original).

[30] RCC § 22E-701 defines property as "anything of value" which would include a motor vehicle. The RCC definition of "property of another" clarifies when property is subject to the theft offense, such as when the accused takes property in which he or she has a joint ownership. The relevant language in the RCC definition of "property of another" is "any property that a person has an interest with which the actor is not privileged to interfere, regardless of whether the actor also has an interest in that property." The second requirement of the RCC definition of "property of another" is that the definition does not include "any property in the possession of the accused that the other person has only a security interest in." The definition of "property of another" is discussed in the commentary to RCC § 22E-701.

[31] D.C. Code § 22-3212:

> (c) A person convicted of theft in the first or second degree who has 2 or more prior convictions for theft, not committed on the same occasion, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 15 years and for a mandatory-minimum term of not less than one year, or both. A person sentenced under this subsection shall not be released from prison, granted probation, or granted suspension of sentence, prior to serving the mandatory-minimum.

that a defendant convicted of first or second degree theft who has two or more prior convictions for theft not committed on the same occasion shall be sentenced to a term of imprisonment of not more than 15 years and is subject to a mandatory minimum term of imprisonment of one year. This special enhancement is highly unusual in current District law. There is no clear basis for singling out recidivist thefts as compared to other offenses of similar seriousness. In contrast, for the revised theft statute, only the general recidivism enhancement in section RCC § 22E-606 may provide enhanced punishment for recidivist theft, consistent with other offenses, improving the overall consistency and proportionality of the RCC.

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

First, the revised theft statute eliminates the evidentiary provision for theft of services that is in subsection (c) of the current theft statute.[32] The evidentiary provision states that "proof" of certain facts "shall be prima facie evidence that the person had committed the offense of theft." The provision neither specifies the government's burden of proof for those facts nor states whether the finding of prima facie evidence is a mandatory presumption that the trier of fact must make or a permissive presumption that the trier of fact may, but is not required, to make. There is no District case law concerning the theft of services provision. It appears that the language in the theft of services provision is superfluous[33] and deletion of the provision clarifies the revised theft offense.

Second, the revised theft offense requires a "knowingly" culpable mental state for whether the accused's conduct constituted taking, obtaining, transferring, or exercising control over the property, and whether the property met the definitions of "property" and "property of another." The current theft statute does not specify a culpable mental state for these elements and no case law exists directly on point. The current robbery statute does not refer to "property" or "property of another," but the statute and case law support using these elements as they are defined in the RCC,[34] and applying a culpable mental

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> (d) For the purposes of this section, a person shall be considered as having 2 or more prior convictions for theft if he or she has been convicted on at least 2 occasions of violations of:
>
> (1) § 22-3211;
>
> (2) A statute in one or more jurisdictions prohibiting theft or larceny; or
>
> (3) Conduct that would constitute a violation of § 22-3211 if committed in the District of Columbia.

[32] D.C. Code § 22-3211(c).

[33] In practice, it is unclear whether there are fact patterns where it could be said the government would satisfy the requirements of the theft of services provision and not also established a prima facie case for theft. Indeed, the theft of services evidentiary provision requires the government to establish additional facts beyond what the theft offense requires—for example that the services were rendered "in circumstances where payment is ordinarily made immediately upon the rendering of services or prior to departure from the place where the services were obtained."

[34] The current robbery statute requires that the defendant "take" "anything of value." D.C. Code § 22-2801. RCC § 22E-701 defines property as "anything of value." In addition, the DCCA has held that the current robbery statute incorporates the elements of "larceny," *Lattimore*, 684 A.2d at 359, which requires that property belong to another person. *See, e.g.*, *Lattimore*, 684 A.2d at 360 ("An individual has committed larceny if that person "without right took and carried away property of another with the intent to

similar to that of theft.[35] Instead of these ambiguities, the revised theft statute requires a "knowingly" culpable mental state whether the accused's conduct constituted taking, obtaining, transferring, or exercising control over the property, and whether the property met the definitions of "property" and "property of another." Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[36] Requiring a knowing culpable mental state also makes the revised theft offense consistent with the revised fraud statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[37]

Third, the revised theft gradations, by use of the phrase "in fact," codify that no culpable mental state is required as to the value of the property or the motor vehicle, whether the property is a "motor vehicle," as that term is defined in RCC § 22E-701, or the fact that the property was taken from the actual possession of another person or from within his or her immediate physical control. The current theft, robbery, and carjacking statutes are silent as to what culpable mental state applies to these elements and there is no District case law on point. However, District practice does not appear to apply a mental state to the values in the current theft gradations.[38] In addition, the current carjacking statute does not define "motor vehicle" and there is no relevant case law, making the scope of the offense unclear as compared to other offenses in Title 22 that define "motor vehicle."[39] To resolve these ambiguities, the revised theft offense, by use of the phrase "in fact," applies strict liability to the value of the property or the motor vehicle, whether the property is a "motor vehicle," as that term is defined in RCC § 22E-701, or the fact that the property was taken from the actual possession of another person or from within his or her immediate physical control. Applying strict liability to statutory

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permanently deprive the rightful owner thereof.") (quoting *Durphy v. United States*, 235 A.2d 326, 327 (D.C.1967)).

The definition of "property of another" clarifies when property is subject to the theft offense, such as when the accused takes property in which he or she has a joint ownership. The relevant language in the RCC definition of "property of another" is "any property that a person has an interest in that the accused is not privileged to interfere with, regardless of whether the accused also has an interest in that property." The second requirement of the RCC definition of "property of another" is that the definition does not include "any property in the possession of the accused that the other person has only a security interest in." The definition of "property of another" is discussed in the commentary to RCC § 22E-701.

[35] The DCCA has stated that robbery consists of larceny and an assault, and requires a "felonious taking," similar to the current and revised theft statutes. *Lattimore v. United States*, 684 A.2d 357, 359 (D.C. 1996) (citing *United States v. McGill*, 487 F.2d 1208, 1209 (U.S.App. D.C. 1973)).

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

[37] *See, e.g.*, RCC § 22E-2201.

[38] D.C. Crim. Jur. Instr. § 5.300.

[39] *See* D.C. Code §§ 22-3215(a) (defining "motor vehicle" for the unauthorized use of a motor vehicle statute as "any automobile, self-propelled mobile home, motorcycle, truck, truck tractor, truck tractor with semitrailer or trailer, or bus."); D.C. Code Ann. § 22-3233(c)(2) (defining "motor vehicle" for the altering or removing motor vehicle identification numbers offense as "any automobile, self-propelled mobile home, motorcycle, motor scooter, truck, truck tractor, truck semi trailer, truck trailer, bus, or other vehicle propelled by an internal-combustion engine, electricity, or steam, including any non-operational vehicle that is being restored or repaired.").

elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[40] Clarifying that these elements are matters of strict liability in the revised theft gradations clarifies and potentially fills a gap in District law, as does applying the RCC definition of "motor vehicle."

Fourth, third degree of the revised theft statute does not require asportation of the property for the non-violent taking of property from the actual possession of another person or from within his or her immediate physical control. The current robbery statute does not include an asportation element. However, the DCCA has stated that robbery requires that the defendant "possess the item being stolen and move it."[41] Asportation is a minimal requirement under current robbery law that may be satisfied by "the slightest moving of an object from its original location."[42] Third degree of the revised theft statute eliminates the asportation requirement as redundant to liability for non-violent taking of property from the actual possession of another person or from within his or her immediate physical control. It is unclear how a defendant could "take" property without also slightly moving it and satisfying any asportation requirement. However, to the extent that eliminating an asportation requirement expands the scope of current District law, such expansion reflects the gravamen of the gradation―invading the space of the complainant.[43] Eliminating the asportation requirement is also consistent with the revised robbery statute (RCC § 22E-1201) and revised unauthorized use of property statute (RCC § 22E-2102), neither of which requires asportation. This change improves the clarity and consistency of the revised statute.

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

First, subsection (a)(1) of the revised theft offense no longer uses the phrase "wrongfully obtains or uses" that is in the current theft statute,[44] and eliminates superfluous language[45] in the long list of predicate conduct. These changes in wording

[40] *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).").

[41] *Moorer v. United States*, 868 A.2d 137, 142 (D.C. 2005) (discussing *Newman v. United States*, 705 A.2d 246 (D.C. 1997)). *See also* D.C. Crim. Jur. Instr. § 4.300 ("[a]lthough not explicitly required in the statute, the government must prove that the defendant took the property and carried it away[.]").
Current District law does not require asportation for carjacking liability. *Moorer*, 868 A.2d at 141 ("Carjacking simply requires possession or control (or attempted possession or control) of the car. Neither the statute nor the case law requires the government to prove asportation—or, indeed, any movement at all—of the car.").

[42] *See, e.g., Simmons v. United States*, 554 A.2d 1167, 1171 n.9 (D.C. 1989) (citing, *Durphy v. United States*, 235 A.2d 326, 327 (D.C.1967)).

[43] *See, e.g.*, § 19.3(b) Carrying away (asportation), 3 Subst. Crim. L. § 19.3(b) (3d ed.) ("The rationale is that, in any taking from the area [within the victim's presence] 'the rights of the person to inviolability would be encroached upon and his personal security endangered, quite as much as if his watch or purse had been taken from his pocket.'") (quoting *State v. Eno*, 8 Minn. 220 (1963)).

[44] D.C. Code § 22-3211(a).

[45] Superfluous terms are: "making an unauthorized use" or unauthorized "disposition," and "interest in or possession of property." The remaining terms in the definition of "wrongfully obtains or uses" are included

do not affect the limited District case law interpreting this part of the definition of "wrongfully obtains or uses," such as *In re D.D.*[46] and *Dobyns v. United States*.[47] No change to the scope of the theft statute is intended by these changes.

Second, subsection (a)(3) of the revised theft statute requires that the defendant act "without the consent of an owner." This element is intended to clarify the meaning of the ambiguous phrase "without authority or right" in current theft law. The current theft statute does not distinguish "without authority or right" as a separate element, but "without authority or right" is part of one of the statutorily specified means of committing theft.[48] Regardless of the status of "without authority or right" as a separate element in the theft statute, both the legislative history[49] and current practice as reflected by the Redbook jury instruction[50] acknowledge that theft requires an additional element similar to "without authority or right," although they each use different language to discuss it. The current robbery statute[51] and carjacking statute[52] do not state as an element that the actor lacks the consent of an owner, but case law[53] and current District practice[54] support requiring such an element.

To resolve these ambiguities, the revised theft statute requires that the defendant lack the "consent" of an "owner," as those terms are defined in RCC § 22E-701. "Consent" has been recognized in DCCA case law as providing a grant of authority or

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in either the revised theft offense or revised fraud offense (RCC § 22E-2201).takes, obtains, transfers, or exercises control over

[46] 775 A.2d 1096 (D.C. 2001).

[47] 30 A.3d 155 (D.C. 2011).

[48] D.C. Code §§ 22-3211(b)(2) (requiring "with intent to appropriate the property to his or her own use or to the use of a third person."); 22-3201(1) (defining "appropriate" as "to take or make use of without authority or right."). However, in at least one instance the DCCA has suggested that proof that a defendant act "without authority or right" also is required when the defendant committed theft by an "intent to deprive." *Russell v. United States*, 65 A.3d 1177, 1181 (D.C. 2013) ("[W]e are satisfied that appellants 'wrongfully obtained' [Federal Aviation Administration] property, 'without authority or right,' specifically intending at the time to deprive the [Federal Aviation Administration] of property that the evidence shows had value. Accordingly, the statutory elements of second-degree theft have been satisfied.").

[49] Chairperson Clarke of the Judiciary Committee, *Extension of Comments on Bill No. 4-193: The District of Columbia Theft and White Collar Crimes Act of 1982* (July 20, 1982) (hereinafter *Extension of Comments on Bill No. 4-193*) at 16-17 (discussing how "wrongfully" was added to the phrase "obtains or uses" to "insure that purely innocent transactions are excluded from the scope" of the theft offense and is used to "indicate a wrongful intent to obtain or use the property without the consent of the owner or contrary to the owner's rights to the property.").

[50] D.C. Crim. Jur. Instr. § 5.300 cmt. 5-33 to 5-34 (discussing why "against the will" and "against the will or interest" were added to parts of the theft jury instruction).

[51] D.C. Code § 22-2801.

[52] D.C. Code § 22-2803.

[53] The DCCA has stated that robbery requires a "felonious taking" "against the other person's will." *Lattimore v. United States*, 684 A.2d 357, 359-60 (D.C. 1996) (*citing United States v. McGill*, 487 F.2d 1208, 1209 (U.S.App. D.C. 1973)); *see also Lattimore*, 684 A.2d at 327 (examining the elements of larceny, which include taking and carrying away property "without right," because "robbery is [partially] comprised of larceny.") (internal citations and quotations omitted).

[54] D.C. Crim. Jur. Instr. § 4.300 (listing as an element of robbery that the actor "did so against the will" of the complainant); Redbook 4.302 ("S/he took [attempted to take] the [insert type of motor vehicle] without right to it;") ("The 'without right to it' language refers to the defendant's lack of a lawful claim to the motor vehicle, such as ownership."

right which negates theft[55] and it seems as though it would similarly negate robbery and carjacking. However, a person may have authority or right to deprive another of their property without consent of an owner, such as in the case of a police seizure of contraband or other government operations. To the extent that there is a government seizure of property of another without consent of an owner, that does not constitute theft under the revised statute. No change in the scope of liability is intended by requiring that the defendant lack the "consent of an owner." The definitions of "consent" and "owner" are discussed in more detail in the commentary to RCC § 22E-701.

Third, subsection (a)(4) of the revised theft statute requires that the defendant act "with intent to deprive the other of the property." The current theft statute requires an "intent to deprive the other of a right to the property or a benefit of the property."[56] The revised theft statute deletes the language "a right to the property or a benefit of the property as surplusage, given that the definition of "deprive" in RCC § 22E-701 refers to the property's "value" and "benefit." The current robbery statute does not specify an intent to deprive, but the DCCA has held that the statute incorporates the elements of "larceny,"[57] which requires an intent to deprive.[58] No change to current District law is intended by this change.

Fourth, subsection (a)(3) of the revised theft statute specifies a "knowingly" culpable mental state as to the fact that the accused lacked an owner's consent. Although the current theft statute is silent as to the applicable culpable mental state, DCCA case law has applied a knowledge requirement to a similar element.[59] The current robbery statute does not state as an element that the actor lacks the consent of an owner, but case law supports such a requirement[60] and applying a culpable mental similar to that of

[55] *Nowlin v. United States*, 782 A.2d 288, 290, 292-93 (D.C. 2001) (discussing the importance of the fact that there was another individual "authorized" to sign checks on the auto body shop account as it pertains to whether the defendant "knew" he was not "entitled" to cash the check); *Russell*, 65 A.3d at 1777-81, n. 27 (discussing the doctrine of apparent authority).

[56] D.C. Code Ann. § 22-3211(b)(1).

[57] *Lattimore*, 684 A.2d at 359 ("In the District of Columbia, robbery retains its common law elements. Thus, the government must prove larceny and assault.") (internal citations omitted).

[58] *See, e.g.*, *Lattimore*, 684 A.2d at 360 ("An individual has committed larceny if that person "without right took and carried away property of another with the intent to permanently deprive the rightful owner thereof.") (quoting *Durphy v. United States*, 235 A.2d 326, 327 (D.C.1967)).

[59] *Russell v. United States*, 65 A.3d 1177 (D.C. 2013) ("Thus, to be clear, in order to show that the accused took the property 'without authority or right,' the government must present evidence sufficient for a finding that 'at the time he obtained it,' he 'knew that he was without the authority to do so.'") (citations omitted); *Nowlin v. United States*, 782 A.2d 288, 291-293 (D.C. 2001); *Peery v. United States*, 849 A.2d 999, 1001 (D.C. 2004) (listing the elements of second degree theft and then stating that "The question we address is whether the government presented sufficient evidence to prove that, at the time *Peery* used the AMEX card for personal purchases, he knew that he was without the authority to do so.").
The DCCA has also stated that the culpable mental state of the current theft offense is one of "specific intent." *See, e.g.*, *Price v. United States*, 985 A.2d 434, 438 (D.C. 2009).

[60] The DCCA has stated that robbery requires a "felonious taking" "against the other person's will." *Lattimore v. United States*, 684 A.2d 357, 359-60 (D.C. 1996) (*citing United States v. McGill*, 487 F.2d 1208, 1209 (U.S.App. D.C. 1973)); *see also Lattimore*, 684 A.2d at 327 (examining the elements of larceny, which include taking and carrying away property "without right," because "robbery is [partially] comprised of larceny.") (internal citations and quotations omitted).

theft.[61] Requiring a knowing culpable mental state also makes the revised theft offense consistent with the revised fraud statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[62]

Fifth, subsection (f) of the revised theft statute codifies an exclusion from liability for fare evasion. This exception codifies recent law.[63]

[61] The DCCA has stated that robbery consists of larceny and an assault, and requires a "felonious taking," similar to the current and revised theft statutes. *Lattimore v. United States*, 684 A.2d 357, 359 (D.C. 1996) (citing *United States v. McGill*, 487 F.2d 1208, 1209 (U.S.App. D.C. 1973)).
[62] *See, e.g.*, RCC § 22E-2201.
[63] Fare Evasion Decriminalization Amendment Act of 2018 (Act 22-592).

RCC § 22E-2102. Unauthorized Use of Property.

Explanatory Note. *This section establishes the unauthorized use of property (UUP) offense in the Revised Criminal Code (RCC). UUP covers conduct that results in the taking, obtaining, transferring, or exercising of control over property of another without an owner's effective consent. UUP criminalizes behavior that does not rise to the level of conduct "with intent to deprive an owner of the property" in the revised theft offense (RCC § 22E- 2101), the revised fraud offense (RCC § 22E-2201), or the revised extortion offense (RCC § 22E-2301). The revised UUP offense replaces the taking property without right (TPWR) statute*[1] *in the current D.C. Code.*

Subsection (a)(1) specifies the prohibited conduct—takes, obtains, transfers, or exercises control over the property of another. "Property" is a defined term in in RCC § 22E-701 that means an item of value and includes goods, services, and cash. "Property of another" is a defined term in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the defendant cannot infringe upon, regardless of whether the defendant also has an interest in that property. Subsection (a)(1) specifies a culpable mental state of "knowingly." Per the rule of construction in RCC § 22E-207, the "knowingly" mental state in subsection (a)(1) applies to all of the elements in subsection (a)(1)—takes, obtains, transfers, or exercises control over the property of another. "Knowingly" is a defined term in RCC § 22E-206 that here requires the defendant to be aware to a practical certainty that his or her conduct takes, obtains, transfers, or exercises control over property that is "property of another."

Subsection (a)(2) states that the proscribed conduct must be done "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, a coercive threat, or deception. "Owner" is a defined term in RCC § 22E-701 to mean a person holding an interest in property that the accused is not privileged to interfere with. Per the rule of construction in RCC § 22E-207, the "knowingly" mental state in subsection (a)(1) also applies to subsection (a)(2). "Knowingly" is a defined term in RCC § 22E-206, here requiring the accused to be aware to a practical certainty that he or she lacks effective consent of an owner.

Subsection (b) codifies an exception to liability for fare evasion. Conduct constituting a violation of D.C. Code § 35-252 is not a violation of UUP.

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

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

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

[1] D.C. Code § 22-3216.

First, the revised UUP offense eliminates the current statute's asportation requirement[2] and extends liability if the defendant merely "takes," "obtains," "transfers," or "exercises control" over the property without carrying it away. The DCCA has never interpreted the scope of the asportation requirement in the current TPWR statute, but in the context of other offenses has stated it is a minimal requirement.[3] In contrast, the revised UUP statute requires only that the defendant take, obtain, transfer, or exercise control over the property of another. It is unclear why a slight physical movement of property should make the difference between an unauthorized, temporary action being criminal and non-criminal. This revision improves the consistency and proportionality of the revised statute.

Second, the revised UUP statute applies a "knowingly" culpable mental state to the elements "property of another" and "without the effective consent of an owner." The current TPWR statute merely requires that the defendant engage in conduct "without right" and does not specify a mental state for this element.[4] Case law interpreting the current TPWR statute has construed the phrase "without right" to mean without the consent of the owner, but has not required a knowledge culpable mental state as to the lack of consent.[5] Similarly, case law suggests that something less than a knowledge culpable mental state is necessary for the element that the property is "property of another."[6] In contrast, the revised UUP statute applies a "knowingly" culpable mental state to the elements "property of another" and "without the effective consent of an owner." Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[7] Requiring a knowing culpable mental state also makes the revised UUP offense consistent with the revised theft statute and other property offenses,

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[2] D.C. Code § 22-3216 (requiring takes and "carries away" the property of another).

[3] *Simmons v. United States*, 554 A.2d 1167, 1171 & n. 9(D.C. 1989) ("We have made clear in several cases that the slightest moving of an object from its original location may constitute an asportation." (citing *Durphy v. United States*, 235 A.2d 326, 327 (D.C.1967) and *Ray v. United States*, 229 A.2d 161, 162 (D.C.1967)).

[4] The DCCA has stated that the culpable mental state of the current TPWR offense is one of "general intent." *See Schafer v. United States*, 656 A.2d 1185, 1188 (D.C. 1995). "General intent" is not used in or defined in the statute for TPWR, but the DCCA has said that it is frequently defined as "intent to do the prohibited act" which requires "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984).

[5] *Tibbs v. United States*, 507 A.2d 141, 143 (D.C. 1986) ("Only two legal principles can be distilled from the existing case law. First, we held very recently . . . that '[p]roperty cannot be taken 'without right' if it is taken with the knowledge and consent of the owner, or one authorized to consent on his behalf.' . . . Second, it is established that to convict a person of taking property without right, the government need not prove any specific intent; a general intent to commit the proscribed act is all that the law requires." (internal citations omitted).).

[6] *Schafer v. United States*, 656 A.2d 1185, 1189 (D.C. 1995) ("In other words, in the context of this particular case, we must determine whether substantial evidence in the record demonstrates that in removing the television set appellant actually knew, or had reason to know that it was the property of another, not his own.").

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

which generally require that the defendant act knowingly with respect to the elements of the offense.[8]

Third, the revised UUP statute, through the general culpability principles for self-induced intoxication in RCC § 22E-209, allows a defendant to claim he or she did not act "knowingly" due to his or her self-induced intoxication. The current statute is silent as to the effect of intoxication. However, the DCCA has held that the current TPWR statute is a general intent crime,[9] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming the necessary intent for the crime.[10] At the same time, the DCCA has also interpreted the current statute to incorporate a negligence-like culpable mental state, which is not a form of culpability that is susceptible to being negated by self-induced intoxication.[11] As a result, a defendant charged under the current statute would have no basis for even raising—let alone presenting evidence in support of—a claim that he or she, due to his or her self-induced intoxicated state, lacked the necessary intent. By contrast, per the revised UUP offense, a defendant would both have a basis for, and be allowed to raise, a claim of this nature since the revised UUP offense is subject to a more demanding culpable mental state of knowledge.[12] Likewise, where appropriate, under the revised UUP offense the defendant would be entitled to a jury instruction clarifying that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge at issue in UUP. This change improves the clarity, consistency, and proportionality of the offense.

FiFourthfth, subsection (b) of the revised UUP statute codifies an exception for liability for fare evasion. Such an exception exists in current law for the theft statute,[13] but not TPWR. Conduct that satisfies the current theft statute could also be charged as TPWR.[14] Codifying the same exclusion from liability for fare evasion improves the consistency of the revised UUP statute and further clarifies the lesser included relationship between theft and UUP.

Beyond these four main changes to current District law, three other aspects of the revised UUP statute may be viewed as a substantive change in law.

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[8] *See, e.g.*, RCC § 22E-2201.

[9] *See Schafer v. United States*, 656 A.2d 1185, 1188 (D.C. 1995).

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

[11] *See Schafer*, 656 A.2d at 1188.

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

[13] Fare Evasion Decriminalization Amendment Act of 2018 (Act 22-592).

[14] The current theft statute can be satisfied with an intent to "appropriate," which is defined as "to take or make use of without authority or right." D.C. Code §§ 22-3211(b)(2); 22-3201. Since the current TPWR statute does not require any intent to interfere with the property, an intent to "appropriate" could satisfy TPWR.

First, the revised UUP offense is made a lesser included offense[15] of the revised theft (RCC § 22E-2101), fraud (RCC § 22E-2201), and extortion (RCC § 22E-2301) offenses. The current TPWR statute is silent as to whether it constitutes a lesser included offense of the current theft,[16] fraud,[17] and extortion[18] offenses. Based on legislative history,[19] the DCCA has recognized that the current TPWR statute is a lesser included offense of theft,[20] although the current TPWR statute appears to fail the DCCA's current "elements test" as to whether it is a lesser included offense of theft.[21] There is no case law on point with respect to fraud or extortion and these offenses also appear to fail the DCCA's current "elements test."[22] Instead of this ambiguity, the revised UUP statute is clearly a lesser included offense of the revised theft, fraud, and extortion statutes insofar as it has no elements not included in these offenses.[23] This revision removes an

[15] By being a lesser included offense, a person cannot be convicted of both UUP and theft or UUP and fraud, or UUP and extortion for the same act or course of conduct. *See, e.g., Mooney v. United States*, 938 A.2d 710, 723 (D.C. 2007) (discussing how multiple punishments that result from convictions of a greater and a lesser-included offense are prohibited by the Double Jeopardy Clause unless there is clear legislative intent that punishment should be imposed for both offenses). In addition, the defendant is on notice from the time of indictment for theft, fraud, or extortion, that he may be convicted of the lesser included offense. *See Woodard v. United States*, 738 A.2d 254, 259 n. 10 (D.C. 1999) ("the law is settled that an indictment on a greater offense puts the indictee on notice that the prosecution might also press a lesser-included charge"); *see also Schmuck v. United States*, 489 U.S. 705, 718, 109 S. Ct. 1443, 1452, 103 L. Ed. 2d 734 (1989) ("The elements test . . . permits lesser offense instructions only in those cases where the indictment contains the elements of both offenses and thereby gives notice to the defendant that he may be convicted on either charge."). Upon a showing of some evidence, the defendant may demand an instruction to the jury on the lesser included offense of UUP to accompany theft, fraud, or extortion charges. *Woodward v. United States*, 738 A.2d at 261 ("Any evidence, however weak, is sufficient to support a lesser-included instruction so long as a jury could rationally convict on the lesser-included offense after crediting the evidence.").

[16] D.C. Code § 22-3211.

[17] D.C. Code § 22-3221.

[18] D.C. Code § 22-3251.

[19] The legislative history for the 1982 Theft Act indicates that the Council of the District of Columbia intended for TPWR to be a lesser included offense of theft. Chairperson Clarke of the Judiciary Committee, *Extension of Comments on Bill No. 4-193: The District of Columbia Theft and White Collar Crimes Act of 1982* (July 20, 1982) (hereinafter *Extension of Comments on Bill No. 4-193*) at 36 ("[I]t is intended that the offense of taking property without right continue to be treated as a lesser included offense of the consolidated theft offense.").

[20] *Moorer v. United States*, 868 A.2d 137, 143 (D.C. 2005).

[21] *Moorer v. United States*, 868 A.2d at 140 ("Under the elements test, one offense is included within another if "(1) the lesser included offense consists of some, but not every element of the greater offense; and (2) the evidence is sufficient to support the lesser charge."). Because the asportation element of the current TPWR statute is not required by the current theft, fraud, or extortion statutes, the current TPWR statute does not appear to be a lesser included offense of the current theft, fraud, or extortion statutes.

[22] See *Byrd v. United States*, 598 A.2d 386, 390 (D.C. 1991) (*en banc*).

[23] The revised UUP statute requires "without the effective consent of the owner." RCC § 22E-701 defines "effective consent" as "consent other than consent induced by the physical force, a coercive threat, or deception." RCC § 22E-701 defines "consent" as "a word or action that indicates, expressly or implicitly, agreement to particular conduct or a particular result" given by a person generally competent to do so. Thus, in requiring that the defendant lack "effective consent," the revised UUP statute requires either that there is no consent at all, or that there is consent but it is obtained by physical force, coercive threat, or deception, and is not valid. These requirements mirror the requirements in the RCC theft offense ("without the consent of the owner"), fraud ("with the consent of the owner; the consent being obtained by

unnecessary gap in liability for temporary takings and improves the overall proportionality of these statutes.

Second, the revised UUP offense requires a "knowingly" culpable mental state for "takes, obtains, transfers, or exercises control over the property of another." The current statute does not specify a culpable mental state for the comparable elements[24] and no case law exists directly on point.[25] Instead of this ambiguity, the revised UUP statute requires a "knowingly" culpable mental state for "takes, obtains, transfers, or exercises control over the property of another." Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[26] A knowingly culpable mental state also makes the revised UUP offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[27] This revision improves the clarity and consistency of the revised statute.

Third, the revised UUP offense requires that the person act "without the effective consent of an owner." The current TPWR statute requires that the defendant act "without right." This phrase has been interpreted by the DCCA to refer to "consent of the owner, or one authorized to consent on his behalf,"[28] and to exclude instances where the consent was "the product of trickery" or where the person had consent to take the item for one purpose but then exceeded the terms of that consent.[29] The revised UUP requirement that the person act "without the effective consent of an owner," uses definitions in RCC § 22E-701 for "consent," "effective consent," and "owner" that are consistent across property offenses and also appears to be consistent with existing case law on the current TPWR statute. The change improves the clarity and consistency of the revised UUP offense.

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deception), and extortion ("with the consent of the owner; the consent being obtained by a coercive threat.").

[24] D.C. Code § 22-3216 ("A person commits the offense of taking property without right if that person takes and carries away the property of another without right to do so.").

[25] Insofar as the current TPWR offense has been held to be a "general intent crime," courts have consistently held that there must be an "intent to commit the proscribed act" which here consists of the taking. *See, e.g., Fogle v. United States*, 336 A.2d 833, 835 (D.C. 1975). However, case law provides no greater specificity as to the nature of the required intent for TPWR.

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

[27] *See, e.g.*, RCC § 22E-2101.

[28] *Fussell v. United States*, 505 A.2d 72 (D.C. 1986).

[29] *Baggett v. United States*, 528 A.2d 444 (D.C. 1987).

RCC § 22E-2103. Unauthorized Use of a Motor Vehicle.

Explanatory Note. *This section establishes the unauthorized use of a motor vehicle (UUV) offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes the use of a motor vehicle without the effective consent of an owner. The offense has a single penalty gradation. The revised UUV offense replaces portions of the unauthorized use of motor vehicles statute[1] in the current D.C. Code.*

Subsection (a)(1) specifies the prohibited conduct—operating a motor vehicle. "Motor vehicle" is a defined term in RCC § 22E-701 that includes any vehicle designed to be propelled only by an internal-combustion engine or electricity. Subsection (a)(1) also specifies a culpable mental state of "knowingly," a term defined at RCC § 22E-206 that here means the accused must be aware to a practical certainty that his or her conduct is operating a "motor vehicle," as that term is defined in RCC § 22E-701.

Subsection (a)(2) states that the proscribed conduct must be done "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, a coercive threat, or deception. "Owner" is a defined term in RCC § 22E-207 that means a person holding an interest in property that the accused is not privileged to interfere with. Per the rule of construction in RCC § 22E-207, the "knowingly" mental state in subsection (a)(1) also applies to subsection (a)(2), and here requires that the accused be aware to a practical certainty that he or she lacks effective consent of an owner.

Subsection (b) specifies the penalty for the offense. [RESERVED.]

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

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

First, through the revised definition of "motor vehicle" in RCC § 22E-701, the revised UUV offense includes liability with respect to any vehicle that is "designed to be propelled only by an internal-combustion engine or electricity." The current definition of "motor vehicle," and thus the scope of the current UUV offense, is limited to "any automobile, self-propelled mobile home, motorcycle, truck, truck tractor, truck tractor with semitrailer or trailer, or bus."[2] In contrast, the revised definition of "motor vehicle" broadens the revised UUV offense to include any watercraft, aircraft, or land vehicle that is "designed to be propelled only by an internal-combustion engine or electricity." The "designed to be" language includes vehicles that happen to be moved by human exertion

[1] D.C. Code § 22-3215. Specifically, the revised UUV offense replaces D.C. Code § 22-3215 (b), (d)(1)-(d)(3). The remaining portions of D.C. Code § 22-3215, concerning rented and leased cars under certain conditions, are not part of the RCC and will remain in D.C. Code § 22-3215, subject to conforming amendments as necessary.

[2] D.C. Code § 22-3215(a).

in a given case, but are "designed" to be propelled only by an internal-combustion engine or electricity. This revision eliminates possible gaps in the offense and clarifies the statute.

Second, through the revised definition of "motor vehicle" in in RCC § 22E-701, the revised UUV offense no longer includes vehicles like mopeds that are designed to be propelled, in whole or in part, by human exertion. The current definition of "motor vehicle," and thus the scope of the current UUV offense, is limited to "any automobile, self-propelled mobile home, motorcycle, truck, truck tractor, truck tractor with semitrailer or trailer, or bus,"[3] although the DCCA has held explicitly held that mopeds[4] fall within the current definition of "motor vehicle." In contrast, the revised definition of "motor vehicle" requires that the vehicle that be "designed to be propelled only by an internal-combustion engine or electricity." These types of vehicles are generally more expensive, heavier, and pose more severe safety risks to others than a vehicle that is designed to be propelled, in whole or in part, by human exertion. Unauthorized use of vehicles such as mopeds,[5] that fall outside the RCC definition of "motor vehicle" and the revised UUV offense, remains criminalized by the RCC unauthorized use of property offense (RCC § 22E-2102). This revision improves the clarity, consistency, and proportionality of the revised definition.

Third, the revised UUV offense eliminates any offense-specific penalty enhancements. The current UUV statute includes a special recidivist penalty[6] and a special penalty for committing UUV during a crime of violence or to facilitate a crime of

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[3] D.C. Code § 22-3215(a).

[4] In *United States v. Stancil*, the DCCA held that "[a]fter considering the language and history of the UUV statute, and the characteristics of the vehicle in question, we hold that a moped is a 'motor vehicle' for the purposes" of the then-current UUV statute." *Stancil v. United States*, 422 A.2d 1285, 1286 (D.C. 1980). *Stancil* was decided under an earlier version of the UUV statute, but the definition of "motor vehicle" in this earlier statute is substantively identical to the current definition of "motor vehicle" and the case is still good law. The jury instruction for UUV adopts the holding in *Stancil* and includes "moped" in the definition of "motor vehicle." D.C. Crim. Jur. Instr. § 5.302 cmt. at 5-42.

[5] Similarly, a bicycle or scooter designed to run on either an electric motor or bodily propulsion would not constitute a "motor vehicle."

[6] D.C. Code § 22-3215(d)(3).

> (3)(A) A person convicted of unauthorized use of a motor vehicle under subsection (b) of this section who has 2 or more prior convictions for unauthorized use of a motor vehicle or theft in the first degree, not committed on the same occasion, shall be fined not less than $5,000 nor more than $15,000, or imprisoned for not less than 30 months nor more than 15 years, or both.
>
> (B) For the purposes of this paragraph, a person shall be considered as having 2 prior convictions for unauthorized use of a motor vehicle or theft in the first degree if the person has been twice before convicted on separate occasions of:
>
> (i) A prior violation of subsection (b) of this section or theft in the first degree;
>
> (ii) A statute in one or more other jurisdictions prohibiting unauthorized use of a motor vehicle or theft in the first degree;
>
> (iii) Conduct that would constitute a violation of subsection (b) of this section or a violation of theft in the first degree if committed in the District of Columbia; or
>
> (iv) Conduct that is substantially similar to that prosecuted as a violation of subsection (b) of this section or theft in the first degree.

violence.[7] These special enhancements are highly unusual in current District law, and there is no clear basis for singling out UUV for recidivist and crime of violence enhancements as compared to other offenses of equal seriousness. In contrast, in the RCC, the general recidivism enhancement (RCC § 22E-606) will provide enhanced punishment for recidivist UUV consistent with other offenses. For UUV committed during a crime of violence or to facilitate a crime of violence, the defendant will continue to be liable for both UUV and the crime of violence. This change improves the proportionality and consistency of the revised UUV offense.

Fourth, the revised UUV offense eliminates the separate offense of "UUV passenger" that currently is recognized in DCCA case law. The current UUV statute is limited to a single gradation,[8] and does not specifically address whether or in what manner it reaches a passenger in a motor vehicle. However, the DCCA has held that riding in a motor vehicle as a passenger with knowledge of its unlawful operation is sufficient for liability.[9] In contrast, the revised UUV offense penalizes only knowingly *operating* a motor vehicle without the effective consent of an owner. A passenger riding in a motor vehicle, with knowledge of its unlawful operation, is not, without more, sufficient for UUV liability. However, a passenger that satisfies the requirements of accomplice liability (RCC § 22E-210) may be liable as an accomplice to UUV and consequently receive the same penalty as the driver of the vehicle. The revised UUV statute does not change District case law establishing that mere presence in the vehicle is insufficient to prove knowledge, such as *In re Davis*[10] and *Stevens v. United States*,[11] nor does it change the requirement in existing case law that a passenger is not liable for aiding and abetting UUV if he or she does not have a reasonable opportunity to exit the vehicle upon gaining knowledge that its operation is unauthorized.[12] To the extent that

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[7] D.C. Code § 22-3215(d)(2):

> (2)(A) A person convicted of unauthorized use of a motor vehicle under subsection (b) of this section who took, used, or operated the motor vehicle, or caused the motor vehicle to be taken, used, or operated, during the course of or to facilitate a crime of violence, shall be:
>
> (i) Fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 10 years, or both, consecutive to the penalty imposed for the crime of violence; and
>
> (ii) If serious bodily injury results, imprisoned for not less than 5 years, consecutive to the penalty imposed for the crime of violence.
>
> (B) For the purposes of this paragraph, the term "crime of violence" shall have the same meaning as provided in § 23-1331(4).

[8] D.C. Code § 22-3215(d)(1).

[9] *See, e.g.*, *Bynum v. United States*, 133 A.3d 983, 987 (D.C. 2016); *In re D.P.*, 996 A.2d 1286, 1288 (D.C. 2010); *In re C.A.P.*, 633 A.2d 787, 792 (D.C. 1993); *In re R.K.S.*, 905 A.2d 201, 218 (D.C. 2006); *see also In re T.T.B.*, 333 A.2d 671 (D.C. 1975) ("To sustain a conviction of a passenger in a stolen vehicle of its unauthorized use, the government must show beyond a reasonable doubt that the passenger rode in the vehicle knowing that it was being used without the consent of the owner.").

[10] *In re Davis*, 264 A.2d 297 (D.C. 1970)

[11] 319 F.2d 733 (D.C. Cir. 1963).

[12] *Jones v. United States*, 404 F.2d 212, 216 (D.C. Cir. 1968) ("It scarcely brooks denial that a passenger is not to be convicted of aiding and abetting if he discovers only in the course of a 60 mile per hour chase that the vehicle is being operated without the owner's permission."); *Bynum v. United States*, 133 A.3d 983, 987 (D.C. 2016) ("A passenger is not to be convicted of aiding and abetting if he discovers only in the course of

District case law holds that riding as a passenger in a motor vehicle with knowledge of its unlawful operation is sufficient for UUV, the revised UUV statute is a change in law.[13] This revision clarifies current law and improves the proportionality of the revised UUV statute.

Fifth, under the revised UUV statute the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "knowingly" due to his or her self-induced intoxication. The current statute is silent as to the effect of intoxication. However, the DCCA has held that the current statute is a general intent crime,[14] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming the necessary intent for the crime.[15] The DCCA holding would also likely mean that a defendant would be precluded from directly raising—though not necessarily presenting evidence in support of[16]—the claim that, due to his or her self-induced intoxicated state, the defendant not possess the knowledge required for any element of UUV.[17] In contrast, per the revised UUV offense, a defendant would both have a basis for, and will be able to raise and present relevant and admissible evidence in support of, a claim of that voluntary intoxication prevented the defendant from forming the knowledge required to prove UUV. Likewise, where appropriate, the defendant would be entitled to an instruction, which clarifies that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge at issue in UUV.[18] This change improves the clarity, consistency, and proportionality of the offense.

Beyond these five main changes to current District law, one other aspect of the revised UUV statute may be viewed as a substantive change in law.

The revised UUV statute requires a "knowingly" culpable mental state for "operat[ing]" a "motor vehicle." The current statute does not clearly specify a culpable

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a 60 mile per hour chase that the vehicle is being operated without the owner's permission.") (quoting *Jones v United States*, 404 F.2d 212, 216 (D.C. Cir. 1968)).

[13] *See, e.g.*, *Kemp v. United States*, 311 F.2d 774 (D.C. Cir. 1962); *Jones v. United States*, 404 F.2d 212 (D.C. Cir. 1968); *In re D.M.L.*, 293 A.2d 277 (D.C. Cir. 1972); *In re T.T.B.*, 333 A.2d 671 (D.C. 1975); *In re C.A.P.*, 633 A.2d 787 (D.C. 1993); *In re R.K.S.*, 905 A.2d 201 (D.C. 2006); *Bynum v. United States*, 133 A.3d 983 (D.C. 2016).

[14] *See Carter v. United States*, 531 A.2d 956, 960 n.13 (D.C. 1987).

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

[16] Whether intoxication evidence may be presented when it cannot negate intent is less clear. *Compare Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) *with Cooper v. United States*, 680 A.2d 1370, 1372 (D.C. 1996); *Parker v. United States*, 359 F.2d 1009, 1012–13 (D.C. Cir. 1966)); *see also Buchanan v. United States*, 32 A.3d 990, 996 (D.C. 2011) (Ruiz, J., concurring) (discussing *Parker*).

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

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

mental state for these elements. No case law exists directly on point, although the DCCA does require for UUV that the defendant know he lack the consent of the owner.[19] Instead of this ambiguity, the revised UUV statute requires a "knowingly" culpable mental state for operating a motor vehicle. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[20] This revision is consistent with the DCCA requirement of knowledge as to the lack of consent of an owner. It also makes the revised UUV offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[21]

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

First, "takes" has been deleted from the revised UUV offense. "Takes" has been deleted to emphasize that the import of the revised UUV offense is not the taking of the motor vehicle, but rather its operation. Deleting "takes" does not change the scope of the general UUV offense because, practically, a "taking" of a motor vehicle necessarily involves its operation.

Second, the revised general UUV offense deletes "for his or her own profit, use, or purpose" that is in the current UUV offense. It appears this language does not actually narrow the scope of the UUV offense, as even a person whose ostensible motive is to benefit another would have as his or her own purpose the unauthorized use of the car to benefit that other person. Deleting "for his or her own profit, use, or purpose" clarifies the scope of the revised UUV offense without a substantive change of law.

Third, "causes a motor vehicle to be taken, used or operated" has been deleted from the revised statute. It is unclear what this language could mean other than codifying liability for aiding and abetting, conduct addressed generally for all offenses in section RCC § 22E-210. Deleting the language is not intended to change the scope of the revised offense.

Fourth, the revised UUV statute requires that the defendant act without the "effective consent of an owner." The current UUV statute simply requires that the defendant act "without the consent of the owner."[22] However, DCCA case law for UUV expands "consent of the owner" to an "authorized" person" to give consent,[23] and

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

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

[21] *See, e.g.*, RCC § 22E-2101.

[22] D.C. Code § 22-3215(b).

[23] *Agnew v. United States*, 813 A.2d 192 (D.C. 2002) (stating as an element "at the time the appellant took, used, operated, or removed the vehicle . . . she knew he that she did so without the consent of the owner or some other authorized person.") (citations omitted); *In re R.K.S.*, 905 A.2d 201, 218 (D.C. 2006).

indicates that a person who uses deception to obtain consent to use a motor vehicle commits UUV.[24] Using "effective consent" in the revised UUV statute ensures that the specialized type of property at issue in the statute has the same protection afforded other property in theft and theft-related offenses in Chapter 21 of the RCC. The definitions of "effective consent" and "owner" are discussed in the commentary to RCC § 22E-701. The RCC relies on civil law for determining agency and it is unnecessary to specify that consent may be given by authorized persons. The change improves the clarity and consistency of definitions throughout property offenses.

Fifth, the revised UUV statute requires a "knowingly" culpable mental state as to the fact that the defendant lacked effective consent of an owner. The current UUV statute requires acting "without the consent of the owner," but does not specify a mental state for the element. DCCA case law, however, requires a "knowing" mental state for this element.[25] This revision is not intended to change current District law.

[24] *Evans v. United States*, 417 A.2d 963, 966 (D.C. 1980) (finding in a general UUV case that the"government's evidence that appellant gave a false identity and false addresses in order to procure the rental agreement was sufficient for a jury to conclude that Hertz did not knowingly consent to appellant's use of the vehicle at the time agreement was signed."). *Evans* is a pre-1982 case relying on statutes concerning unauthorized use of motor vehicles that are substantively similar, but not identical, to the current UUV statute.

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

RCC § 22E-2104. Shoplifting.

Explanatory Note. *This section establishes the revised shoplifting offense and penalty for the Revised Criminal Code (RCC). Shoplifting addresses theft-like conduct specific to stores and retail establishments, but does not require an intent to deprive an owner of property. There are no penalty gradations. The revised shoplifting offense replaces the existing shoplifting statute[1] in the current D.C. Code.*

Subsection (a)(1)(A), subsection (a)(1)(B), and subsection (a)(1)(C) specify the prohibited conduct—conduct that conceals, removes, transfers, etc. an item. Subsection (a)(1) specifies the culpable mental state for this conduct to be "knowingly." Per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state in subsection (a)(1) applies to the elements in subsection (a)(1)(a), subsection (a)(1)(B), and subsection (a)(1)(c). "Knowingly" is a defined term in RCC § 22E-206 that here means the accused must be aware to a practical certainty that his or her conduct is concealing, removing, transferring, etc. an item.

Subsection (a)(2) specifies several requirements for the item that the defendant must conceal, remove, transfer, etc. First, the item must be "property," a defined term in RCC § 22E-701 meaning an item of value which includes goods, services, and cash. Second, the property must be "property of another," a defined term in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the defendant cannot infringe upon, regardless of whether the defendant also has an interest in the property. Third, the item must be the "personal" property of another, which excludes property such as real estate. Fourth, the item must be either "displayed or offered for sale" (subsection (a)(2)(A)) or "held or stored on the premises in reasonably close proximity to the customer sales area for future display or sale" (subsection (a)(2)(B)). Per the rule of construction in RCC § 22E-207, the "knowingly" mental state in subsection (a)(1) also applies to the elements in subsection (a)(2), here requiring the accused to be aware to a practical certainty that the item is personal property of another that is displayed, held, stored, or offered for sale in the required manner.

Subsection (a)(3) states that the proscribed conduct must be done "with intent to take or make use of without complete payment." This is a lesser intent than "with intent to deprive an owner of the property" that the revised theft offense requires in RCC § 22E-2101. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would take or make use of the property without complete payment. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the defendant actually took or made use of the property without complete payment, only that the defendant believed to a practical certainty that this would occur.

Subsection (b) prohibits charging attempted shoplifting. Conduct constituting attempted shoplifting may be chargeable as attempted theft or attempted unauthorized use of property, however.

Subsection (c) specifies the penalty for the offense. [RESERVED.]

[1] D.C. Code § 22-3213.

Subsection (d) provides qualified immunity to specified individuals for detention, false imprisonment, malicious prosecution, defamation, and false arrest in any proceedings arising from the detention or arrest of a person suspected of shoplifting. The subsection lists requirements for the detention or arrest that must be met for the immunity to apply.

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

Relation to Current District Law. *The revised shoplifting statute changes current District law in one main way.*

First, the language in subsection (a)(1)(C) has been simplified to refer to transfer from any container or package (regardless of the purpose of the container). The current shoplifting statute limits the container involved to those concerning sale or display.[2] There is no case law interpreting the scope of this language. In contrast, the revised language in subsection (a)(1)(C), in combination with the requirements that the property be "displayed or offered for sale" (subsection (a)(2)(A)) or "held or stored on the premises in reasonably close proximity to the customer sales area for future display or sale" (subsection (a)(2)(B)), effectively broadens the revised offense to include transfers between containers that store or otherwise hold property. The nature of the container is irrelevant if the action is done with intent to take or make use of the property without complete payment per subsection (a)(3). This revision clarifies the statute and reduces possible litigation over whether a given container may be a display or sales container.

Beyond this substantive change to current District law, three other aspects of the revised shoplifting statute may be viewed as a substantive change of law.

Per subsection (a)(3) of the shoplifting offense, engaging in the specified conduct "with intent to take or make use of the property without complete payment" is the sole intent for shoplifting. The current shoplifting statute requires the specified conduct either be "with intent to appropriate without complete payment" or "with intent to defraud an owner of the value of the property." The term "defraud" is not defined in the current offense and there is no case law on point for shoplifting. The revised shoplifting statute inserts the current statute's definition of "appropriate"—"to take or make use without authority or right"[3]—into the intent requirement "to appropriate without complete payment," and eliminates the intent to defraud alternative requirement. "Defraud" is a common law term with an unclear meaning. In the context of shoplifting, it is unclear what the use of "defraud" would criminalize that is not already covered by conduct undertaken "with intent to take or make use of the property without complete payment." This change in the revised shoplifting statute clarifies the offense.

Second, the revised shoplifting statute deletes from the qualified immunity provision in subsection (d)(1) the requirement that the offense be "committed in that person's presence." The current qualified immunity provision requires that the "person detaining or causing the arrest had, at the time thereof, probable cause to believe that the

[2] D.C. Code Ann. § 22-3216(a)(3) ("knowingly transfers any such property from the container in which it is displayed or packaged to any other display container or sales package.").
[3] D.C. Code § 22-3201(1).

person detained or arrested had committed in that person's presence, an offense described in this section."[4] There is no case law interpreting the scope of "committed in that person's presence," and it is unclear if it includes the use of technology such as surveillance equipment and anti-theft devices to identify an alleged shoplifter. Instead of this ambiguity, the revised qualified immunity provision deletes the requirement "committed in that person's presence" and relies on the probable cause requirement to ensure that that detention or ensuing arrest is reasonable. This revision clarifies the provision and fills a potential gap in current District law.

Third, the revised shoplifting statute replaces "within a reasonable time" with "as soon as practicable" in subsection (d)(3) and subsection (d)(4) of the qualified immunity provision. The current qualified immunity provision requires that "[l]aw enforcement authorities were notified within a reasonable time"[5] and "[t]he person detained or arrested was released within a reasonable time of the detention or arrest, or was surrendered to law enforcement authorities within a reasonable time."[6] The scope of "within a reasonable time" is unclear and there is no DCCA case law on point. Instead of this ambiguity, the revised qualified immunity provision requires "as soon as practicable. This revision improves the clarity of the revised statute.

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

First, subsection (a)(1) of the revised shoplifting offense applies a culpable mental state of "knowingly" to each type of proscribed conduct in subsection (a)(1)(A), subsection (a)(1)(B), and subsection (a)(1)(C) and to whether the property is "displayed or offered for sale" (subsection (a)(2)(A)) or "held or stored on the premises in reasonably close proximity to the customer sales area for future display or sale" (subsection (a)(2)(B)). The current shoplifting statute[7] requires, in part, a "knowingly" culpable mental state,[8] but it is unclear to which elements the culpable mental state applies. However, it would be difficult for a defendant to satisfy either of the "with intent to" requirements in the current statute without knowing that it was the personal property of another that is offered for sale. The requirement of a "knowingly" culpable mental state for subsections (a)(1) and (a)(2) is not intended to change existing law on shoplifting.

Second, in subsection (a)(1)(B), "transfers" has been added so that the subsection prohibits conduct which "removes, alters, or transfers" price tags or other specified marks. The current shoplifting statute is limited to "removes or alters" price tags or other specified marks. There is no case law interpreting the scope of this language.

[4] D.C. Code § 22-3213(d)(1).
[5] D.C. Code § 22-3213(d)(3).
[6] D.C. Code § 22-3213(d)(4).
[7] D.C. Code § 22-3216.
[8] D.C. Code § 22-3213(a) ("A person commits the offense of shoplifting if, with intent to appropriate without complete payment any personal property of another that is offered for sale or with intent to defraud the owner of the value of the property, that person: (1) Knowingly conceals or takes possession of any such property; (2) Knowingly removes or alters the price tag, serial number, or other identification mark that is imprinted on or attached to such property; or (3) Knowingly transfers any such property from the container in which it is displayed or packaged to any other display container or sales package.").

Transferring a price tag is accomplished by removing or altering the price tag, an action already covered in the current statute. Adding "transfers" to the statute merely clarifies the scope of the revised shoplifting offense in a common situation.

Third, the revised shoplifting statute clarifies the type of property at issue by requiring either that the property is "displayed or offered for sale" (subsection (a)(2)(A)) or "held or stored on the premises in reasonably close proximity to the customer sales area for future display or sale" (subsection (a)(2)(B)). The current shoplifting statute requires that the property be "offered for sale."[9] However, in *Harris v. United States*, the DCCA held that the current shoplifting statute extended "at least to merchandise held . . . in reasonably close proximity to the customer area and intended for prompt availability to customers when and as needed."[10] The addition of "displayed or offered for sale" (subsection (a)(2)(A)) and "held or stored on the premises in reasonably close proximity to the customer sales area for future display or sale" (subsection (a)(2)(B)) codifies *Harris* as to the scope of "offered for sale" in the current shoplifting statute and is not intended to change District law on shoplifting. Under the revised element in subsection (a)(2), the property should be in "reasonably close proximity" to the customer area and readily available to customers as needed. Merchandise on a truck in a loading dock, for example, would not fall within the scope of the revised offense.

Lastly, there are two minor changes to the language in the qualified immunity provision in subsection (e). The current qualified immunity subsection refers to, "A person who offers tangible personal property for sale to the public."[11] The term "offers" is not defined in the statute and there is no case law on point. The revised subsection (e) expands "offers" to "displays, holds, stores, or offers for sale" in order to match the scope of the revised elements in subsection (a)(2). Similarly, the revised shoplifting statute no longer refers to "tangible personal property." Instead, it refers to "personal property" as specified in subsection (a)(2) so that the qualified immunity provision matches the element.

[9] D.C. Code § 22-3213(a).

[10] *Harris v. United States*, 602 A.2d 1140, 1142 (D.C. 1992). The court further characterized the merchandise at issue in the case as "merchandise contained in a storeroom off the customer sales area, which is used to replenish stock in the sales area or which is available as a source of sizes, colors, or the like not on display in the sales area." *Id.* at 1141.

[11] D.C. Code § 22-3213(d).

RCC § 22E-2105. Unlawful Creation or Possession of a Recording.

Explanatory Note. *This section establishes the unlawful creation or possession of a recording (UCPR) offense and penalty gradations for the Revised Criminal Code (RCC). The revised offense proscribes making, obtaining, or possessing a sound recording that is a copy of an original sound recording fixed before February 15, 1972, or a sound recording or audiovisual recording of a live performance, without the effective consent of an owner and with intent to derive commercial gain or advantage. The revised offense is structured to avoid criminalizing conduct that is preempted by federal legislation protecting copyright. The revised offense is graded based on the number of unlawful recordings that the defendant made, obtained, or possessed. The revised UCPR offense replaces the commercial piracy statute*[1] *in the current D.C. Code.*

Subsection (a)(1) specifies the prohibited conduct for first degree UCPR—making, obtaining, or possessing an item. Subsection (a)(1) also specifies the culpable mental state for subsection (a)(1) to be "knowingly," a term defined at RCC § 22E-206 that here requires the accused be aware to a practical certainty that his or her conduct is making, obtaining, or possessing an item.

Subsection (a)(1)(A) and subsection (a)(1)(B) state that the accused must make, obtain, or possess either a sound recording that is a copy of an original sound recording that was fixed prior to February 15, 1972, or a sound recording or audiovisual recording of a live performance. Per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state in subsection (a)(1) also applies to the elements in subsection (a)(1)(a) and subsection (a)(1)(B), here requiring the accused to be aware to a practical certainty that the item is the specified kind of audiovisual or sound recording.

Subsection (a)(2) states that the proscribed conduct must be done "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires some indication of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception." Lack of effective consent means there was no consent, or the consent was obtained by means of physical force, a coercive threat, or deception. "Owner" is defined in RCC § 22E-701 to mean a person holding an interest in property that the accused is not privileged to interfere with. Per the rule of construction in RCC § 22E-207, the "knowingly" mental state in subsection (a)(1) also applies to subsection (a)(2), and here requires the accused to be aware to a practical certainty that he or she lacks effective consent of an owner.

Subsection (a)(3) requires proof of "with intent to" sell, rent, or otherwise use the recording for commercial gain or advantage. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would sell, rent, or otherwise use the recording for commercial gain or advantage. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such a use actually occurred, only that the defendant believed to a practical certainty that such a use would result.

[1] D.C. Code § 22-3214.

"Intent" is a defined term in RCC § 22E-206 that here meaning the defendant believed his or her conduct was practically certain to sell, rent, or otherwise use the recording for commercial gain or advantage. It is not necessary to prove that such commercial advantage occurred, just that the defendant believed to a practical certainty that such advantage would result.

Subsection (a)(4) requires that "in fact," the number of unlawful recordings made, obtained, or possessed was 100 or more for first degree UCPR. In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement for the fact the number of unlawful recordings made, obtained, or possessed was 100 or more.

Subsection (b) specifies the requirements for second degree UCPR. The requirements in subsection (b)(1), subsection (b)(2), and subsection (b)(3) are identical to those in subsection (a)(1), subsection (a)(2), and subsection (a)(3) for first degree unlawful creation or possession of a recording. Subsection (b)(4) requires that "any number" of unlawful recordings were made obtained, or possessed for second degree UCPR. In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement for the fact that "any number" of unlawful recordings were made, obtained, or possessed.

Subsection (c) contains two broad exclusions from liability under the revised UCPR statute for copying of recordings permitted by federal law and copying by licensed radio, television, and cable broadcasters for broadcast or archival use.

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

Subsection (e) provides judicial discretion to order the forfeiture and destruction or other disposition of all sound recordings, audiovisual recordings, and equipment used, or attempted to be used, in violation of this section.

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

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

First, the revised UCPR offense no longer includes proprietary information within its scope. The current commercial piracy statute concerns not only sound recordings, but "proprietary information" which is broadly defined to include "any [] information, the primary commercial value of which may diminish if its availability is not restricted."[2] In contrast, the revised UCPR offense eliminates the current statute's definition of "proprietary information" as well as references to "proprietary information" in the offense elements. This revision improves the clarity of the revised UCPR offense and reduces unnecessary overlap that currently exists between commercial piracy, theft, and other property offenses in the D.C. Code.[3]

[2] D.C. Code § 22-3214(a)(2) ("'Proprietary information' means customer lists, mailing lists, formulas, recipes, computer programs, unfinished designs, unfinished works of art in any medium, process, program, invention, or any other information, the primary commercial value of which may diminish if its availability is not restricted.").

[3] This overlap exists because the current definition of "property" is "anything of value," D.C. Code § 22-3201(3), which would appear to include intellectual property. Per this broad definition of "property," the current theft, taking property without right, and other property offenses create liability for taking

Second, the revised UCPR offense applies a "knowingly" mental state to the element that the defendant acted "without the effective consent of an owner." The current commercial piracy statute requires "knowing or having reason to believe" for the "without the consent of the owner" element. There is no case law interpreting "having reason to believe" in the current commercial piracy statute, however legislative history suggests that it may be intended to be a lesser culpable mental state than "knowingly."[4] In contrast, the revised UCPR offense applies a "knowingly" culpable mental state to the element that the defendant acted "without the effective consent of an owner." Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[5] Requiring a knowing culpable mental state also makes the revised UCPR offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[6] This revision improves the consistency and proportionality of the revised statute.

Third, the revised UCPR offense increases the number and type of grades of the offense. The current commercial piracy offense is a misdemeanor, regardless of the number of unlawful recordings the defendant at issue.[7] In contrast, the revised UCPR statute has two gradations, depending on the number of unlawful recordings the defendant makes, obtains, or possesses. This revision improves the proportionality of the offense and creates consistency with the gradations in the revised unlawful labeling of a recording statute.[8]

Fourth, subsection (f) of the revised UCPR offense permits a court to order the forfeiture and destruction or other disposition of all recordings, equipment used, or attempted to be used, in violation of this section. The current commercial piracy offense does not contain a forfeiture provision. In contrast, the revised statute allows judges to order forfeiture in order to destroy illegal copies and potentially deter large-scale

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proprietary information, independent of the inclusion of "proprietary information" in the current commercial piracy statute. Since the RCC retains the broad definition of "property" as "anything of value" (RCC § 22E-701), multiple property offenses will continue to cover takings of proprietary information without effective consent or consent.

It should also be noted that federal law makes theft or misappropriation of trade secrets a federal offense, but allows for state action. U.S. Economic Espionage Act of 1996, effective January 1, 1997.

[4] The legislative history suggests that a mistake as to whether or not a person has permission must be reasonable. "[I]t is a defense under this section that the defendant honestly and reasonably believed that he or she made the copy with the owner's permission or possessed a copy which was legitimate." Chairperson Clarke of the Judiciary Committee, *Extension of Comments on Bill No. 4-193: The District of Columbia Theft and White Collar Crimes Act of 1982* (July 20, 1982) (hereinafter *Extension of Comments on Bill No. 4-193*) at 28.

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

[6] *See, e.g.*, RCC § 22E-2101.

[7] D.C. Code § 22-3214(d) ("Any person convicted of commercial piracy shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both.").

[8] RCC § 22E-2207.

prohibited copying. The current[9] and revised[10] unlawful labeling of a recording statute and several other offenses[11] under current District law contain similar forfeiture provisions. This revision improves the consistency and proportionality of the offense.

Fifth, the provision in RCC § 22E-2001, "Aggregation of Property Value to Determine Property Offense Grades," allows aggregation of the number of recordings based on a single scheme or systematic course of conduct to determine the gradation of the revised UCPR offense. The current commercial piracy offense is not part of the current aggregation of value provision for property offenses.[12] This revision improves the proportionality of the revised statute.

Sixth, the revised UCPR offense eliminates any statutory presumption of intent. The current commercial piracy statute states that, "A presumption of the requisite intent arises if the accused possesses 5 or more unauthorized phonorecords either of the same sound recording or recording of a live performance."[13] The legislative history does not clearly state whether the presumption is mandatory or permissive, although some language suggests a mandatory presumption.[14] There is no case law on point. In contrast, the revised UCPR statute eliminates the presumption because it may run afoul of District and Supreme Court case law requiring that even permissive (non-mandatory) inferences be "more likely than not to flow from the proved fact"[15] of possession of 5 or more copies of a recording. While possession of a large number of copies of a recording appears more likely than not to indicate an intent to distribute the copies, the number of recordings alone indicates nothing regarding the purpose of distribution. Without other evidence, such possession also is consistent with a desire to gift or share for purposes other than commercial gain or advantage. This revision improves the proportionality, and perhaps the constitutionality, of the revised statute.

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

First, the revised UCPR offense explicitly applies to audiovisual recordings for live performances. The current commercial piracy statute, through its definition of

[9] D.C. Code § 22-3214.01(e) ("Upon conviction under this section, the court shall, in addition to the penalties provided by this section, order the forfeiture and destruction or other disposition of all sound recordings, audiovisual works, and equipment used, or attempted to be used, in violation of this section.").
[10] RCC § 22E-2207.
[11] *See, e.g.*, D.C. Code § 22-2723 (seizure and forfeiture for certain prostitution offenses); § 22-1838 (forfeiture requirement for human trafficking offenses).
[12] D.C. Code § 22-3202. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.").
[13] D.C. Code § 22-3214(b) ("A presumption of the requisite intent arises if the accused possesses 5 or more unauthorized phonorecords either of the same sound recording or recording of a live performance.").
[14] *Extension of Comments on Bill No. 4-193* at 29 ("If such a fact is established, the offender will be presumed to have acted with the requisite intent.").
[15] Statutes, or parts of statutes, authorizing the inference of one fact from the proof of another in criminal cases "must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Reid v. United States*, 466 A.2d 433, 435 (D.C. 1983) (citing *Leary v. United States*, 395 U.S. 6, 36, 89 S.Ct. 1532, 1548, 23 L.Ed.2d 57 (1969)).

"phonorecords,"[16] excludes sound recordings of audiovisual works. However, the current commercial piracy statute separately criminalizes obtaining a copy of "proprietary information" without consent, which may cover illicit audiovisual recordings. State protection of live performances is not limited by federal copyright law[17] and the current deceptive labeling statute[18] and the revised deceptive labeling statute[19] extend to audiovisual recordings. Including audiovisual recordings for live performances in the revised UCPR statute potentially fills a gap in existing law or, to the extent there is liability in current law, improves the clarity and consistency of the offense.[20]

Second, the revised statute requires a culpable mental state of "knowingly" as to the elements "makes, obtains, or possesses" and to the requirements for the unlawful sound recording (subsections (a)(1)(A), (a)(1)(B), (b)(1)(A), and (b)(1)(B)). No mental state is provided in the current statute regarding these elements, and there is no clear case law on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[21] Requiring a knowing culpable mental state also makes the revised UCPR offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[22]

Third, the revised UCPR offense uses a new definition of "owner," the same definition consistently applied to other property offenses.[23] The current commercial piracy offense's definition of "owner"[24] is very specific, referring either to the person who owns the original fixation, the exclusive licensee with reproduction and distribution rights, or in the case of a live performance, the performer. No case law exists construing this definition. However, the definition's rigid categories may lead to unintuitive outcomes in some fact patterns.[25] The revised UCPR statute is intended to more broadly

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[16] D.C. Code § 22-3214(a)(3).

[17] 17 USC 1101(d).

[18] D.C. Code § 22-3214.01.

[19] RCC § 22E-2206.

[20] It should be noted that nothing about expanding the unlawful creation or possession of a recording statute to included audiovisual recordings of live performances changes the offense's limited protection of sound recordings. As under the current commercial piracy statute, D.C. Code § 22-3214(e), the unlawful creation or possession of a recording statute is limited to sound recordings fixed prior to February 15, 1972. This limitation exists to avoid preemption by federal copyright law. 17 U.S.C. § 301(c).

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

[22] *See, e.g.*, RCC § 22E-2101.

[23] RCC § 22E-701 ("'Owner' means a person holding an interest in property with which the actor is not privileged to interfere without consent.").

[24] D.C. Code § 22-3214(a)(1):

> (1) "Owner", with respect to phonorecords or copies, means the person who owns the original fixation of the property involved or the exclusive licensee in the United States of the rights to reproduce and distribute to the public phonorecords or copies of the original fixation. In the case of a live performance the term "owner" means the performer or performers.

[25] E.g., a person who has reproduction but not distribution rights (the current statute refers to a licensee with rights to "reproduce and distribute"), or a person who by contractual agreement with someone other

identify the relevant person whose consent must be obtained. Ordinarily, it is expected that the parties specified under the current statute would be the relevant owners, but the revised definition provides flexibility where property rights are not arranged in the manner anticipated by the current statute. The revised UCPR is intended to reduce potential gaps in the offense and improve the consistency of definitions across property offenses.

Fourth, the revised UCPR offense, by use of the phrase "in fact," codifies that no culpable mental state is required as to the number of unlawful recordings made, obtained, or possessed. The current statute is silent as to what culpable mental state applies to these circumstances. There is no District case law on what mental state, if any, applies to the current gradations based on the number of recordings. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[26] Clarifying that the number of unlawful recordings is a matter of strict liability in the revised UCPR gradations clarifies District law.

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

First, the revised UCPR statute requires that the defendant "makes, obtains, or possesses." This language, particularly "possesses" is intended to include all the conduct prohibited by "reproduces or otherwise copies, possesses, buys or otherwise obtains" in the current commercial piracy statute. "Possesses" is defined in RCC § 22E-701 and discussed further in the commentary to that statute.

Second, the revised UCPR statute requires that the defendant act without the "effective consent of an owner." The current commercial piracy statute simply requires that the defendant act "without the consent of the owner."[27] There is no legislative history or District case law discussing the scope of "consent" in the current commercial piracy statute, or how the statute operates when there is more than one owner. The revised statute uses standardized definitions, discussed more fully in RCC § 22E-701, that exclude UCPR liability where consent is improperly gained and extend UCPR liability for unlawful conduct with respect to any owner where there are several. Using "effective consent" and "an owner" in the revised UCPR statute ensures that the specialized type of property at issue in the statute has the same protection afforded other property in theft and theft-related offenses in Chapter 21 of the RCC. The change in language improves the clarity and consistency of definitions throughout property offenses.

Third, the revised UCPR statute requires that the actor's conduct be "with intent to sell, rent, or otherwise use the sound recording for commercial gain or advantage." By

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than the performer has the rights to reproduce recordings of a live performance, may not be considered an "owner" under the current definition.

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

[27] D.C. Code § 22-3214(b).

contrast, the wording in the current commercial piracy statute is "with the intent to sell, to derive commercial gain or advantage, or to allow another person to derive commercial gain or advantage." The revised UCPR statute's addition of "rent" clarifies a common way of gaining commercial advantage. Deletion of the current statute's intent "to allow another person to derive commercial gain or advantage" prong reflects the fact that ordinary aiding and abetting or conspiracy liability applies to the offense. Consistent with prior legislative history,[28] the revised UCPR statute's language "sell, rent, or otherwise use the recording for commercial gain or advantage" is to be broadly construed.

[28] *Extension of Comments on Bill No. 4-193* at 29 ("The phrase 'derive commercial gain or advantage' is intended to encompass any transaction where the person reproducing or possessing the unauthorized phonorecord or copy of proprietary information surrenders ownership and control over it for consideration or any related form of compensation. Consequently, even an individual who does not hold himself or herself out to the public as engaging in a commercial enterprise can be subjected to criminal liability.").

RCC § 22E-2106. Unlawful Operation of a Recording Device in a Motion Picture Theater.

Explanatory Note. *This section establishes the unlawful operation of a recording device in a motion picture theater offense (revised unlawful recording offense) and penalty gradations for the Revised Criminal Code (RCC). The revised offense proscribes operating a recording device within a motion picture theater without the effective consent of an owner and with the intent to record a motion picture. The revised offense has a single penalty gradation. The revised unlawful recording offense replaces the unlawful operation of a recording device in a motion picture theater statute*[1] *in the current D.C. Code.*

Subsection (a)(1) specifies the prohibited conduct—operating a recording device within a motion picture theater. "Recording device" and "motion picture theater" are defined terms in subsection (e) of the statute. Subsection (a)(1) specifies that the culpable mental state for this conduct is "knowingly." Per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state in subsection (a)(1) applies to all the elements in subsection (a)(1). "Knowingly" is a defined term in RCC § 22E-206 that here means the accused must be practically certain this his or her conduct will operate a recording device within a motion picture theater.

Subsection (a)(2) states that the proscribed conduct must be done "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was induced by means of physical force, a coercive threat, or deception. "Owner" is a defined term in RCC § 22E-701 that means a person holding an interest in property with which the accused is not privileged to interfere without consent. Per the rule of construction in RCC § 22E-207, the "knowingly" mental state in subsection (a)(1) also applies to subsection (a)(2), and here requires that the accused be practically certainty that he or she lacks effective consent of an owner of the motion picture theater.

Subsection (a)(3) requires "with the intent" to record a motion picture. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would record a motion picture. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that a motion picture was actually recorded, only that the defendant believed to a practical certainty that a motion picture would be recorded.

Subsection (b) specifies the penalty for the offense. [RESERVED]

Subsection (c) provides qualified immunity to specified individuals for detention, false imprisonment, malicious prosecution, defamation, and false arrest in any proceedings arising from the detention or arrest of a person suspected of unlawfully operating a recording device within a motion picture theater. The subsection lists requirements for the detention or arrest that must be met for the immunity to apply.

[1] D.C. Code § 22-3214.02.

Subsection (d) provides judicial discretion to order the forfeiture and destruction or other disposition of all sound recordings, audiovisual recordings, and equipment used, or attempted to be used, in violation of this section.

Subsection (e) cross-references applicable definitions located elsewhere in the RCC and defines "motion picture theater" and "recording device" for this statute.

Relation to Current District Law. *The revised unlawful recording offense changes existing District law in two main ways.*

First the revised unlawful recording statute requires conduct be "with the intent to record a motion picture." The current unlawful recording statute does not have such an intent requirement and broadly prohibits "operat[ing] a recording device" within the premises of a motion picture theater.[2] The current statute would appear to include the use of a recording device (including a cell phone's audio, photo, or video recording features) in a motion picture theater, even if someone or something other[3] than the motion picture being exhibited is recorded. In contrast, the revised unlawful recording statute requires that the defendant have the intent to record a motion picture. This change improves the clarity and proportionality of the revised statute.

Second, subsection (d) of the revised unlawful recording statute permits a court to order the forfeiture and destruction or other disposition of all recordings, equipment used, or attempted to be used, in violation of this section. The current unlawful recording offense does not contain a forfeiture provision. In contrast, the revised unlawful recording statute allows judges to order forfeiture in order to destroy illegal copies and potentially deter large-scale prohibited copying. The current[4] and revised[5] unlawful labeling of a recording statutes and several other offenses[6] under current District law contain similar forfeiture provisions. This revision improves the consistency and proportionality of the offense.

Beyond these two main changes to current District law, seven other aspects of the revised UCPR statute may constitute substantive changes of law.

First, the revised unlawful recording statute requires that the defendant operate the recording device "within a motion picture theater." The current unlawful recording statute requires that the defendant operate a recording device "within *the premises* of a motion picture theater."[7] It is unclear if "within the premises" is meant to include areas of a motion picture theater where a motion picture is not being exhibited—for example, a lobby or a restroom of a motion picture theater. Instead of this ambiguity, the revised unlawful recording statute requires that the defendant operate the recording device within

[2] D.C. Code § 22-3214.02(b).

[3] For example, taking a photo or video chatting with someone while within a movie theater waiting for a movie to start would appear to satisfy the plain language of the current offense.

[4] D.C. Code § 22-3214.01(e) ("Upon conviction under this section, the court shall, in addition to the penalties provided by this section, order the forfeiture and destruction or other disposition of all sound recordings, audiovisual works, and equipment used, or attempted to be used, in violation of this section.").

[5] RCC § 22E-2207.

[6] *See, e.g.*, D.C. Code § 22-2723 (seizure and forfeiture for certain prostitution offenses); § 22-1838 (forfeiture requirement for human trafficking offenses).

[7] D.C. Code § 22-3214.02(b) (emphasis added).

the motion picture theater. This change improves the clarity and consistency of the revised statute.

Second, through the revised definition of "motion picture theater" in subsection (e), the revised unlawful recording statute includes venues they may not qualify as a "theater" or "other auditorium" under the current definition. The current definition of "motion picture theater" is limited to a "theater or other auditorium in which a motion picture is exhibited."[8] It is unclear whether this definition extends to other venues where a movie may be exhibited, such as a drive-in theater or a concert hall. To resolve this ambiguity, the revised definition of "motion picture" includes "other venue[s]" that are "being utilized primarily for the exhibition of a motion picture to the public." This change improves the clarity and completeness of the revised statute.

Third, through the revised definition of "motion picture theater" in subsection (e), the revised unlawful recording statute excludes the use of a recording device in venues where a motion picture is exhibited, but such an exhibition is not the primary purpose of the venue. The current definition of "motion picture theater" is limited to a "theater or other auditorium in which a motion picture is exhibited."[9] Due to this definition, it is unclear whether the current unlawful recording statute extends to the operation of a recording device in venues where a motion picture may be exhibited, incidental to the primary purpose of the venue—such as a salesperson at an electronics store who records portions of a movie being shown to demonstrate the capabilities of a widescreen television. The revised definition of "motion picture theater," and, by extension, the revised unlawful recording offense, require that the primary purpose of the venue is to exhibit a motion picture to the public. This change is consistent with the legislative history of the current unlawful recording statute[10] and a comparable federal offense.[11] This change improves the clarity and proportionality of the revised offense.

Fourth, through the revised definition of "motion picture theater" in subsection (e), the revised unlawful recording statute excludes the use of a recording device in venues where a motion picture is being exhibited, but the exhibition is not open to the public. The current definition of "motion picture theater" is limited to a "theater or other

[8] D.C. Code § 22-3214.02(a)(1).
[9] D.C. Code § 22-3214.02(a)(1).
[10] The legislative history for the current unlawful recording statute indicates that the statute was part of an effort to combat "film and video piracy" on a "local level." Committee on the Judiciary, *Report on Bill 11-125, The "Commercial Piracy and Deceptive Labeling Amendment Act of 1995,"* (April 19, 1995) at 1, 2.
[11] A substantively similar federal offense exists in 18 U.S.C. § 2319B, enacted after the District's current statute. The legislative history for the federal statute notes that "the bill is not intended to permit a prosecution of . . . a salesperson at a store who uses a camcorder to record portions of a movie playing to demonstrate the capabilities of a widescreen television" or "a university student who records a short segment of a film being show in film class." Family Entertainment and Copyright Act of 2005, House Committee on the Judiciary, H. Rpt. 109-33 Part I, April 12, 2005, Cong. Session 109-1, at 3. In these instances, the venue is not being used "primarily" to exhibit a motion picture. *Id.* The legislative history for the federal statute notes that it "deals with the very specific problem of illicit 'camcording' of motion pictures in motion picture exhibition facilities. Typically, an offender attends a pre-opening 'screening' or a first-weekend theatric release, and uses sophisticated digital equipment to record the movie. A camcorded version is then sold to a local production factory or to an overseas producer where it is converted into DVDs or similar products and sold on the street for a few dollars per copy." *Id*. at 2.

auditorium in which a motion picture is exhibited."[12] Due to this definition, it is unclear whether the current unlawful recording statute extends to the operation of a recording device in venues where a motion picture may be exhibited, but the exhibition is not open to the public—such as a person who records movies off the television screen in his or her home. The revised definition of "motion picture theater," and, by extension, the revised unlawful recording offense, require that the primary purpose of the venue is to exhibit a motion picture to the public. This change is consistent with the legislative history of the current unlawful recording statute[13] and a comparable federal offense.[14] This change improves the clarity and proportionality of the revised offense.

Fifth, the revised unlawful recording statute requires a "knowingly" culpable mental state for "operating a recording device in a motion picture theater." The current unlawful recording statute does not have a mental state for these elements, and there is no case law on point. The current statute would appear to criminalize a person with a recording device that is "on" even if the person does not know the device is "on." Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[15] Requiring a knowing culpable mental state also makes the revised unlawful recording offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[16]

Sixth, the revised unlawful recording statute requires that the defendant act without the "effective consent" of an owner of a motion picture theater and requires a "knowingly" culpable mental state for this element. The current unlawful recording statute requires that the defendant act "without authority or permission" of the owner.[17] There is no case law interpreting the meaning of "without authority or permission" in the current statute. The revised unlawful recording statute instead requires that the defendant lack the "effective consent" of an owner. "Effective consent" is defined in RCC § 22E-701 and is consistently used in the RCC property offenses. Using "effective consent" in the revised statute ensures that the specialized type of property at issue in the statute has the same protection afforded other property in theft and theft-related offenses in Chapter 21 of the RCC. This change improves the clarity and consistency of definitions throughout property offenses.

Seventh, the revised unlawful recording statute deletes from the qualified immunity provision in subsection (c)(1) the requirement that the offense be "committed in that person's presence." The current qualified immunity provision requires that the owner had at the time, probable cause to believe that the person detained or arrested had

[12] D.C. Code § 22-3214.02(a)(1).
[13] Committee on the Judiciary, *Report on Bill 11-125, The "Commercial Piracy and Deceptive Labeling Amendment Act of 1995,"* (April 19, 1995) at 1, 2.
[14] Family Entertainment and Copyright Act of 2005, House Committee on the Judiciary, H. Rpt. 109-33 Part I, April 12, 2005, Cong. Session 109-1, at 3
[15] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[16] *See, e.g.*, RCC § 22E-2101.
[17] D.C. Code § 22-3214.02(b).

committed "in [the owner's] presence, an offense described in this section."[18] There is no case law interpreting the scope of "committed in [the owner's] presence," and it is unclear if it includes the use of technology such as surveillance equipment. Instead of this ambiguity, the revised qualified immunity provision deletes the requirement "committed in [the owner's] presence" and relies on the probable cause requirement to ensure that that detention or ensuing arrest is reasonable. This revision clarifies the provision and fills a potential gap in current District law.

Eighth, the revised unlawful recording statute replaces "within a reasonable time" with "as soon as practicable" in subsection (c)(3) and subsection (c)(4) of the qualified immunity provision. The current qualified immunity provision requires that "[l]aw enforcement authorities were notified within a reasonable time"[19] and "[t]he person detained or arrested was released within a reasonable time of the detention or arrest, or was surrendered to law enforcement authorities within a reasonable time."[20] The scope of "within a reasonable time" is unclear and there is no DCCA case law on point. Instead of this ambiguity, the revised qualified immunity provision requires "as soon as practicable." This revision improves the clarity of the revised statute.

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

First, the revised unlawful recording statute uses the definition of "owner" in RCC § 22E-701, the same definition that is consistently applied to other RCC property offenses. The current recording statute does not define the term "owner"[21] and there is no DCCA case law on the issue. "Owner" is defined in RCC § 22E-701 as a person holding an interest in property with which the actor is not privileged to interfere without consent. The definition establishes that there may be multiple owners of property, in this case, a movie theater. This change clarifies the revised statute.

Second, the revised unlawful recording statute deletes the reference to "or his or her agent" in the offense definition.[22] The RCC relies on civil law for determining agency and it is unnecessary to specify that consent may be given by authorized persons. The definitions of "effective consent" and "owner" are discussed in the commentary to RCC § 22E-701. This change improves the clarity of the revised statute.

[18] D.C. Code § 22-3214.02(d)(1).
[19] D.C. Code § 22-3213(d)(3).
[20] D.C. Code § 22-3214.02(d)(4).
[21] D.C. Code § 22-3214.02(b).
[22] D.C. Code § 22-3213(b).

RCC § 22E-2201. Fraud.

Explanatory Note. *This section establishes the fraud offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes a broad range of conduct in which a person obtains property of another by means of deception. The penalty gradations are based on the value of the property involved in the crime. The revised fraud offense is closely related to the revised theft and extortion offenses.*[1] *It differs from theft because theft requires the lack of the owner's consent to take, obtain, transfer or exercise control over the property. It differs from extortion because extortion requires obtaining the owner's consent by use of a coercive threat, instead of deception. The revised fraud offense replaces both the general fraud statute*[2] *and, to the extent it criminalizes deceptive forms of theft, the theft statute*[3] *in the current D.C. Code.*

Subsection (a) specifies the elements of first degree fraud. Paragraph (a)(1) specifies alternative elements that a person must engage in—conduct that takes, obtains, transfers, or exercises control over property of another.[4] "Property," is a term defined in RCC § 22E-701, means something of value which includes goods, services, and cash. Further, the property must be "property of another," a term defined in RCC § 22E-701, which means that some other person has a legal interest in the property at issue that the accused cannot infringe upon without consent. Paragraph (a)(1) also specifies a culpable mental state of knowledge, a term defined in RCC § 22E-206 which here requires that the accused must be aware to a practical certainty that he or she would take, obtain, transfer, or exercise control over property of another.

Paragraph (a)(2) states that the proscribed conduct must be done with "consent" of an owner. The term consent requires some words or actions that indicate an owner's agreement to allow the accused to take, obtain, transfer, or exercise control over the property. "Owner" is also defined to mean a person holding an interest in property that the accused is not privileged to interfere with without consent.[5] Per the rule of construction in 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to the element "with the consent of an owner" in paragraph (a)(2), which requires that the accused was practically certain that he or she had an owner's consent.

Paragraph (a)(2) also codifies the element that distinguishes fraud from the revised theft and extortion offenses—that the consent of an owner be obtained by deception, a term defined in RCC § 22E-701. Deception includes a variety of ways of creating or reinforcing false impressions as to material information. Per the rule of construction in 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to the element, which here requires that the accused was practically certain that the

[1] RCC § 22E-2101 and RCC § 22E-2301, respectively.
[2] D.C. Code § 22-3221.
[3] *Id*. Conduct in the current theft statute that constitutes "obtaining property by trick, false pretense [] or deception" is replaced by the revised fraud offense.
[4] This conduct includes "causing" the taking, obtaining, transfer, etc. of property by indirect means, that meets the RCC § 22A-204 provisions regarding causation.
[5] The determination of who an owner is depends on civil law, including agency law regarding which persons are authorized to act on behalf of another. Thus, for example, a store employee who is authorized to sell merchandise may be an "owner" for purposes of the statute although the merchandise is in fact owned by the store company itself.

misimpression was actually false. In addition, fraud requires reliance; the deception must have caused the owner to provide consent, and the accused must have known that the deception caused the owner to provide consent. If the deception does not cause the owner to provide consent, there is no fraud.[6]

Paragraph (a)(3) requires that the defendant act "with intent to" deprive that owner of property. "Deprive" is a defined term meaning that the other person is unlikely to recover the property, or that it will be withheld permanently or long enough to lose a substantial portion of its value or benefit. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would "deprive" the other person of the property. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such a deprivation actually occurred, only that the defendant believed to a practical certainty that a deprivation would result.

Paragraph (a)(4) requires that the property other than labor or services was, in fact, valued at $250,000 or more; or that the property, in fact, was more than 2080 hours of labor or services. When fraud involves taking labor or services, the market value of the labor or services is not used to determine the property penalty grade. "In fact" is a defined term in RCC § 22E-207, and indicates that there is no culpable mental state requirement as to the value of the property, or the number of hours of labor or services.

Subsections (b)-(e) specify the elements for second, third, fourth, and fifth degree fraud. The elements of each grade of fraud are identical to the elements of first degree fraud, except for the value of the property. Each subsection specifies a minimum required property value or number of hours of labor or services, except for fifth degree fraud, which has no specific minimum value.[7] As with first degree fraud, strict liability applies to value of the property other than labor or services, or the hours of labor or services in each grade of fraud.

Subsection (f) specifies penalties for each grade of the fraud offense.

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

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

First, the revised fraud statute requires that the accused "takes, obtains, transfers, or exercises control over" the property of another. The current D.C. Code fraud statute requires proof that the accused "obtains property of another or causes another to lose property"[8] and the current theft statute refers to "obtaining property by trick, false

[6] For example, if a person sells a watch falsely claiming that the watch is made of gold, but the buyer did not care at all what the watch was made of, and would have purchased it regardless, the seller has not committed fraud.

[7] However, as defined in RCC § 22E-701, "property" means "anything of value" and includes services. Therefore, although fifth degree fraud does not specify any minimum value or number of hours of labor or services, as defined in the RCC, the "property" (including labor or services) must have *some* value.

[8] D.C. Code § 22-3221.

pretense, false token . . . or deception[.]"[9] These terms are not statutorily defined, and there is no relevant D.C. Court of Appeals (DCCA) case law. In contrast, the revised statute lists conduct that is consistent with the revised theft and extortion offenses. The revised statute is broader insofar as the accused is liable for many actions besides actually gaining the property himself, the typical meaning of "obtain."[10] The phrase "takes, obtains, transfers, or exercises control over" is identical to language in the revised theft statute, which is to be construed broadly to include any unauthorized use or disposition of property.[11] Less clear is whether the revised statute's various alternate elements cover all the possibilities covered by the current "causes another to lose property." For instance, the revised statute would reach conduct that causes the transfer of the victim's property (and otherwise satisfies the elements of the offense), whether or not the transfer is to the accused or received by the accused.[12] The breadth of the new language in practice may cover all or nearly all fact patterns covered under the prior "causes another to lose" language. This change improves the clarity and consistency of the revised statute.

Second, the revised offense defines and punishes attempted fraud consistent with attempt liability and penalties in other revised offenses. The current D.C. Code first degree fraud statute requires that the accused either obtains property or causes another to lose property, but second degree fraud, identical in every other element, requires neither.[13] In other words, second degree fraud in the current D.C. Code is akin to an attempt to commit first degree fraud. In contrast, under the revised fraud statute, if a person fails to obtain property, that person cannot be convicted of the completed offense but still may be convicted of an attempt under the RCC general attempt statute.[14] The elimination of the inchoate version of fraud does not decriminalize any behavior. Rather the change makes the revised fraud offense consistent with other property offenses in how attempt liability affects the scope and punishment for the offense. This change improves the completeness, consistency, and proportionality of the revised statute.

Third, the revised offense provides liability for a single fraudulent act. The current D.C. Code statute refers to a "scheme or systematic course of conduct,"[15] but does not define these terms. Construing this language, the D.C. Court of Appeals (DCCA) has held that a scheme or systematic course of conduct requires "at least two acts calculated to deceive, cheat or falsely obtain property."[16] There is no case law as to what minimal conduct would satisfy the current "two acts" requirement. In contrast, the revised fraud statute does not require proof of two or more acts constituting a scheme or systematic course of conduct. The practical effect of this change is unclear given the

[9] *Id*. Conduct in the current theft statute that constitutes "obtaining property by trick, false pretense [] or deception" is replaced by the revised fraud offense.
[10] https://www.merriam-webster.com/dictionary/obtain.
[11] As described in the commentary to the revised theft statute, language such as "unauthorized use" or "disposition" were not used in the current theft statute as duplicative and unnecessary, not to substantively change the broad scope of the offense.
[12] For example, a door-to-door salesman who uses deception to induce a customer to purchase items from the company the salesman works for not only has caused a loss to the homeowner, but has knowingly engaged in conduct that causes the transfer of funds from the homeowner to the company.
[13] D.C. Code § 22-3221.
[14] RCC § 22E-301.
[15] D.C. Code § 22-3221.
[16] *Youssef v. United States*, 27 A.3d 1202, 1207-08 (D.C. 2011).

possibility that the two acts referred to in the current statute might be robustly construed to require what would amount to two separate instances of theft by deception,[17] or could be minimally construed so as to constitute separate acts only in the most technical sense.[18] In either case, because the revised fraud statute is replacing theft by deception, the revised offense preserves the theft offense's requirement that only one act is sufficient to establish liability for fraud. This is not to say that each act that satisfies the requirements for fraud liability, however slight in distinction, must be charged separately, but they may be so charged if the harms are distinct.[19] This change improves the clarity and consistency of the revised statute.

Fourth, the revised fraud statute increases the number and type of gradations based on the value of the property or number of hours of labor or services lost. The current D.C. Code fraud offense is divided into two grades, with first degree fraud requiring that the accused actually obtained property or caused another to lose property.[20] Each grade of fraud is then divided into felony and misdemeanor versions. Felony first degree fraud requires that the accused obtained property, or caused another to lose property, valued at $1,000 or more. Felony second degree fraud requires that the object of the fraud is $1,000 or more, and there is no requirement that the accused actually obtained the property, or caused anyone to lose property. Misdemeanor versions of first and second degree fraud require that the property gained, property lost, or the object of fraud had any value, and have identical maximum allowable sentences.[21] In contrast, the

[17] Notably, in *Warner v. United States*, 124 A.3d 79, 86 (D.C. 2015) the DCCA held that "one cannot commit second degree fraud without also committing attempted second degree theft by deception." The implication is that every fraud charge could, in the alternative, be charged as theft by deception. Lending support to this notion that fraud may be viewed as two instances of theft by deception, the legislative history of the current fraud statute states that, "[t]he gravamen of the offense of fraud which distinguishes it from theft, is that fraud involves a scheme or systematic course of conduct to defraud or obtain property of another." Committee Report to the Theft and White Collar Crime Act of 1982 at 40.

[18] Under a longstanding fork-in-the-road test, a defendant's momentary, entirely subjective consideration of another matter may be sufficient to break the defendant's conduct into two acts, cognizable as fraud. For example, a defendant convincing a victim to purchase unneeded home repair services (based on defendant's lie about the condition of the home) who pauses momentarily to mention the hot weather before resuming the conversation may be deemed to have engaged in a fresh, second act by continuing the conversation, thereby incurring liability for a "scheme."

[19] The holding in *Youssef v. United States*, to the extent it relied on the requirement of a scheme to determine the relevant unit of prosecution, is no longer compelled under the revised fraud statute. In *Youssef*, the defendant deposited several checks into his Chevy Chase bank account at several locations throughout the city. The accounts he drew on had insufficient funds to cover the checks. However, before the checks cleared, Chevy Chase still allowed him to draw funds from his Chevy Chase account. The defendant ultimately made twenty-nine withdrawals from his Chevy Chase account over a one week period. This scheme was prosecuted as a single count of first degree fraud, as it constituted a single scheme or systematic course of conduct. Under the revised fraud statute, it is possible that these distinct withdrawals could be prosecuted as separate counts. However, if these incidents were prosecuted as separate counts, the *Youssef* holding as to a special unanimity instruction would also no longer apply. On appeal, the defendant argued that because the single count of fraud was premised on allegations of several withdrawals, the trial judge should have instructed the jury that in order to convict, it must be unanimous as to which particular fraudulent transactions it believed occurred. The DCCA rejected this argument, holding that he jury need not be unanimous as to which facts satisfy the elements of the offense. *Youssef*, 27 A.3d at 1207.

[20] D.C. Code § 22-3221.

[21] D.C. Code § 22-3222.

revised fraud offense has a total of five gradations which span a much greater range in value or loss of labor or services, with a value of $250,000 or more, or 2080 hours of labor, required for the most serious grade. In addition, by eliminating the inchoate version of fraud criminalized currently in the D.C. Code as second degree fraud, the penalty gradations for the revised offense will penalize attempted fraud more consistently under the general attempt penalty provision,[22] the same as in other offenses. The change improves the proportionality of the revised offense.

Fifth, the revised fraud statute's grades conduct that involves taking labor or services by the number of hours of labor or services taken. The current D.C. Code fraud offense is graded on the market value of property, not on the number of hours of labor or services. In contrast, the revised statute's separate calculation for the fraudulent taking of labor or services does not distinguish between the harm to persons with different hourly income levels.[23] Grading fraud based on market value risks disproportionately severe penalties in cases involving the fraudulent taking of high cost labor, and disproportionately lenient penalties in cases involving the fraudulent taking of minimum wage or near minimum wage labor. This change improves the proportionality of the revised criminal code.

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

First, the revised fraud offense eliminates the "intent to defraud" means of proving fraud, and therefore requires that the accused obtain property of another for liability as a completed[24] fraud offense. The current D.C. Code fraud statute criminalizes engaging in a scheme "with intent to defraud *or* to obtain property of another[.]"[25] The use of the word "or" suggests that "intent to defraud" could include conduct other than obtaining property by deception. However, neither District statutory nor case law provides a definition of "defraud" and the DCCA has not determined whether the current fraud statute criminalizes conduct beyond obtaining property by deception.[26] Federal courts and courts in other jurisdictions have interpreted fraud statutes with "intent to defraud" elements to include conduct that arguably goes beyond the scope of the revised fraud offense.[27] However, it is unclear if these types of cases would be covered under

[22] RCC § 22E-301(c).

[23] For example, if a person defrauds a person of 10 hours of labor, this constitutes fourth degree fraud, even if the market value of the labor would be sufficient for a higher grade of fraud.

[24] Attempted fraud liability may exist, per RCC § 22E-301, where the actor does not succeed in obtaining property of another.

[25] D.C. Code § 22-3221.

[26] *But see*, *United States v. Lewis*, 716 F.2d 16 (D.C. Cir. 1983) (affirming convictions under prior version of D.C. Code § 22-1805a for conspiracy to defraud the District of Columbia, on theory that the defendants deprived the District of Columbia of right to "faithful services").

[27] So-called "honest services frauds" do not involve deceptive taking of property, but involve a public official, executive, or other person with a fiduciary duty, depriving another person of a right to honest services. For example, if a public official awards a government contract to a bidder, in exchange for a kickback, the official would have deprived the public to its right to honest services, but did not obtain property by deception. *See Skilling v. United States*, 561 U.S. 358 (2010) (holding that honest services frauds are limited to kick back or bribery schemes); *see generally* Judge Pamela Mathy, *Honest Services Fraud After Skilling*, 42 St. Mary's L.J. 645, 704 (2011). Second, obtaining property by means that do not

current District law. Moreover, some DCCA fraud case law indicates that the current fraud offense should be construed to cover only deceptive thefts.[28] To resolve these ambiguities, the revised fraud statute eliminates separate liability for "intent to defraud," focusing the statute on conduct to obtain property of another by deception. This change improves the clarity of the revised statute.

Second, the revised fraud statute defines "deception" to specify the particular means of committing fraud. The current D.C. Code fraud statute generally refers to conduct that obtains property "by means of a false or fraudulent pretense, representation, or promise" in the current fraud statute. The phrase is undefined in current District statutory or case law, however there is scant District case law applying the phrase.[29] To resolve these ambiguities, the revised statute uses a standardized statutory definition of "deception"[30] that broadly provides fraud liability to cover conduct that historically was criminalized at common law as "larceny by trick . . . , and false pretenses."[31] The revised definition of deception is consistent with the limited case law applying the fraud statute's requirement that conduct be "by means of a false or fraudulent pretense, representation, or promise," and is consistent with numerous other revised statutes.[32] This change improves the clarity and consistency of the revised statute.

Third, the revised fraud statute requires that the accused act knowingly with respect to the elements in paragraphs (a)(1)-(a)(2), (b)(1)-(b)(2), (c)(1)-(c)(2), (d)(1)-(d)(2), and (e)(1)-(e)(2). The current D.C. Code fraud statute requires the conduct be committed "with intent to defraud or to obtain property of another" and explicitly references knowledge or intent in a separate provision in the fraud statute explaining liability for a false promise as to future performance.[33]

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involve deception as defined under the statute would also not constitute fraud. *See e.g., People v. Reynolds*, 667 N.Y.S.2d 591 (Sup. Ct. 1997) (defendants convicted of fraud had engaged in a scheme in which plaintiffs' attorneys who had won personal injury judgments paid kickbacks to expedite payment of the judgments by an insurance adjustor).

[28] See *Warner v. United States*, 124 A.3d 79, 86 (D.C. 2015) holding that "one cannot commit second degree fraud without also committing attempted second degree theft by deception." Although the DCCA was not considering the outer bounds of the current fraud statute, the *Warner* holding implies that schemes to deprive others of honest services or to obtain property by wrongful, but not deceptive conduct, are not covered by the current fraud statute.

[29] For example *Youssef v. United States*, 27 A.3d 1202, 1207 (D.C. 2011) (noting that fraud requires acts "calculated to deceive, cheat, or falsely obtain property"; *Cf. Bennett v. Kiggins*, 377 A.2d 57, 59 (D.C. 1977) (holding that elements of common law civil fraud are "(1) a false representation (2) in reference to material fact, (3) made with knowledge of its falsity, (4) with the intent to deceive, and (5) action is taken in reliance upon the representation"); *see also*, Committee Report for the Theft and White Collar Crime Act of 1982 at 40 (The language 'intent to defraud' expresses the concept of an intent to deceive or cheat someone.").

[30] For a detailed description of the definition of "deception," see the commentary entry to RCC § 22E-701.

[31] Conduct previously known as larceny by trust or embezzlement remains part of theft, except insofar as such conduct operates by means of deception and is therefore part of the revised fraud statute (22A-2201).

[32] *See, e.g.*, RCC § 22E-1401 (kidnapping, including as one form an interference with another's freedom of movement by deception, under specified circumstances) and the many revised offenses that use a definition of "effective consent" in RCC § 22E-701, which in relevant part refers to consent other than consent obtained by deception.

[33] D.C. Code 22-3221(c) ("Fraud may be committed by means of false promise as to future performance which the accused does not intend to perform or knows will not be performed. An intent or knowledge shall not be established by the fact alone that one such promise was not performed").

However, the fraud statute is silent as to the applicable culpable mental state requirements for other elements of the offense. The DCCA has recognized a knowledge requirement in the context of a false promise,[34] but there is no other case law on point. Current practice in the District may apply a less stringent culpable mental state of recklessness, based on case law in other jurisdictions.[35] To resolve these ambiguities, the revised statute requires knowing culpable mental states as to the elements of "takes, obtains, transfers, or exercises control over property of another" and acting "with the consent of an owner obtained by deception." Requiring knowing culpable mental states for these fraud elements is consistent with the current theft statute, which requires that the accused knew he or she lacked consent to take property of another,[36] and the revised theft and other property offenses. This change improves the clarity, consistency, and completeness of the revised statute.

Fourth, the gradations of the revised statute use the term "in fact," to specify that no culpable mental state is required as to the value of the property or number of hours of labor or services. The current statute is silent as to what culpable mental state, if any, applies to the value of property. There is no DCCA case law on point, although District practice does not appear to require a culpable mental state as to the monetary values in the current gradations.[37] To resolve these ambiguities, the revised statute specifies that strict liability applies to the elements regarding the value of the property or the number of hours of labor or services. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[38] This change improves the clarity, consistency, and completeness of the revised statute.

One other change to the revised theft statute are clarificatory in nature and are not intended to substantively change District law.

The revised fraud statute eliminates the special fine enhancement which provides an alternative fine of "twice the value of the property obtained or lost, whichever is greater" for first and second degree fraud of property worth $1,000 or more does not

[34] *See Warner v. United States*, 124 A.3d 79 (D.C. 2015) (the trial judge noted that whether a promise is fraudulent or not depended on "whether or not at the time the defendant made the promise, he knew he was going to [fail to perform the promise.]"

[35] *See*, D.C. Crim. Jur. Instr. § 5-200 ("A showing of reckless indifference for the truth will support a charge of fraud. *See U.S. v. Frick*, 588 F.2d 531 (5th Cir. 1979); *U.S. v. Amrep Corp.*, 560 F.2d 539 (2d Cir. 1977); *U.S. v. Love*, 535 F.2d 1152 (9th Cir. 1976).").

[36] *Russell v. United States*, 65 A.3d 1177 (D.C. 2013) ("Thus, to be clear, in order to show that the accused took the property 'without authority or right,' the government must present evidence sufficient for a finding that 'at the time he obtained it,' he 'knew that he was without the authority to do so.'") (citations omitted); *Nowlin v. United States*, 782 A.2d 288, 291-293 (D.C. 2001); *Peery v. United States*, 849 A.2d 999, 1001 (D.C. 2004) (listing the elements of second degree theft and then stating that "The question we address is whether the government presented sufficient evidence to prove that, at the time *Peery* used the AMEX card for personal purchases, he knew that he was without the authority to do so.").

[37] D.C. Crim. Jur. Instr. § 5.200.

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

affect available punishments. An equivalent provision in RCC § 22E-604(c) provides an alternate maximum fine of not more than twice the pecuniary gain or loss caused.

RCC § 22E-2202. Payment Card Fraud.

Explanatory Note. *This section establishes the payment card fraud offense and penalty gradations for the Revised Criminal Code (RCC). This offense criminalizes the use of a payment card, typically a credit card, to pay for or obtain property without the consent of the person to whom the card was issued, or the use of a payment card with knowledge that the card has already been canceled or revoked, or that the card had never actually been issued. It is also payment card fraud if the person uses for his or her own purposes a card that was issued to that person by an employer or contractor for the employer's purposes. The penalty gradations are determined by the value of the property obtained or amount paid using the payment card. The revised offense replaces the current credit card fraud[1] statute in the current D.C. Code.*

Subsection (a) specifies the elements for first degree payment card fraud. Paragraph (a)(1) specifies the element that a person must obtain or pay for property by using a payment card. The term "property" is a defined in RCC § 22E-701 to mean "something of value," including goods and services. "Payment card" is a defined in § 22E-701 as an instrument of any kind issued for use of the cardholder for obtaining or paying for property, or the number inscribed on such a card.[2] Paragraph (a)(1) also specifies a culpable mental state of knowledge, a term defined in RCC § 22E-206 which here requires that the accused must be aware to a practical certainty that he or she would obtain or pay for property by using a payment card.

Paragraph (a)(1) also specifies four additional alternate elements, at least one of which must be proven beyond a reasonable doubt. Subparagraph (a)(1)(A) states that the accused must use the payment card "without the effective consent of the owner." The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, a coercive threat, or deception. "Owner" is defined in § 22E-701 to mean a person holding an interest in property that the accused is not privileged to interfere with, without consent. Per the rule of construction in 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to subsection (a)(1)(A), here requiring the accused to be aware to a practical certainty that he or she lacked effective consent of the owner to use the payment card.

Subparagraph (a)(1)(B) states that the accused must use the payment card after the card was revoked or canceled. The term "revoked or canceled" is defined in RCC § 22E-701, to means that notice, in writing, of revocation or cancellation either was received by the named holder, as shown on the payment card, or was recorded by the issuer. Per the rule of construction in 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to subsection (a)(2)(B), here requiring the accused to be aware to a practical certainty that the card had been revoked or canceled.

[1] D.C. Code § 22-3223.

[2] The definition includes not only credit and debit cards, but common items such as gift cards, membership cards, and metro cards used to obtain or pay for goods, services, or any kind of property.

Subparagraph (a)(1)(C) states that the accused must use a payment card that had never actually been issued. Per the rule of construction in 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to subsection (a)(1)(C), here requiring the accused to be aware to a practical certainty that the card had never actually been issued.

Subparagraph (a)(1)(D) states that the accused must use the payment card for his or her own purposes, when the card had been issued to or provided to an employee or contractor for the employer's purposes.[3] Per the rule of construction in 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to subsection (a)(1)(D), here requiring the accused to be aware to a practical certainty that the card had been issued to or provided for the employer's purposes, and that the accused was using the card for his or her own purposes.

Subsection (a)(2) specifies that the property a person pays for or obtains was, in fact, valued at $250,000 or more. "In fact" is a defined term in RCC § 22E-207, and indicates that there is no culpable mental state requirement as to the value of the property.

Subsections (b)-(e) specify the elements for second, third, fourth, and fifth degree payment card fraud. The elements of each grade of fraud are identical to the elements of first degree payment card fraud, except for the value of the property. Each subsection specifies a minimum required property value, except for fifth degree fraud, which has no specific minimum value.[4] As with first degree fraud, strict liability applies to value of the property other than labor or services, or the hours of labor or services in each grade of fraud.

Subsection (f) specifies rules of jurisdiction for the payment card offense. This subsection specifies that payment card fraud 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 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.

Subsection (g) specifies relevant penalties for each grade of payment card fraud.

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

Relation to Current District Law. *The revised payment card fraud statute changes current District law in one main way.*

First, the revised payment card fraud statute increases the number of grade distinctions and dollar value cutoffs. Under the current D.C. Code statute, first degree payment card fraud involves property with a value of $1,000 or more and is punished as a serious felony; second degree payment card fraud involves property valued at less than $1,000 and is a misdemeanor.[5] By contrast, the revised payment card fraud offense has a

[3] For example, if a payment card is issued to an employee and that employee is authorized to use the card for the employer's purposes, if that employee uses the card to purchase goods or services for his own personal use, that employee may be found guilty of payment card fraud.

[4] However, as defined in RCC § 22E-701, "property" means "anything of value."

[5] D.C. Code § 22-3223(d) ("(1) Except as provided in paragraph (2) of this subsection, any person convicted of credit card fraud shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 180 days, or both. (2) Any person convicted of credit card fraud shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 10 years, or both, if the value of the property or services obtained or paid for is $1,000 or more.").

total of five gradations which span a much greater range in value, with a value of $250,000 or more being the most serious grade. The revised offense's gradations are consistent with other revised property offense gradations. This change improves the consistency and proportionality of the revised offense.

Beyond this one main change to current District law, four other aspects of the revised payment card fraud statute may constitute substantive changes of law.

First, the revised statute eliminates the current statute's requirement that the accused act "with intent to defraud."[6] The current statute does not define the term "defraud," and the D.C. Court of Appeals (DCCA) has never defined the meaning of the language in the credit card fraud statute. Current District practice does not appear to include an "intent to defraud" element.[7] To resolve this ambiguity, the revised statute eliminates the term. An additional "intent to defraud" element is not necessary to distinguish innocent from criminal conduct in the revised offense because the revised statute requires the accused actually pay for the property, and the accused must know one of the elements in subparagraphs (a)(1)(A)-(D) and comparable provisions in other paragraphs were satisfied. This change clarifies the revised statute.

Second, the revised statute requires that the accused act knowingly with respect to the elements in paragraphs (a)(1), (b)(1), (c)(1), (d)(1), and (e)(1). The current statute itself is silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[8] Requiring a knowing culpable mental state also makes the elements of payment card fraud consistent with the revised fraud statute and other property offenses, which generally require that the accused act knowingly with respect to the elements of the offense.[9] This change clarifies the revised statute.

Third, the revised statute does not expressly criminalize using a "falsified, mutilated or altered" card as provided in the current D.C. Code statute.[10] The current statute does not define these terms, and there is no case law interpreting the provision. To clarify the revised statute, specific reference to use of a "falsified, mutilated or altered" card is removed. The other provisions of the revised offense in subparagraphs (a)(1)(A)-(D) and comparable provisions in other paragraphs cover many instances apparently criminalized under the eliminated "falsified, mutilated or altered" provision. Knowing uses of a "falsified mutilated or altered" card may also be criminalized under the revised forgery offense, RCC § 22E-2204. This change clarifies and reduces unnecessary overlap between revised offenses.

Fourth, subsections (a)-(e), by use of the phrase "in fact," codify that no culpable mental state is required as to the value of the property obtained or paid for by using the

[6] D.C. Code § 22-3223 ("A person commits the offense of credit card fraud if, with intent to defraud, that person.").
[7] D.C. Crim. Jur. Instr. § 5.201.
[8] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[9] *See, e.g.*, RCC § 22E-2201.
[10] D.C. Code § 22-3223 (3).

payment card. The current D.C. Code statute is silent as to what culpable mental state applies to these elements. There is no District case law on what mental state, if any, applies to the current payment card fraud value gradations, although District practice does not appear to apply a mental state to the monetary values in the current gradations.[11] To resolve this ambiguity, the revised statute specifies that the value of the property is a matter of strict liability. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[12] This change improves the clarity and completeness of the revised statute.

[11] D.C. Crim. Jur. Instr. § 5.201.

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

RCC § 22E-2203. Check Fraud.

Explanatory Note. *This section establishes the check fraud offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes using a check to obtain or pay for property, with intent that the check will not be honored in full. The penalty gradations are determined by the value of the loss to the check holder. The revised offense replaces the current making, drawing, or uttering check, draft, or order with intent to defraud*[1] *statute in the current D.C. Code.*

Subsection (a) specifies the elements of first degree check fraud. Paragraph (a)(1) specifies that a person must obtain or pay for "property," a defined term in RCC § 22E-701 meaning anything of value.[2] The accused must obtain or pay for the property by using a check. "Check" is a defined term in RCC § 22E-701, and includes any written instrument for payment of money by a financial institution. Paragraph (a)(1) also specifies a culpable mental state of knowledge, a term defined in RCC § 22E-206 which here requires that the accused must be aware to a practical certainty that he or she obtains or pays for property by a check.

Paragraph (a)(2) specifies that the use of the check must be "with intent that" the check not be honored in full upon presentation to the bank or depository institution. "Intent" is a defined term in RCC § 22E-206 meaning here that the defendant was practically certain that a bank or depository institution would not honor the check in full. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the bank or financial institution did not actually honor the check in full, just that the defendant believed to a practical certainty, or desired, that the check would not be honored in full. The specific basis for why a person believes the bank or depository institution will not honor the check is not specified in the offense, and all that must be proven is the actor's belief at the time that the check will not be honored, whatever the basis.[3] This element requires that the accused believe to a practical certainty that the bank or depository institution will not honor the check *when it is presented* to the bank or depository institution, which may occur after the check is actually used to pay for property.[4]

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[1] D.C. Code § 22-1510.

[2] E.g., the property received may be cash, goods, or services.

[3] For example, a person may believe that their check will not be honored because they have insufficient funds or credit, but other bases for expecting a check will not be honored may include having a hold on an account.

[4] For example a person who knowingly tries to cash a check at his bank that draws upon his overdrawn account would be simultaneously "presenting" the check at the same time as he uses it to obtain property (cash). However, perhaps more typically, the accused would use the check to obtain property (goods) at a business which only later would present the check to the bank for deposit. The possibility of a time lapse between the time of using the check and it being presented to the financial institution may be important to proving the offense, because it may indicate the defendant did not have a culpable mental state. For example, a person would not be liable when that person presents a check to a business owner that draws upon his overdrawn account, but lacks knowledge that the check will not be honored upon presentation to the financial institution because he or she plans to immediately go make a deposit in the account to cover the check. Similarly, a person who spoke with a merchant and was told her check wouldn't be deposited for two weeks would not be liable for check fraud if she then used a check that she knew would not be

Paragraph (a)(3) specifies that there must be a loss to the check holder that is, in fact, $2,500 or more. Paragraph (a)(3) uses the term "in fact," which is defined in RCC § 22E-207, and indicates that there is no culpable mental state requirement as to the amount of loss to the check holder. The amount of the loss to the check holder may differ from the face value of the check.[5] A person who pays for or obtains property with the necessary intent need not be aware that the check holder actually experienced a loss, or the amount of the loss. Practically, very high value checks are unlikely to be accepted by a person without bank verification, resulting in few or no completed instances of very high value check fraud.[6]

Subsection (b) specifies the elements of second degree check fraud. The elements of second degree check fraud are identical to the elements of first degree check fraud, except that there is no requirement that the loss to the check holder be $2,500 or greater. Any amount of loss to a check holder is sufficient for second degree check fraud.

Subsection (c) specifies penalties for each grade of the check fraud offense.

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

Relation to Current District Law. *The revised check fraud statute changes current District law in five main ways*.

First, the revised statute requires that the accused obtain or pay for property or services with a check. Under the current D.C. Code statute, merely making, drawing, uttering, or delivering a bad check is sufficient.[7] Such language is not defined by the current statute,[8] and case law provides no precise definition either. However, the plain language of the current statute appears to include a broad range of conduct that ordinarily would be considered inchoate in most property offenses because no actual harm to anyone is required.[9] In contrast, the revised check fraud statute requires that the accused actually obtains or pays for property by using a check. By requiring that the accused actually obtain or pay for property or services, the revised offense significantly narrows liability for the completed offense to situations where the harm has been completed (i.e. the bad check has been used to obtain something of value) or is very nearly completed (i.e. payment is made, whether or not the property is obtained). Additional liability for

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honored by the financial institution if presented that day, but she planned to take action to ensure the check would be honored in two weeks.

[5] *E.g.*, if a person writes a check to a merchant for $2500 dollars, but upon presentation to the financial institution the bank honors the check for a value of $1000 and there is a $20 fee by the bank on the check holder based on the fact that the account drawn upon was insufficient, the loss for purposes of grading would be $1520.

[6] However, a person may be liable for attempt check fraud per RCC § 22E-301 even when there is no loss to the check holder.

[7] D.C. Code § 22-1510 ("Any person within the District of Columbia who…shall make, draw, utter, or deliver….").

[8] However, "utter" is statutorily defined in the District's forgery statute. See D.C. CODE § 22-1510 ("Utter" means to issue, authenticate, transfer, publish, sell, deliver, transmit, present, display, use, or certify.").

[9] *E.g.*, the ordinary meaning of "drawing" a check is to "create and sign" a check. Black's Law Dictionary (10th ed. 2014). Such conduct, when done with intent to defraud, knowing that insufficient funds are available to cover the check would complete the existing offense—even if the accused did it while at home alone one evening, communicating the drawn check to no one.

attempted check fraud would continue to exist, potentially covering much of the conduct criminalized under the current statute.[10] This change improves the consistency and proportionality of the revised statute.

Second, the revised check fraud statute does not provide an evidentiary inference regarding the check user's bad intent based on their failure to timely repay a bounced check. The current D.C. Code statute specifies that, "it shall be prima facie evidence of the intent to defraud . . . [if the accused] shall not have paid the holder thereof the amount due thereon, together with the amount of protest fees, if any, within 5 days after receiving notice in person, or writing, that such check, draft, order, or other instrument has not been paid."[11] There is no DCCA case law interpreting this provision.[12] In contrast, the RCC omits this statutory inference of intent because it appears to be unconstitutional.[13] However, even with this language omitted, the government may still present evidence of the accused's failure to pay the check holder after receiving notice that the check was not honored, and a fact finder may consider this evidence in determining whether the accused knew at the time the check was used that it would not be honored in full. This change improves the proportionality of the revised statute.

Third, the revised check fraud statute changes the dollar value cutoffs and specifies that it is the value of the loss to the check holder that should be used to determine gradations. The current D.C. Code check fraud offense turns on the amount of the check, being a three-year felony if the offense is $1,000 or more, otherwise a misdemeanor.[14] The current statute's grading based on the amount of the check may lead

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[10] *E.g.*, Drawing a check, with intent to defraud, knowing that insufficient funds are available to cover the check may well constitute attempted check fraud if the accused did so at the counter of a check cashing business while waiting for the clerk. *See*, generally, RCC § 22E-301 Criminal Attempt.

[11] D.C. Code § 22-1510.

[12] However, the D.C. Court of Municipal Appeals, the pre-cursor to the DCCA, has held that the "the presumption of fraudulent intent created by the statute" may still apply even when the check was used to "in payment of an antecedent debt." *Clarke v. United States*, 140 A.2d 181, 182 (D.C. 1958), *aff'd*, 263 F.2d 269 (D.C. Cir. 1959).

[13] In *Reid v. United States*, 466 A.2d 433 (D.C. 1983), the DCCA considered whether part of a statute criminalizing obliterating identifying marks on a pistol was constitutional. The statute in part, read "Possession of any pistol, machine gun, or sawed-off shotgun upon which any such mark shall have been changed, altered, removed, or obliterated shall be prima facie evidence that the possessor has changed, altered, removed, or obliterated the same within the District of Columbia[.]" D.C. Code § 22-4512. The DCCA stated that "Statutes, or parts of statutes, authorizing the inference of one fact from the proof of another in criminal cases 'must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.'" *Id.* (quoting *Leary v. United States*, 395 U.S. 6, 36 (1969)).

Although the issue has not been litigated before the DCCA, it appears that the portion of the current uttering statute which allows an inference of "intent to defraud" would similarly fail. It does not seem that it can be said "with substantial assurance" that it is "more likely than not" that a person who fails to pay back the check holder within 5 days of learning that the check was not honored had "intent to defraud" at the time the check was used. For example, a person may use a check to pay for property, genuinely believing that the check would be honored, and simply not have enough money to pay the check holder in full within 5 days of learning that the check was not honored.

[14] D.C. Code § 22-1510 ("Any person…shall, if the amount of such check, draft, order, or other instrument is $1,000 or more, be guilty of a felony and fined not more than the amount set forth in § 22-3571.01 or imprisoned for not less than 1 year nor more than 3 years, or both; or if the amount of such check, draft,

to counterintuitive liability in instances where there are nearly, but not fully, sufficient funds to cover a large value check.[15] By contrast, the revised check fraud offense is graded based on the actual loss to the check holder, and the threshold value is raised to $2,500 to be consistent with other revised property offenses. This change improves the consistency and proportionality of the revised statute.

Fourth, the provision in RCC § 22E-2001, "Aggregation To Determine Property Offense Grades," allows aggregation of value for the revised check fraud offense based on a single scheme or systematic course of conduct. In the current D.C. Code, the statutory provision that allows for aggregation of value across many property offenses[16] does not include the current check fraud offense, which is located in another chapter of the D.C. Code. In contrast, the revised check fraud statute permits aggregation for determining the appropriate grade of check fraud to ensure penalties are proportional to the accused's actual conduct. This change improves the consistency, and proportionality of the revised offense.

Fifth, the revised statute makes liability turn on a person's belief that his or her check will not be honored by the bank or depository institution. The current D.C. Code statute requires, more narrowly, that the accused know that he or she has insufficient funds or credit to cover the check.[17] There is no case law interpreting the scope of this element. In contrast, the revised statute provides liability in instances where the accused knows of other reasons[18]—besides insufficient funds or credit—why the bank or depository institution will deny payment and cause a loss to the check holder. This change may fill a gap in existing law.

Beyond these five main changes to current District law, three other aspects of the revised check fraud statute may constitute substantive changes of law.

First, the revised statute requires that the accused act knowingly with respect to obtaining or paying for property by using a check. The current statute is silent as to the culpable mental state requirements applicable to the clause "make, draw, utter, or deliver any check, draft, order, of other instrument for the payment of money upon any bank or

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order, or other instrument has some value, be guilty of a misdemeanor and fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both.").

[15] E.g., a person who writes a check for $1,001, knowing there is only $1,000 available to cover the check (and otherwise satisfying the elements of the offense) would be subject to a three year felony under current law. By contrast, a person who writes a check for $999, knowing there is no money available to cover the check (and otherwise satisfying the elements of the offense) would be subject to a 180-day misdemeanor under current law.

[16] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")

[17] D.C. Code § 22-1510 ("…knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, order, or other instrument….").

[18] E.g., if an account is frozen for legal or investigatory reasons, or the accused has closed the type of account the check purports to draw upon.

other depository,"[19] and no case law exists on point.[20] To resolve this ambiguity, the revised statute applies a knowledge culpable mental state requirement. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[21] Requiring a knowing culpable mental state also makes check fraud consistent with the revised fraud statute and other property offenses, which generally require that the accused act knowingly with respect to the elements of the offense.[22] The change improves the clarity and completeness of the revised offense.

Second, the revised statute requires that the accused acted with intent that the check not be honored in full upon presentation to the bank or depository institution drawn upon. The current statute requires that the actor "with intent to defraud,"[23] and that the person act "knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, order, or other instrument in full upon its presentation."[24] The current statute does not define the terms "defraud" or "knowing" and the DCCA has never defined the meaning of the language in the uttering a check, draft, or order with intent to defraud statute. To resolve these ambiguities, the revised statute applies a "with intent" culpable mental state requirement to the element that the check not be honored in full. A person who believes to that the check they are using to gain property will not be honored in full has an intent to deceive the recipient, and belief to a practical certainty appears to be equivalent to the level of certainty ordinarily associated with knowledge. The revised statute's "with intent" requirement is consistent with the revised fraud[25] statute and other property offenses, using the RCC's standardized definition. This change improves the clarity and consistency of the revised statute.

Third, first degree check fraud uses the phrase "in fact," to codify that no culpable mental state is required as to the value of the loss to the check holder. The current statute is silent as to what culpable mental state, if any, applies to this element. There is no District case law on what mental state, if any, applies to the current check fraud value gradations, although District practice does not appear to apply a mental state to the monetary values in the current gradations.[26] To resolve this ambiguity, the revised statute applies strict liability as to the amount of loss. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior

[19] D.C. Code § 22-1510.
[20] There is a DCCA case suggesting that the culpable mental state of the current uttering offense is one of "specific intent." *Zanders v. United States*, 678 A.2d 556, 565–66 (D.C. 1996). However, in that case, the DCCA quoted the Redbook Jury Instructions, and did not make a ruling based on the offense being a specific intent crime.
[21] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[22] See, e.g., RCC § 22A-2201.
[23] D.C. Code § 22-1510.
[24] D.C. Code § 22-1510.
[25] RCC § 22E-2201.
[26] D.C. Crim. Jur. Instr. § 5.211.

is an accepted practice in American jurisprudence.[27] This change clarifies and potentially fills a gap in the revised statute.

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

RCC § 22E-2204. Forgery.

Explanatory Note. *This section establishes the forgery offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes making, completing, altering, using, or transmitting falsified written instruments, when the accused has intent to use the written instrument to obtain property by deception, or to otherwise harm another person. The revised offense replaces the current forgery[1] statutes and the recordation of deed, contract, or conveyance with intent to extort money[2] in the current D.C. Code.*

Subsection (a) specifies the elements of first degree forgery. First degree forgery requires that the accused commits third degree forgery, and in addition the written instrument falls into one of the categories specified in subparagraphs (a)(2)(A)-(E). These subparagraphs describe various public records or documents of legal import, such as wills and contracts, as well as any written instrument with a value of more than $25,000. Paragraph (a)(2) uses the term "in fact," a defined term in RCC § 22E-207, which indicate that there is no culpable mental state requirement as to the type or value of written instrument.

Subsection (b) specifies the elements of second degree forgery. Second degree forgery requires that the accused commits third degree forgery, and in addition the written instrument falls into one of the categories specified in (b)(2)(A)-(C). These subparagraphs describe various prescriptions and tokens, fair cards, public transportation transfer certificates, or other articles intended as symbols of value for use as payment for goods and services, as well as any written instrument with a value of more than $2,500. Paragraph (b)(2) uses the term "in fact," a defined term in RCC § 22E-207, which indicates that there is no culpable mental state requirement as to the type or value of written instrument.

Subsection (c) specifies three alternate means of committing third degree forgery. Paragraph (c)(1) specifies that the accused knowingly does any of the acts described in subparagraphs (c)(1)(A)-(C). Subparagraph (c)(1)(A) provides that the accused alters a written instrument without authorization, and the written instrument is reasonably adapted to deceive a person into believing it is genuine. Subsection (c)(1) specifies that a knowingly culpable mental state applies, a term defined in RCC § 22E-207, which here requires that the accused was practically certain that he or she altered was a written instrument, that he or she lacked authority to do so, and that the alteration was reasonably adapted to deceive a person into believing it is genuine. This subsection covers unauthorized alterations to written instruments even if they were originally genuine.

Subparagraph (c)(1)(B) requires that that the accused make or complete a written instrument. In addition, when making or completing the item, the written instrument must appear: to be the act of someone who did not authorize the making or creating; to have been made or completed at a time or place or in a numbered sequence other than was in fact the case; or to be a copy of an original when no such original existed. Further, under subparagraph (c)(1)(B)(ii), the written instrument must be reasonably adapted to deceive a person into believing the written instrument is genuine. Per the rule

[1] D.C. Code §§ 22-3241 - 22-3242.
[2] D.C. Code §22-1402.

of construction in RCC § 22E-207, the "knowingly" mental state in paragraph (c)(1) also applies to all of the elements in subparagraph (c)(1)(B).

Subparagraph (c)(1)(C) requires that that the accused transmits or uses a written instrument that was made, altered, or completed as described in subparagraphs (c)(1)(A) or (c)(1)(B). The accused must have known he was transmitting or using the instrument, and known that the instrument was altered, made, or completed in a manner listed under subparagraphs (c)(1)(A) or (c)(1)(B). Subparagraph (c)(1)(C) codifies conduct previously known as "uttering."[3]

Paragraph (c)(2) further requires that, whichever alternative means of committing forgery occurs, the accused also must act "with intent to" obtain property of another by deception, or to otherwise harm another person. "Intent" is a defined term in RCC § 22E-206 that here means the accused was practically certain he or she would obtain property by deception or harm another person. The word harm does not require bodily injury and should be construed more broadly to include causing an array of adverse outcomes.[4] Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the accused actually obtained property or harmed another, only that the accused believed to a practical certainty that he or she would do so. In a forgery prosecution predicated on intent to obtain property by deception, the deception must relate to the *genuineness* of the written instrument, not false information contained within the instrument.[5]

Subsection (d) specifies penalties for each grade of the forgery offense.

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

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

First, the revised offense makes forgery, by any means, one offense. Despite the fact that its text makes no indication of the matter, the current forgery statute has been recognized by the D.C. Court of Appeals (DCCA) as codifying two separate legal offenses—forgery and uttering a forged document.[6] Under current law, a person can be convicted of both forgery and uttering, based on forging and then using a single written instrument.[7] In contrast, although multiple forgery convictions with respect to a single

[3] D.C. Code § 22-3241(a)(2).

[4] For example, forging business documents with intent to harm the business reputation of a business rival would constitute forgery.

[5] *See* Lafave, Wayne, 3 Subst. Crim. L. § 19.7 (2d ed.) ("Though forgery, like false pretenses, requires a lie, it must be a lie about the document itself: the lie must relate to the genuineness of the document."); Commentary to MPC § 224.1 at 289 ("Where the falsity lies in the representation of facts, not in the genuineness of the execution, it is not forgery.)

[6] *White v. United States*, 582 A.2d 774, 778 (D.C. 1990) ("it should be noted that forgery and uttering constitute two distinct offenses, albeit contained in a single statutory provision") *aff'd* 613 A.2d 869, 872 (D.C. 1992) (en banc). The DCCA ruling on this point follows apparent legislative intent. See COMMENTARY TO THEFT AND WHITE COLLAR CRIME ACT of 1982 at 60.

[7] *Id. at* 872 n.4 (D.C. 1992) (rejecting claim that uttering and forgery convictions should merge); *see also, Driver v. United States*, 521 A.2d 254, 256 (D.C. 1987) (defendant convicted of both forgery and uttering based on forging, and attempting to cash a single check).

written instrument may still occur under the revised statute,[8] the revised statute would change current law by barring convictions for both creating and using a forged document as part of the same act or course of conduct. The combined, revised offense eliminates unnecessary overlap in the revised statute.

Second, the revised statute replaces the "intent to defraud" element in the current statute with "intent to obtain property of another by deception." The current statute does not define the term "defraud," and DCCA has never defined the meaning of the language in forgery.[9] Consequently, the precise effect of the revision is unclear. In contrast, the revised statute requires that the accused act with intent to obtain property by deception. This revised language is intended to be broad enough to cover all, or nearly all, [10] the wrongful intentions that currently fall under the "intent to defraud" language in the current statute. Moreover, there remains the alternative element of committing the offense "with intent to harm another person," which broadly criminalizes forgery with ill-intent. The revised offense improves the clarity and consistency of the revised statute.

Third, the revised statute no longer grades forgery of payroll checks as first degree forgery. Under current law, forging payroll checks is subject to the highest maximum penalties allowed for forgery.[11] By contrast, under the revised statute, if a person commits forgery involving a payroll check, or an instrument that appears to be a payroll check, the gradation would be determined by the value of that instrument. This revision treats the forgery of payroll checks the same as forgeries of any other kinds of checks. This change improves the consistency and proportionality of the revised offense.

Fourth, the provision in RCC § 22E-2001, "Aggregation To Determine Property Offense Grades," allows aggregation of value for the revised forgery offense based on a single scheme or systematic course of conduct. The current forgery offense is not part of the current D.C. Code aggregation of value provision for property offenses.[12] In contrast, the revised forgery statute permits aggregation for determining the appropriate grade of forgery. This change improves the proportionality of the revised statute.

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[8] *E.g.*, If a person forges a written instrument, and uses it to obtain property from another, then as part of a different act or course of conduct, uses the same forged written instrument to obtain different property, then multiple convictions might be warranted. Multiple convictions with respect to a single forged instrument may or may not be appropriate depending on the facts of a particular case.

[9] Note though that other jurisdictions have held that intent to defraud includes "the purpose of causing financial loss to another," and to "prejudice . . . the rights of another[.]" People v. Lawson, 28 N.E.3d 210, 215–16 (Ill. Ct. App. 2015); *State v. Bourgeois*, 113 So. 3d 225, 230 (La. Ct. App. 2013).

[10] For example, a person could conceivably commit an "honest services fraud" by using forged documents. "Honest services fraud" does not involve obtaining property by deception, but instead involves depriving another of a right to honest or fair services. For example, if a public official used a forged document in an act of nepotism, this could constitute an honest services fraud, but would not involve obtaining property by deception. It is unclear if this type of conduct is covered by the current statute, but it would be excluded under the revised statute, except to the extent that it constituted an "intent to harm" another person.

[11] D.C. Code § 22-3242 (5).

[12] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")

Beyond these four main changes to current District law, two other aspects of the revised forgery statute may constitute a substantive change of law.

First, the revised statute requires that the accused act knowingly with respect to the elements in subparagraphs (c)(1)(A)-(C).[13] The current D.C. Code forgery statute is silent as to the applicable culpable mental state requirements, and no case law exists on point.[14] To resolve this ambiguity, the revised statute applies a culpable mental state requirement of knowledge. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[15] Requiring knowing culpable mental states also makes forgery consistent with the fraud statute, which requires that the accused knew that he or she used deception to obtain consent to take property.[16]

Second, the revised statute clarifies that a person is strictly liable as to the type or value of written instrument for purposes of grading forgery. Under the current D.C. Code statute and case law it is unclear what culpable mental state, if any, is required as to the type or value of written instrument involved in the forgery, and no case law exists on point. To resolve this ambiguity, the revised statute specifies that there is no culpable mental state required as to the type or value of written instrument. While applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence,[17] the presumption that the accused must have a subjective intent has not typically been applied to facts that merely distinguish the degree of wrongdoing.[18] The particular type of written instrument that has been forged does not distinguish innocent from criminal conduct, so no culpable mental state is assumed to apply to that fact. Applying no culpable mental state requirement to statutory elements that do not

[13] There is some DCCA case law suggesting that the culpable mental state of the current forgery offense is one of "specific intent." *Zanders v. United States*, 678 A.2d 556, 565 (D.C. 1996). However, in this case, the DCCA was quoting the Redbook Jury Instructions, and not making an actual holding.

[14] There is one possible exception. In *Ashby v. United States*, 363 A.2d 685 (D.C. 1976), the defendant was convicted of forgery for signing a false name to a check. On appeal, the defendant argued that there was insufficient to find that he had the requisite "intent to defraud." Although the D.C. Court of Appeals did not specifically define what is required for "intent to defraud," it noted that the defendant's "*awareness* that the name he affixed to the check for the purpose of cashing it was not his own" served as evidence of his "intent to defraud." *Ashby*, 363 A.2d at 687. At least in regards to the element under subsection (a)(1)(B)(i), there is some case law suggesting that a culpable mental state of "knowing" is appropriate.

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

[16] RCC § 22E-2201.

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

[18] *See* Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285, 325 (2012) ("State and federal courts frequently cite the U.S. Supreme Court for this point. Relying on United States v. X-Citement Video, Inc., courts emphasize 'the presumption in favor of a scienter requirement should apply to each of the statutory elements [of an offense] that criminalize otherwise innocent conduct'--but no elements beyond those.").

distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[19]

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

First, the revised forgery statute deletes the definition of "forged written instrument" and instead separately specifies conditions in which altering, making, completing, transmitting, or using a written instrument constitutes forgery. The current statute defines "forged written instrument" to include written instruments that have "been *falsely* made, altered, signed, or endorsed[.]"[20] The DCCA has clarified however that an instrument is falsely made, altered, or signed, when the person making, altering, or signing the instrument lacked authority to do so.[21] The revised statute includes this requirement; when a forgery prosecution is premised on altering an instrument, the accused must have lacked authority to do so. The current definition of "forged written instrument" also includes instruments that "contain[] a false addition or insertion."[22] Again, the revised statute's reference to altering a written instrument without authorization is intended to cover all instruments that "contain a false addition or insertion" under the current statute. Finally, the current definition of "forged written instrument" also includes instruments that are a "combination of parts of 2 or more genuine written instruments."[23] Correspondingly, the revised statute's reference to making or completing a written instrument that appears to have been made or completed at a time or place or in a numbered sequence other than was in fact the case, is intended to cover cases in which two otherwise genuine instruments are combined. The DCCA has not precisely defined when an instrument has been falsely made, altered, signed, or endorsed, or when an addition or insertion is false. The direct integration into the revised offense of elements in the current definition of "forged written instrument," and the clarification of those requirements, is not intended to substantively alter the scope of the offense.

Second, the revised statute requires that the accused "alters," "makes," "completes," "transmits," or "uses" a written instrument. These verbs are intended to encompass the words "makes, draws," or "utters"—the last being a term defined to mean, "to issue, authenticate, transfer, publish, sell, deliver, transmit, present, display, use, or

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

[20] D.C. Code § 22-3241 (a)(1)(A) (emphasis added).

[21] *See, Martin v. United States*, 435 A.2d 395, 398 (D.C. 1981) (noting that "It is the unauthorized completion of the stolen money orders which renders the instruments "falsely made or altered"); *Hall v. United States*, 383 A.2d 1086, 1089–90 (D.C. 1978) ("to establish falsity in a forgery charge it must be made to appear not only that the person whose name is signed to the instrument did not sign it, but also it must be established by competent evidence that the name was signed by defendant without authority") (quoting Owen v. People, 195 P.2d 953 (Colo. 1948)).

[22] D.C. Code § 22-3241 (a)(1)(B).

[23] D.C. Code § 22-3241 (a)(1)(C).

certify."[24] The verbs "draws," and "issue, authenticate, transfer, publish, sell, deliver, transmit, present, display, [], or certify," appear to be duplicative[25] and their elimination is intended only to clarify, not change, current law.

Third, the revised statute requires that the forged instruments be "reasonably adapted to deceive a person into believing it is genuine." Although the current forgery statute does not include this language, the requirement is based on current DCCA case law. The DCCA has held that forgery requires that the forged written instrument "must be apparently capable of effecting a fraud."[26] The "reasonably adapted" language in the revised statute is intended to codify this element recognized in case law.

Fourth, the revised statute eliminates as a separate offense the current offense of recordation of deed, contract, or conveyance with intent to extort money under D.C. Code § 22-1402.[27] Under that statute, it is a crime for a person to cause any instrument purporting to convey or relate to land in the District to be recorded in the office of the Recorder of Deeds, when that person has no title or color of title to the land, and with intent to extort money or anything of value from the true owner. Insofar as it involves use of a forged instrument with intent to harm another, the conduct constituting an offense under D.C. Code § 22-1402 would necessarily satisfy the elements under the revised forgery statute. Due to the complete overlap between D.C. Code § 22-1402 and the revised forgery statute, D.C. Code § 22-1402 is deleted as redundant.

[24] D.C. Code § 22-3241.

[25] *E.g.*, anytime a person "endorses," a written instrument, that person would also have necessarily either altered, made, completed, transmitted, or otherwise used the written instrument.

[26] *Martin*, 435 A.2d at 398 (D.C. 1981); *Hall*, 383 A.2dat 1089–90 (D.C. 1978). *See also*, Commentary to 1982 Theft and White Collar Crime Act. ("The final element which must be proven is that the falsely made or altered writing was apparently capable of effecting a fraud.").

[27] D.C. Code §22-1402.

RCC § 22E-2205. Identity Theft.

Explanatory Note. *This section establishes the identity theft offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes possessing, using, or creating a wide array of personal identifying information, without consent of the owner, for specified wrongful ends. The penalty gradations are based on the value of property obtained, payment avoided, or the financial loss caused, by the identity theft. The revised identity theft offense replaces the criminal identity theft*[1] *statutes in the current D.C. Code.*

Subsection (a) specifies the elements of first degree identity theft. First degree identity theft requires that the accused commits fifth degree identity theft, and in addition, the value of the property sought to be obtained or the amount of the payment intended to be avoided or the financial injury, whichever is greater, in fact, is $250,000 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[2] Subsection (a) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property sought to be obtained or the amount of the payment intended to be avoided or the financial injury.

Subsection (b) specifies the elements of second degree identity theft. Second degree identity theft requires that the accused commits fifth degree identity theft, and in addition, the value of the property sought to be obtained or the amount of the payment intended to be avoided or the financial injury, whichever is greater, in fact, is $25,000 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[3] Subsection (b) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property sought to be obtained or the amount of the payment intended to be avoided or the financial injury.

Subsection (c) specifies the elements of third degree identity theft. Third degree identity theft requires that the accused commits fifth degree identity theft, and in addition, the value of the property sought to be obtained or the amount of the payment intended to be avoided or the financial injury, whichever is greater, in fact, is $2,500 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[4] Subsection (c) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property sought to be obtained or the amount of the payment intended to be avoided or the financial injury.

Subsection (d) specifies the elements of fourth degree identity theft. Fourth degree identity theft requires that the accused commits fifth degree identity theft, and in addition, the value of the property sought to be obtained or the amount of the payment intended to be avoided or the financial injury, whichever is greater, in fact, is $250 or

[1] D.C. Code §§ 22-3227.01 - § 22-3227.04; D.C. Code §§ 22-3227.06 - § 22-3227.08. Provisions relating to record corrections due to identity theft are codified in RCC § 22A-2006 (Identity Theft Civil Provisions).
[2] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.
[3] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.
[4] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.

more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[5] Subsection (d) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property sought to be obtained or the amount of the payment intended to be avoided or the financial injury.

Subsection (e) specifies the elements of fifth degree identity theft. Paragraph (e)(1) requires that the accused knowingly created, possessed, or used "personal identifying information" belonging to or pertaining to another person. Possess is a term defined in RCC § 22E-701 to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." The term "personal identifying information" is defined in RCC § 22E-701. This subsection specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-207, which here requires that the accused was practically certain that he or she would create, possess, or use personal identifying information belonging or pertaining to another person.

Paragraph (e)(2) requires that the accused must have created, possessed, or used personal identifying information belonging to or pertaining to another person without that person's effective consent. The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, a coercive threat, or deception. Per the rule of construction in § 22E-207, the "knowingly" mental state in paragraph (e)(1) also applies to paragraph (e)(2), here requiring the accused to be aware to a practical certainty that he or she lacks effective consent of the other person.

Paragraph (e)(3) requires that the accused acted "with intent to" use the identifying information accomplish one of three goals: obtain property of another by deception; avoid payment due for any property, fines, or fees by deception; or give, sell, transmit, or transfer the information to a third person to facilitate the use of the identifying information by that third person to obtain property by deception and without that victim's consent. "Intent" is a defined term in RCC § 22E-206 meaning the accused was practically certain that he or she would achieve one of the goals listed in (e)(3)(A)-(C). Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the accused actually achieved any of the goals listed in (e)(3)(A)-(C), just that the accused consciously desired, or was practical certain, that he or she would achieve one of them.

Subsection (f) clarifies jurisdictional rules for prosecution of identity theft.

Subsection (g) clarifies that obtaining, creating, or possessing a single person's identifying information constitutes a single violation of this statute. A person who possesses multiple pieces of identifying information pertaining to a single person, with a required criminal purpose, is still only liable for one count of identity theft. Subsection (g) also specifies for purposes of the statute of limitations under D.C. Code § 23-113 that

[5] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.

an identity theft offense is deemed to have been committed after the course of conduct has been completed or terminated.

Subsection (h) specifies penalties for each grade of the identity theft statute.

Subsection (i) specifically requires the Metropolitan Police Department to report each complaint of identity theft and provide copies of such reports.

Subsection (j) cross references other terms defined elsewhere in the RCC.

Relation to Current District Law. *The revised identity theft statute changes current District law in three main ways.*

First, the revised statute eliminates reference to use of another person's identifying information to falsely identify himself at an arrest, to facilitate or conceal his commission of a crime, or to avoid detection, apprehension or prosecution for a crime—conduct included in the current identity theft statute.[6] The current identity theft statute includes using identifying information to avoid detection, apprehension or prosecution for a crime. In contrast, the revised identity theft statute does not criminalize this conduct. Most such conduct already is criminalized under other offenses, including the obstructing justice,[7] false or fictitious reports to Metropolitan Police,[8] and false statements.[9] All such conduct is criminalized under other offenses in the RCC, including the revised obstructing justice[10] and revised false statements offenses.[11] This change eliminates unnecessary overlap, and improves the proportionality of the revised statute.

Second, the revised statute criminalizes creating, possessing, or using another person's identifying information, without effective consent, with intent to avoid payment due for any property, fines, or fees by deception. The current D.C. Code identity theft statute does not criminalize use of identifying information with intent to avoid payments. In contrast, the revised statute explicitly criminalizes possessing, creating, possessing, or using identifying information with intent to avoid payments. This change improves the proportionality of the revised statute and fills a possible gap in offense liability.

Third, the revised statute increases the number of penalty grades. The current identity theft offense is limited to two gradations based solely on value of the property obtained, attempted to be obtained, or amount of the financial injury. The current first degree identity theft offense involves property with a value, or a financial injury, of $1,000 or more and is punished as a serious felony; second degree identity theft offense involves property with a value, or a financial injury, of less than $1,000 and is a misdemeanor. In contrast, the revised identity theft offense has a total of five gradations which span a much greater range in value, with a value or financial injury of $250,000 or

[6] D.C. Code § 22-3227.02(3). Notably, while the current identity theft statute purports to criminalize use of another's personal identifying information without consent to identify himself at arrest, conceal a crime, etc., current D.C. Code § 22-3227.03(b) only provides a penalty for such conduct in the limited circumstance where it results in a false accusation or arrest of another person.
[7] D.C. Code § 22-722(6).
[8] D.C. Code § 5-117.05.
[9] D.C. Code § 22-2405. Further supporting treating this offense as more akin to false statements is the fact that under current law penalty for 22-3227.02(3) versions of identity theft is just 180 days.
[10] RCC § 22E-XXXX.
[11] RCC § 22E-XXXX.

more being the most serious grade. This change improves the proportionality of the revised offense.

Beyond these three main changes to current District law, two other aspect of the revised identity theft statute may constitute a substantive change of law.

First, the revised identity theft offense specifies that there is no culpable mental state required as to the value of property obtained or sought to be obtained, amount of payment intended to be avoided, or the amount of financial injury. The current D.C. Code statute is silent as to what culpable mental state applies to these elements. There is no District case law on what mental state, if any, applies to the value of property of financial injury caused, although District practice does not appear to apply a mental state to the monetary values in the current gradations.[12] To resolve this ambiguity, the revised statute specifies that the value of the property is a matter of strict liability. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[13] This change improves the clarity and completeness of the revised statute.

Second, by referencing the RCC's "financial injury" definition, the revised identity theft may change how the offense is graded. Under current law, "financial injury" is defined as "*all* monetary costs, debts, or obligations incurred by a person [as a result of violation of the identity theft statute.]"[14] It is unclear if the current definition of financial injury would include truly unreasonable costs incurred, or costs incurred by a non-natural person. To resolve this ambiguity, the revised statute defines financial injury as the "*reasonable* monetary costs, debts, or obligations incurred by a natural person as a result of a criminal act[.]"[15] The RCC's definition improves the clarity and proportionality of the revised offense.

Four other changes to the revised identity theft statute are clarificatory in nature and are not intended to substantively change District law.

First, the revised statute no longer explicitly refers to "obtaining" identifying information of another. "Obtaining" is not defined in the current statute or case law. Instead the revised statute requires that the accused "creates, possesses, or uses" identifying information. "Obtaining" appears to be superfluous,[16] and no change in the scope of the statute is intended by omitting the word from the revised statute.

Second, the revised statute no longer explicitly refers to using identifying information to obtain property "fraudulently." "Fraudulently" is not defined in the statute or, for this offense, in case law. Instead the revised statute refers only to intent to obtain property by deception, avoid payment due fine by deception, or facilitate another person in obtaining property by deception. "Fraudulently" appears to be unnecessarily

[12] D.C. Crim. Jur. Instr. § 5.220.
[13] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute "only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269 (2000) (quoting *United States v. X–Citement Video*, 513 U.S. 64 at 72 (1994)).
[14] D.C. Code § 22-3227.01.
[15] RCC § 22E-701.
[16] E.g., person who obtains information would, at least temporarily, possess such information.

ambiguous and superfluous. No change in the scope of the statute is intended by that word's elimination from the revised statute.

Third, the revised statute does not explicitly criminalize using identifying information to obtain property of another.[17] The current statute criminalizes using identifying information to "obtain, or attempt to obtain, property[.]"[18] This provision of the current statute is duplicative given that it provides as an alternative basis of liability merely using identifying information to attempt to obtain property of another. There is no penalty difference in the current statute between actually obtaining or attempting to obtain property of another in this manner.

Fourth, the revised statute eliminates references in the current identity theft statutes to restitution[19] and fines at twice the amount of the financial injury.[20] Both provisions are superfluous under both current law[21] and the RCC.[22] No change in the scope of the statute is intended by elimination of these provisions.

[17] D.C. Code § 22-3227.02(1).
[18] D.C. Code § 22-3227.02 (2).
[19] D.C. Code § 22-3227.04.
[20] D.C. Code § 22-3227.03(a).
[21] D.C. Code § 16-711 (Restitution or reparation); § 22–3571.02(b). (Applicability of fine proportionality provision).
[22] RCC § 22A-802(a)(4); RCC § 22A-804(c).

RCC § 22E-2206. Identity Theft Civil Provisions.

Explanatory Note. *This section establishes the identity theft offense civil provisions concerning record correction for the Revised Criminal Code (RCC). The revised identity theft civil provisions are identical to the identity theft corrections of police records*[1] *statute in the current D.C. Code.*

[1] D.C. Code § 22-3227.05.

RCC §22E-2207. Unlawful Labeling of a Recording.

Explanatory Note*. This section establishes the unlawful labeling of a recording (ULR) offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes possession of a recording with a label that fails to identify the true manufacturer, with intent to sell or rent the recording. The penalty gradations are based on the number of recordings that the accused possessed. The revised unlawful labeling of a recording offense replaces the deceptive labeling offense in the current D.C. Code.*[1]

Subsection (a) specifies the elements of first degree ULR. Paragraph (a)(1) requires that the accused knowingly possesses 100 or more sound recordings or audiovisual recordings that do not clearly and conspicuously disclose the true name and address of the manufacturer on their labels, covers, or jackets. This subsection specifies that a "knowingly" culpable mental state applies to most elements, a term defined in RCC § 22E-207, which here requires that the accused was practically certain that he or she possessed sound recordings or audiovisual recordings, and that those recordings did not conspicuously disclose the true name and address of the manufacturer on their labels, covers, or jackets. Possess is a term defined in RCC § 22E-701 to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." The terms "sound recording" and "audiovisual recording" are defined in RCC § 22E-701. Sound and audiovisual recordings are discrete physical objects upon which sounds or images are fixed. The term "manufacturer" is defined for the purposes of this section to mean the person or entity who actually affixed the sounds or images to the sound or audiovisual recording. The term "manufacturer" does not refer to the original artist, or person who holds the copyrights to the sound or audiovisual work. This paragraph uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state required as to the total number of sound or audiovisual recordings being 100 or more.

Paragraph (a)(2) requires that the accused possessed the recordings "with intent to" sell or rent the recordings. "Intent" is a defined term in RCC § 22E-206, here meaning that the accused was practically certain that he would sell or rent the recordings. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the accused actually sold or rented the recordings, only that the accused was practically certain that he or she would sell or rent them.

Subsection (b) specifies the elements of second degree ULR. The elements of second degree ULR are identical to the elements of first degree ULR, except that there is no requirement as to the number of sound or audiovisual recordings. Possession of just a single sound or audiovisual recording is sufficient for second degree ULR.

[1] D.C. Code § 22-3214.01.

Subsection (c) provides an exception from liability if a person is a broadcaster who transfers a recording as part of a broadcast transmission or for the purposes of archival preservation, or any person who transfers recordings at home for personal use.[2]

Subsection (d) specifies penalties for both grades of ULR.

Subsection (e) provides that courts may order forfeiture of certain assets related to violation of this statute in addition to penalties otherwise authorized.

Subsection (f) cross reference definitions found elsewhere in the RCC, and defines the term "manufacturer" as used in this section.

Relation to Current District Law. *The unlawful labeling of a recording statute changes current District law in five main ways.*

First, ULR requires that the accused had intent to rent or sell the recordings. Any other intended uses of the recordings do not constitute ULR. The current statute uses broader language, covering conduct committed for "commercial advantage or private financial gain[.]"[3] The statute does not define these terms and there is no relevant D.C. Court of Appeals (DCCA) case law. However, the current statute's language could arguably include possessing a sound recording for commercial advantage or financial gain by means that do not involve selling or renting the recording.[4] In contrast, the revised statute requires intent to sell or rent the recordings, and intent to use the recordings for other purposes are not covered. To the extent that the current statute is broad enough to cover these uses of recordings, the revised statute is narrower than the current statute. The revision improves the proportionality of the revised offense.

Second, the revised ULR statute changes the penalty structure to equate penalties for ULR with respect to sound or audiovisual recordings. Under the current statute, a person commits a felony if he or she possessed 1,000 or more sound recordings, or 100 or more audiovisual recordings; and the person commits a misdemeanor if he or she possessed fewer than 1,000 sound recordings, or fewer than 100 audiovisual recordings. In contrast, under the revised statute, sound recordings and audiovisual recordings are no longer treated differently, either for determining the unit of prosecution or for the penalty. A person who possesses 100 improperly labeled sound recordings is subject the same penalties as a person who possesses 100 improperly labeled audiovisual recordings. In addition, the revised statute does not permit multiple convictions simply because the accused possessed two different types of recordings, contrary to the DCCA's holding in *Plummer v. United States*, [5] which allowed for two convictions based on the accused's possession of both sound and audiovisual recordings. Also, penalties are the same whether the recordings are sound or audiovisual recordings. The revision improves the consistency and proportionality of the revised statute.

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[2] The exclusion regarding a person at home acting for personal use improves the notice of the statute, but is not otherwise necessary. As described below, any person who acts for his or her personal use rather than with intent to sell or rent the recording, would not satisfy the offense's elements.

[3] D.C. Code § 22-3214.01(b).

[4] *E.g.*, conduct covered under the current statute might include possession of improperly labeled recordings with intent to play them in a store to entertain customers.

[5] 43 A.3d 260 (D.C. 2012). In *Plummer*, the DCCA reasoned that two convictions were warranted because the statute "explicitly treats audiovisual works as different from sound recordings" for sentencing purposes. *Id.* at 274.

Third, the penalty provisions of the revised ULR do not allow the number of recordings to be aggregated across a 180 day period. Under the current statute, the penalty gradations are based on the number of sound or audiovisual recordings possessed "during any 180 day period."[6] There is no case law regarding how the 180 day period is to be determined, and there is no legislative history on the provision. In contrast, under the revised statute, the penalty gradations are based solely on the number of recordings possessed at a single point in time, or as described immediately below, where the government aggregates the number of recordings involved in a single scheme or systematic course of conduct per RCC § 22E-2002, Aggregation To Determine Property Offense Grades. This revision improves the proportionality of the revised statute.

Fourth, the provision in RCC § 22E-2002, "Aggregation To Determine Property Offense Grades," allows aggregation of value for the revised ULR offense based on a single scheme or systematic course of conduct. The current ULR offense is not part of the current aggregation of value provision for property offenses,[7] however, as discussed immediately above, the current ULR statute has a special provision allowing the number of recordings to be aggregated across a 180 day period. In contrast, the revised ULR statute permits aggregation for determining the appropriate grade of ULR to ensure penalties are proportional to the accused's actual conduct. This change improves the proportionality of the revised statute.

Fifth, subsection (e) of the revised ULR offense permits a court to order the forfeiture and destruction or other disposition of all recordings, equipment used, or attempted to be used, in violation of this section. The current D.C. Code deceptive labeling offense contains a forfeiture provision that is mandatory.[8] In contrast, the revised statute allows, but does not require, judges to order forfeiture in order to destroy illegally labeled copies and potentially deter large-scale prohibited copying. The revised unlawful creation or possession of a recording statute[9] and several other offenses[10] under current District law contain similar forfeiture provisions. This revision improves the consistency and proportionality of the offense.

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

The revised statute eliminates the phrase "that person knowingly advertises, offers for sale, resale, or rental, or sells, resells, rents, distributes, or transports" a sound or audiovisual recording. The verbs in this phrase are not statutorily defined and there is no relevant DCCA case law. Nonetheless, this language appears to be redundant, given that the revised statute requires that the accused possesses a recording, with intent to sell or

[6] D.C. Code § 22-3214.01.
[7] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")
[8] D.C. Code § 22-3214.01.
[9] RCC § 22E-2105.
[10] *See, e.g.,* D.C. Code § 22-2723 (seizure and forfeiture for certain prostitution offenses); § 22-1838 (forfeiture requirement for human trafficking offenses).

rent it. However, insofar as the current language creates liability for knowingly advertising or offering recordings for sale, but without actually possessing them, a person engaged in such conduct could likely be prosecuted for ULR as an accomplice or for attempted ULR. It is also possible that a person who advertises or offers for sale such recordings will have committed a conspiracy to commit ULR. Practically, there appears to be little or no change to current law in relying solely on conduct that results in possession of an improperly labeled recording. This revision improves the clarity of the revised offense.

One other change to the revised ULR statute is clarificatory in nature and is not intended to substantively change District law.

The revised statute simplifies the definition of manufacturer to refer to "the person who affixes, or authorizes the affixation of, sounds or images to a sound recording or audiovisual recording." The current statute refers to "the person who authorizes or causes the copying, fixation, or transfer of sounds or images to sound recordings or audiovisual works subject to this section."[11] The elimination of "copying" and "transfer" is not intended to change the definition. Since a recording, as defined in the statute, is a material object, any copying or transfer that is relevant to the statute is necessarily a form of affixation.

[11] D.C. Code § 22-3214.01(a)(2).

RCC § 22E-2208. Financial Exploitation of a Vulnerable Adult or Elderly Person.

Explanatory Note. *This section establishes the financial exploitation of vulnerable adults (FEVA) and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes acquisition or use of the property of a vulnerable adult by means of undue influence and with intent to deprive the person of the property, with recklessness as to the complainant being a vulnerable adult or elderly person. The offense also includes committing theft, extortion, forgery, fraud, or identity theft with recklessness as to the complainant being a vulnerable adult or elderly person. The penalty gradations are based on the value of the property involved in the crime, or by the amount of financial injury inflicted.*

Subsection (a) specifies the elements of first degree FEVA. First degree FEVA requires that the accused commits fifth degree FEVA, and in addition, the value of the property or the amount of financial injury, whichever is greater, in fact, is $250,000 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[1] Subsection (a) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property or the amount of the payment intended to be avoided or the financial injury.

Subsection (b) specifies the elements of second degree FEVA. Second degree FEVA requires that the accused commits fifth degree FEVA, and in addition, the value of the property or the amount of financial injury, whichever is greater, in fact, is $25,000 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[2] Subsection (a) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property or the amount of the payment intended to be avoided or the financial injury.

Subsection (c) specifies the elements of third degree FEVA. Third degree FEVA requires that the accused commits fifth degree FEVA, and in addition, the value of the property or the amount of financial injury, whichever is greater, in fact, is $2,500 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[3] Subsection (a) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property or the amount of the payment intended to be avoided or the financial injury.

Subsection (d) specifies the elements of fourth degree FEVA. Fourth degree FEVA requires that the accused commits fifth degree FEVA, and in addition, the value of the property or the amount of financial injury, whichever is greater, in fact, is $250 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[4] Subsection (a) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is

[1] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.
[2] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.
[3] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.
[4] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.

no culpable mental state requirement as to the value of the property or the amount of the payment intended to be avoided or the financial injury.

Subsection (e) specifies the elements of fifth degree FEVA. Paragraph (e)(1) requires that the accused knowingly takes, obtains, transfers, or exercises control over property of another. The term "property" is defined in RCC § 22E-701, and means anything of value. Further, the property must be "property of another," a term defined in in RCC § 22E-701, which means that some other person has a legal interest in the property at issue that the accused cannot infringe upon. Paragraph (e)(1) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-207, which here requires that the accused was practically certain that he or she would take, obtain, transfer, or exercise control over property of another.

Subparagraph (e)(1)(A) requires that the accused act with consent of the owner. The term "consent" is defined in RCC § 22E-791, and requires some indication (by words or actions) of the owner's agreement to allow the accused to take the property. The term "owner" is also defined in RCC § 22E-701, and means a person holding an interest in property that the accused is not privileged to interfere with, and it specifically includes those persons who are authorized to act on behalf of another.[5] Per the rule of construction in 22E-207, the "knowingly" mental state in paragraph (e)(1) also applies to subparagraph (e)(1)(A), which requires that the accused be practical certain that he or she had the consent of the owner.

Subparagraph (e)(1)(A) also requires that the consent of the owner was obtained by "undue influence." "Undue influence" is defined subsection (h) to mean "mental, emotional, or physical coercion that overcomes the free will or judgment of a vulnerable adult or elderly person and causes the vulnerable adult or elderly person to act in a manner that is inconsistent with his or her financial, emotional, mental, or physical well-being." Per the rule of construction in 22E-207, the "knowingly" mental state in paragraph (e)(1) also applies to subparagraph (a)(1)(A), which here requires that the accused was practically certainty or owner's consent is obtained by undue influence.

Subparagraph (e)(1)(B) specifies that the owner must be to a "vulnerable adult or elderly person", terms defined in RCC § 22E-701 to mean a person who is either 18 years of age or older and has one or more substantial physical or mental impairments, or 65 years of age or older. This subparagraph specifies that a "recklessness" mental state applies a term defined in RCC § 22E-206, which here requires the accused consciously disregarded a substantial risk that the owner was a "vulnerable adult or elderly person."

Subparagraph (e)(1)(C) requires that the accused act "with intent to" deprive the owner of the property. "Deprive" is a defined term meaning that the other person is unlikely to recover the property, or that it will be withheld permanently or long enough to lose a substantial portion of its value or benefit. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would "deprive" the other person of the property. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not

[5] The definition of "owner" specifically includes specifically includes those persons who are authorized to act on behalf of another. For example, a store employee who is authorized to sell merchandise is an "owner," although the merchandise is in fact owned by the store company itself.

necessary to prove that such a deprivation actually occurred, only that the defendant believed to a practical certainty that a deprivation would result.

Paragraph (e)(2) defines FEVA to include committing theft, extortion, forgery, fraud, or identity theft, with recklessness that the complainant is a vulnerable adult or elderly person. This paragraph specifies that a "recklessness" mental state applies a term defined in RCC § 22E-207, which here requires the accused consciously disregarded a substantial risk that the complainant was a "vulnerable adult or elderly person."

Subsection (f) specifies penalties for each grade of FEVA.

Subsection (g) specifies that if any restitution is ordered, the accused must pay the restitution before paying any criminal or civil fines imposed for violation of this section.

Subsection (h) cross-references applicable definitions located elsewhere in the RCC, and defines the term "undue influence."

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

First, the revised FEVA statute applies a "reckless" culpable mental state as to the complainant being a vulnerable adult or elderly person. The current statute does not specify any required mental state as to whether the person was an elderly or vulnerable adult, and there is no case law on point. However, the current statute provides an affirmative defense if the accused "knew or reasonably believed the victim was not a vulnerable adult or elderly person at the time of the offense, or could not have known or determined that the victim was a vulnerable adult or elderly person because of the manner in which the offense was committed."[6] Further, the statute states that "[t]his defense shall be established by a preponderance of the evidence."[7] In contrast, under the revised statute, the government would bear the burden of proving that the accused was reckless as to the complainant being a vulnerable adult or elderly person. This requires that the accused consciously disregarded a substantial risk that the complainant was 65 years or older, or was at least 18 years of age, and had one or more physical or mental limitations that substantially impair his or her ability to independently provide for his or her daily needs or safeguard his or her person, property, or legal interests. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[8] However, a reckless culpable mental state requirement is consistent with other circumstances regarding victims that are aggravators in the RCC.[9] This change improves the clarity and completeness of the revised statute.

Second, the revised FEVA statute increases the number of penalty grade distinctions. The current FEVA statute is limited to two gradations based on the value of

[6] D.C. Code § 22-933.01 (b).
[7] *Id.*
[8] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[9] See, e.g., RCC § 22A-1202 Assault.

the property or legal obligation.[10] In contrast, the revised FEVA offense has a total of five gradations which span a much greater range in value, with a value of $250,000 or more being the most serious grade. The increase in gradations, differentiated by offense seriousness, improves the proportionality of the offense. In addition, the revised FEVA statute also grades penalties based on the value of the property involved, or the amount of financial injury caused, whichever is greater. This change improves the proportionality of the revised offense.

Third, the revised FEVA statute eliminates the special recidivist penalty authorized under current law.[11] Under current law, if a person with two prior FEVA convictions is convicted of FEVA, the maximum allowable sentence is 15 years, regardless of the value of property involved in either of the convictions. In contrast, the revised FEVA statute no longer authorizes this increased penalty. This special enhancement is highly unusual in current District law, and there is no clear basis for singling out recidivist FEVA violations as compared to other offenses of equal seriousness. The general recidivism enhancement in RCC § 22A-806 will provide enhanced punishment for recidivist FEVA violations, consistent with the treatment of recidivism in other offenses. This change reduces unnecessary overlap with other criminal provisions.

Fourth, by referencing the RCC's "financial injury" definition, the revised FEVA statute changes how the offense is graded. Under current law, FEVA is graded based on the value of the property obtained, or the legal obligation incurred by the complainant. In contrast, by referencing the RCC's "financial injury" definition,[12] FEVA may be graded based on *reasonable* costs incurred as a result of the offense.[13] The RCC's definition improves the proportionality of the revised offense by excluding unreasonable costs incurred from affecting penalty gradations.

Fifth, the provision in RCC § 22E-2002, "Aggregation To Determine Property Offense Grades," allows aggregation of value for the revised FEVA offense based on a single scheme or systematic course of conduct. The current FEVA offense is not part of the current aggregation of value provision for property offenses.[14] In contrast, the revised FEVA statute permits aggregation for determining the appropriate grade of FEVA to ensure penalties are proportional to the accused's actual conduct.

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

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[10] D.C. Code § 22-936.01. Felony FEVA involves property or legal obligations with a value of $1,000 or more and is punished as a serious felony; misdemeanor FEVA involves property or legal obligations valued at less than $1,000 and subject to a 180 day maximum sentence

[11] D.C. Code § 22-936.01

[12] RCC § 22E-701. The RCC defines financial injury as the "reasonable monetary costs, debts, or obligations incurred by a natural person as a result of a criminal act[.]"

[13] For example, if a complainant incurred reasonable legal expenses as a result of a violation of this section, those costs could be used to determine the appropriate penalty gradation.

[14] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")

First, paragraph (e)(1) specifies a culpable mental state of "knowingly" for all offense elements other than value of the property involved or the amount of financial loss, or the complainant's status as an elderly person or vulnerable adult. The current statute requires that the accused acted "intentionally and knowingly[.]"[15] The current statute does not define "intentionally" or "knowingly," and there is no case law on point. By applying a culpable mental state of "knowingly," the revised FEVA statute requires that the accused was practically certain that he or she would take, obtain, or exercise control over property of another, with consent obtained by undue influence. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[16] Requiring a knowing culpable mental state also makes the revised theft offense consistent with the revised fraud and extortion statutes, and other property offenses, which generally require that the accused act knowingly with respect to the elements of the offense.[17] This change improves the clarity and completeness of the revised offense.

Second, the revised statute provides liability only for conduct with intent to deprive the vulnerable adult or elderly person of property. The current D.C. Code statute provides liability for conduct with intent to use the property "for the advantage of anyone other than the vulnerable adult or elderly person[.]"[18] There is no case law regarding this phrase. However, the revised statute refers to an intent to deprive where the term "deprive" is defined in the RCC to include withholding property permanently for "so extended a period or under such circumstances that a substantial portion of its value or a substantial portion of its benefit is lost" or "to dispose of the property, or use or deal with the property so as to make it unlikely that the owner will recover it."[19] Consequently, taking property with intent to benefit another person is already within the scope of the RCC's definition of "deprive" if doing so would deny the owner a substantial benefit of the property. The primary effect of the revised FEVA offense eliminating liability for acting with intent to use property "for the advantage of anyone other than the vulnerable adult or elderly person" is to bar prosecution for temporary unauthorized uses of the property. However, the revised unauthorized use of property[20] criminalizes even temporary uses of a person's property without effective consent. This change clarifies the revised statute and reduces unnecessary overlap among offenses.

Third, the revised offense no longer specifically criminalizes causing a vulnerable adult or elderly person to assume a legal obligation. The current D.C. Code statute specifically criminalizes causing a vulnerable adult or elderly person to assume a legal obligation on behalf of, or for the benefit of, anyone other than the vulnerable adult or elderly person.[21] However, the revised FEVA statute already provides liability for

[15] D.C. Code § 22-933.01.
[16] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[17] See, e.g., RCC § 22E-2201.
[18] D.C. Code § 22-933.01.
[19] RCC § 22E-701.
[20] RCC § 22E-2102.
[21] D.C. Code § 22-933.01.

engaging in conduct (with consent obtained by undue influence) that causes a transfer of property or involves exercising control over property with intent to deprive the owner. And the term "property" as defined in RCC § 22E-701 includes anything of value, including real property and interests in real property, as well as credit.[22] Consequently, it appears that most, if not all, instances of causing a vulnerable adult or elderly person to assume a detrimental legal obligation (with consent obtained by undue influence) are criminalized under the currents statute are also covered by the revised FEVA statute.[23] This change clarifies and reduces unnecessary overlap in provisions of the revised offense.

Fourth, subsections (a)-(d) of the revised offense, by use of the phrase "in fact," codify that no culpable mental state is required as to the value of the property or the amount of financial loss. The current statute is silent as to what culpable mental state applies to these elements, and there is no relevant D.C. Court of Appeals (DCCA) case law. To resolve this ambiguity the revised statute makes the amount of loss or value of property a matter of strict liability. Requiring no culpable mental state to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[24] This change clarifies the revised offense.

One other change to the revised FEVA statute is clarificatory in nature and does not substantively change current District law.

The revised statute requires that the accused use "undue influence" to obtain, take, transfer, or exercise control over property, but does not separately include use of "deception" or "intimidation" as does the current statute.[25] However, omitting these words is not intended to change current law. Obtaining property of a vulnerable adult or elderly person by use of deception or intimidation will still be covered by the revised FEVA statute. First, the definition of "undue influence" includes "mental, emotional, or physical coercion[.]"[26] This definition is broad enough to cover any use of "intimidation." Second, FEVA is also defined as committing theft, extortion, forgery, fraud, or identity theft, with recklessness that the complainant is a vulnerable adult or elderly person. Under the RCC, fraud is defined as taking, obtaining, transferring, or exercising control over property, with consent of the owner obtained by deception.[27]

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[22] Commentary to RCC § 22A-2001.

[23] For example, a person who knowingly uses undue influence to cause an elderly person to take out a second mortgage and give over the proceeds may well be guilty under the revised FEVA statute. Such a defendant would have caused the transfer (subsection (a)(1)) of an interest in real property (subsection (a)(2)) with the consent of the owner (subsection (a)(3)), who is elderly (subsection (a)(4)), using undue influence (subsection (a)(5)), believing that in doing so he or she will cause the owner to lose a substantial portion of the property's value (subsection (a)(6)).

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

[25] D.C. Code § 22-933.01.

[26] RCC § 22E-2208 (h).

[27] RCC § 22E-2201.

Taking property of a vulnerable adult or elderly person by deception is therefore still criminalized under the revised FEVA statute.

RCC § 22E-2209. Financial Exploitation of a Vulnerable Adult or Elderly Person Civil Provisions

Explanatory Note. *RCC § 22E-2209 is a combination of two current statutes, D.C. Code §§ 22-937 and 22-938. The text from the two current D.C. Code statutes has been copied verbatim, with the exception of technical changes to update cross-references, and to add headings to some subsections. However these changes are purely technical, and do not substantively alter current District law.*

RCC § 22E-2301. Extortion.

Explanatory Note. *This section establishes the extortion offense and penalty gradations for the Revised Criminal Code (RCC). The offense punishes taking another person's property by inducing their consent by means of coercive threat. The penalty gradations are based on the value of the property involved in the crime. The revised extortion offense is closely related to the revised theft and fraud offenses.*[1] *It differs from theft because in extortion the defendant has the owner's consent obtained by using a coercive threat. It differs from fraud because in fraud the defendant uses deception, rather than a coercive threat, to obtain the owner's consent. The revised extortion offense replaces the extortion*[2] *and, to the extent that it involves conduct with intent to obtain property, blackmail*[3] *statutes in the current D.C. Code.*

Subsection (a) specifies the elements of first degree extortion. Paragraph (a)(1) requires that the defendant takes, obtains, transfers, or exercises control over property of another. "Property," a term defined in RCC § 22E-701, means something of value and includes goods, services, and cash. Further, the property must be "property of another," a term defined in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the accused cannot infringe upon without consent. Paragraph (a)(1) also specifies a culpable mental state of knowledge, a term defined in RCC § 22E-206 which here requires that the accused must be aware to a practical certainty that he or she would take, obtain, transfer, or exercise control over property of another.

Paragraph (a)(2) states that the must take, obtain, transfer, or exercise control over property with "consent" of an owner. The term consent is defined in RCC § 22E-701, and chiefly requires some words or actions that indicate an owner's agreement to allow the accused to take, obtain, transfer, or exercise control over the property. "Owner" is also defined to mean a person holding an interest in property that the accused is not privileged to interfere with without consent.[9] Per the rule of construction in 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to the element "with the consent of an owner" in paragraph (a)(2), which requires that the accused was practically certain that he or she had an owner's consent.

Paragraph (a)(3) codifies the element that distinguishes extortion from the revised theft and fraud offenses—that the consent in paragraph (a)(2) be obtained by coercive threat, a term defined in RCC § 22E-701. Coercive threats a variety of threats that pressure a person to agree to give the defendant the property.[4] Per the rule of construction in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(3), requiring the defendant to be aware to a practical certainty that victim's consent is obtained by coercive threat.

Paragraph (a)(4) requires that the defendant acted "with intent to" deprive that owner of property. Subsection (a)(3) requires that the defendant had an "intent to deprive" that owner of property. "Deprive" is a defined term meaning that the other

[1] RCC § 22A-2101 and RCC § 22A-2701, respectively.
[2] D.C. Code § 22-3251.
[3] D.C. Code § 22-3252.
[4] See Commentary to definition of "coercive threat" accompanying RCC § 22E-701.

person is unlikely to recover the property, or that it will be withheld permanently or long enough to lose a substantial portion of its value or benefit. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would "deprive" the other person of the property. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such a deprivation actually occurred, only that the defendant believed to a practical certainty that a deprivation would result.

Paragraph (a)(5) requires that the property, in fact, has a value of more than $250,000. "Value" is a defined elsewhere in RCC § 22E-701. "In fact" is a defined term in RCC § 22E-207, and indicates that there is no culpable mental state requirement as to the value of the property.

Subsections (b)-(e) specify the elements for second, third, fourth, and fifth degree extortion. The elements of each grade of extortion are identical to the elements of first degree extortion, except for the value of the property. Each subsection specifies a minimum value required for the property, except for fifth degree extortion, which has no specific minimum value.[5] As with first degree extortion, strict liability applies to value of the property in each grade of extortion.

Subsection (f) specifies penalties for each grade of the extortion offense.

Subsection (g) cross references definitions found elsewhere in the RCC.

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

First, the revised extortion statute no longer specially punishes attempts to commit the offense the same as the completed offense. The current extortion statute[6] states that it is an offense if the person "obtains or *attempts* to obtain" property, and the current blackmail statute[7] is an inchoate offense that does not require the defendant to actually obtain property. There is no clear rationale for such a special attempt provision for extortion as compared to other offenses. Under the revised extortion statute, the General Part's attempt provisions[8] will establish liability for attempted extortion consistent with other offenses. Differentiating conduct that does and does not result in depriving someone of property improves the proportionality of the offense.

Second, by its use of the new definition of coercive threat in RCC § 22E-701 the revised extortion statute makes several changes to the means by which the defendant induces the owner's consent. The current extortion statute prohibits four means of obtaining consent: (1) the use of actual force or violence, (2) the threatened use of force or violence, (3) a wrongful threat of economic injury, and (4) under color or pretense of

[5] However, as defined in RCC § 22E-701, "property" means "anything of value[.]" Therefore, although fifth degree extortion does not specify any minimum value, as defined in the RCC, "property" must have *some* value.
[6] D.C. Code § 22-3251.
[7] *Id.* ("A person commits the offense of blackmail, if, with intent to obtain property of another or to cause another to do or refrain from doing any act, that person threatens….").
[8] RCC § 22E-301.

official right.[9] The current blackmail offense[10] prohibits additional means of obtaining consent, including threats "to accuse any person of a crime; to expose a secret or publicize an asserted fact, whether or true or false, tending to subject any person to hatred, contempt, or ridicule; or to impair the reputation of any person, including a deceased person."[11] In contrast, the revised extortion statute is somewhat narrower than the current extortion and blackmail offenses insofar as actual use of force has been eliminated from the statute as a means of obtaining property to reduce overlap with robbery.[12] However, the revised extortion offense also is broader than either the current extortion or blackmail statutes by including new conduct—threatening to "[n]otify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status" or to "[c]ause harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply."[13] Otherwise, the means by which the defendant induces the victim's consent in revised extortion offense is generally the same as the current extortion and blackmail offenses. The current "threatened use of force or violence" prong is covered by the revised offense's inclusion of threats to engage in conduct constituting an "offense against persons" or a "property offense."[14] And the final alternative in the current statute, involving obtaining property under color or pretense of right, also remains in the revised statute.[15] The revised extortion includes each of these forms of conduct via the definition of coercive threat.[16] These changes reduce unnecessary gaps and overlap among revised offenses.

Third, the revised extortion statute requires that the defendant has intent to deprive an owner of the property. Neither the current extortion statute nor the current blackmail statute has comparable provisions;[17] and there is no relevant D.C. Court of Appeals (DCCA) case law. Instances where the defendant extorts property for temporary use or causes the owner to lose a slight benefit are covered by the revised unauthorized use of property offense,[18] which is a lesser-included offense of extortion. Inclusion of the "intent to deprive" element reduces unnecessary overlap between offenses, creates

[9] D.C. Code § 22-3251. It is unclear what difference, if any, exists between "force" and "violence;" neither term is defined in the statute, and no DCCA case law has provided definitions.
[10] D.C. Code § 22-3252.
[11] *Id.*
[12] RCC § 22E-1201.
[13] RCC § 22E-701.
[14] RCC § 22E-701. *See also* Committee on the Judiciary, Report on Bill 4-193 at 69 ("The threat of force or violence may be against any person and is intended to cover threats that anyone will cause physical injury to or kidnapping of any person. The threat of force or violence also covers a threat of property damage or destruction.").
[15] RCC § 22E-701. A "coercive threat" includes threatening to "take or withhold action as a government official, or cause a government official to take or withhold action."
[16] RCC § 22A-2001(4)(E), (F). The current blackmail statute's reference to a threat "to impair the reputation of any person, including a deceased person" is modified slightly in the revised statute, but no change in the scope of the offense is intended. Harm to reputation is referenced with other harms in the final clause of the revised coercion definition. RCC § 22A-2001(4)(J). Impairing the reputation of a deceased person is meant to be covered by the revised coercion definition's reference to asserting a fact that would tend to subject a person to hatred, contempt, or ridicule. RCC § 22A-2001(4)(F).
[17] D.C. Code § 22-3251; D.C. Code § 22-3252.
[18] RCC § 22E-2102.

consistent offense definitions across extortion, theft,[19] and fraud,[20] and improves the proportionality of the revised offense.

Fourth, the revised extortion statute increases the number and type of grade distinctions, grading based on the value of the property extorted. The current extortion and blackmail offenses are not graded at all, and give a flat penalty that does not vary based on whether the offender obtains expensive property or merely attempts to obtain or intends to obtain an item of trivial value.[21] By contrast, the revised extortion offense has a total of five gradations based on the value of the property involved, with a value of $250,000 or more being the most serious grade. The increase in gradations, differentiated by offense seriousness, improves the proportionality of the offense.[22] The gradations in the revised offense also create consistency with the dollar-value distinctions in related theft[23] and fraud[24] offenses.

Fifth, the provision in RCC § 22E-2001, "Aggregation to Determine Property Offense Grades," allows aggregation of value for the revised extortion offense based on a single scheme or systematic course of conduct. The current extortion and blackmail offenses are not part of the current aggregation of value provision for property offenses.[25] As noted above, the current extortion and blackmail offenses are not graded based on value of the property involved. The revised extortion statute permits aggregation for determining the appropriate grade of extortion to ensure penalties are proportional.

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

First, the revised extortion offense requires a culpable mental state of knowledge for subsections (a)(1)-(a)(3), (b)(1)-(b)(3), etc. The current extortion statute does not specify a culpable mental state and the blackmail statute only refers to an "intent to obtain property of another or to cause another to do or refrain from doing any act."[26] No case law exists on point, although legislative history suggests that the Council expected some mental state would apply via the use of the term "wrongful" in the current extortion

[19] RCC § 22E-2101.
[20] RCC § 22E-2201.
[21] D.C. Code § 22-3251(b) ("Any person convicted of extortion shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 10 years, or both.); D.C. Code § 22-3252(b) ("Any person convicted of blackmail shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 5 years, or both.")
[22] Under the revised extortion statute and both the current extortion and blackmail statutes, a wide range of behavior is punished equally. E.g., threats of both a trivial amount of property damage and threats of serious bodily harm equally satisfy the current and revised extortion statutes. However, grading based on the value of property involved may not only improve proportionality with respect to the property loss, but, indirectly, the seriousness of the coercion. Relatively minor forms of coercion would seem inherently unlikely to be successful in causing a person to consent to giving up very high value property.
[23] RCC § 22E-2101.
[24] RCC § 22E-2201.
[25] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")
[26] D.C. Code § 22-3252(a).

statute's text.[27] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[28] Requiring a knowing culpable mental state also makes the revised extortion offense consistent with the revised fraud statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[29]

Second, the revised extortion offense uses the phrase "takes, obtains, transfers, or exercises control over."[30] The current extortion[31] and blackmail[32] statutes require proof of an attempt to, or intent to, "obtain" the property of another. The term "obtain" is not statutorily defined, nor is there any relevant DCCA case law. It is possible that the current term "obtain" does not include all conduct that constitutes transferring or exercising control over property.[33] Using the revised language of "takes, obtains, transfers, or exercises control over" improves the clarity of the statute, reduces possible unnecessary gaps, and makes the revised extortion offense consistent with the revised fraud statute and other property offenses.

Third, the revised extortion statute does not explicitly include making a "wrongful threat of economic injury." The current extortion statute[34] includes the phrase "wrongful threat of economic injury," but the phrase is not defined in the statute, and there is no relevant DCCA case law. The legislative history notes that this language was "not intended to cover the threat of labor strikes or other labor activities," or "consumer boycotts,"[35] but is intended to cover "a leader of an organization [who] threatens to strike or boycott in order to extort anything of value for his personal benefit, unrelated to the interest of the group he represents."[36] However, the RCC's definition of "coercive threats" does not specifically include a "wrongful threat of economic injury." While the revised extortion statute is not intended to criminalize threats of labor strikes or consumer boycotts, certain types of threats of economic injury may still satisfy the catch-all provision in the "coercive threat" definition.[37] However, because it is not clear exactly

[27] The Judiciary Committee's report, which accompanied the bill creating the current extortion offense, states that the threat in extortion "must be 'wrongful,'" and that "the term 'wrongful' when used in criminal statutes implies an evil state of mind." Committee on the Judiciary, Report on Bill 4-164 at 69 citing *Masters v. United States*, 42 App. D.C. 350, 358 (D.C. Cir. 1914).

[28] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[29] *See, e.g.*, RCC § 22A-2201.

[30] RCC § 22A-2701(a)(1).

[31] D.C. Code § 22-3251.

[32] D.C. Code § 22-3252.

[33] For example, if a defendant uses a coercive threat to compel another person to transfer funds to a bank account that the defendant does not control, under the current statute it is unclear whether the defendant has "obtained" those funds.

[34] D.C. Code § 22-3251.

[35] Judiciary Committee, Report on Bill No. 4-193, the D.C. Theft and White Collar Crime Act of 1982, at 69 (hereinafter, "Judiciary Committee Report").

[36] *Id.* at 70.

[37] RCC § 22E-701 (A "coercive threat" includes threatening to "[c]ause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply."

what constitutes a "wrongful threat of economic injury under current law," it is unclear whether the catch-all provision would necessarily cover all such threats. This change clarifies and improves the consistency of the revised statute.

Fourth, by reference to the RCC's definition of coercive threat, the revised extortion statute includes threats to "distribute a photograph, video or audio recording . . . that tends to subject another person to, or perpetuate: Hatred, contempt, ridicule, or other significant injury to personal reputation; [or] significant injury to credit or business reputation."[38] The current blackmail statute covers threatening to "expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, ridicule, embarrassment, or other injury to reputation[.]"[39] The current blackmail statute does not specify whether distributing photographs, videos, or audio recordings, constitutes "expos[ing] a secret or publiciz[ing] an asserted fact[.]"[40] The current blackmail statute also does not specify whether threatening to expose secrets or assert facts that *perpetuate* hatred, contempt, or ridicule[41] are covered. There is no relevant DCCA case law addressing either issue. By contrast, through reference to the definition of "coercive threat," the revised extortion statute clarifies that the revised offense includes threats to distribute photographs, videos, or audio recordings, and to expose or publicize information that would subject a person to, or *perpetuate,* hatred, contempt, ridicule, or other significant injury to personal reputation, or significant injury to credit or business reputation. This change improves the clarity of the revised offense, and may close gaps in current law.

One other change to the revised statute are clarificatory in nature and are not intended to substantively change District law.

First, the revised extortion offense uses the phrase "consent of an owner". The phrase "the other's consent" is used in the current extortion statute,[42] and is implicit in the blackmail statute insofar as it supposes the threat will cause a person to engage in conduct that results in the defendant obtaining property.[43] The term "consent" is not defined in the current statute. Per RCC § 22E-701, "consent" is a defined term, here chiefly meaning that the owner of the property gives words or actions that indicate a preference for particular conduct. Reference to this definition is not intended to change current District law.

[38] RCC § 22E-701.
[39] D.C. Code § 22-3252. The words "embarrassment, or other injury to reputation" were added as part of the Sexual Blackmail Elimination and Immigration Protection Amendment Act of 2018. [Projected Law Date May 21, 2019].
[40] For example, a nude photo arguably does not necessarily expose secrets or expose facts.
[41] For example, if it is already publicly known that a person is habitually unfaithful to his spouse, it is unclear if the current blackmail statute covers threats to expose an additional act of infidelity.
[42] D.C. Code § 22-3251(a).
[43] D.C. Code § 22-3252(a).

RCC § 22E-2401. Possession of Stolen Property.

Explanatory Note. *This section establishes the possession of stolen property (PSP) offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes knowingly buying or possessing property, believing the property to be stolen, with intent to deprive an owner of the property. The five penalty gradations vary based on the value of the property. The revised PSP offense replaces the receiving stolen property*[1] *statute in the current D.C. Code.*

Subsection (a) specifies the elements of first degree PSP. Paragraph (a)(1) requires that the accused knowingly buys or possesses property. Possess is a term defined in RCC § 22E-701 to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." Property is a term defined in RCC § 22E-701, to mean something of value which includes goods, services, and cash. Paragraph (a)(1) also specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which here requires that the accused was practically certain that he or she would buy or possess property.

Paragraph (a)(2) requires that the accused acted "with intent that" the property be stolen. "Intent" is a defined term in RCC § 22E-206, here meaning that the accused was practically certain that the property was stolen. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the property was actually stolen, just that the accused believed to a practical certainty that the property was stolen.

Paragraph (a)(3) requires that the accused acted with intent to deprive an owner of property. "Deprive" is a defined term in RCC § 22E-701 meaning an owner is unlikely to recover the object or it is withheld permanently or long enough to lose a substantial part of its value or benefit. "Intent" also is a defined term in RCC § 22E-701 meaning the accused was practically certain he or she would "deprive" an owner of the property. It is not necessary to prove that such a deprivation actually occurred, just that the accused was practically certain that a deprivation would result. If a person only intends to temporarily possess the stolen property, or to return it to its rightful owner or to law enforcement, he has not committed PSP.

Paragraph (a)(4) requires that the property, in fact, has a value of more than $250,000. "Value" is a defined elsewhere in RCC § 22E-701. "In fact" is a defined term in RCC § 22E-207, and indicates that there is no culpable mental state requirement as to the value of the property.

Subsections (b)-(e) specify the elements for second, third, fourth, and fifth degree PSP. The elements of each grade of PSP are identical to the elements of first degree PSP, except for the value of the property. Each subsection specifies a minimum required property value, except for fifth degree PSP, which has no specific minimum value.[2] As with first degree PSP, strict liability applies to value in each grade of PSP.

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[1] D.C. Code § 22-3232.

[2] However, as defined in RCC § 22E-701, "property" means "anything of value[.]" Therefore, although fifth degree PSP does not specify any minimum value, as defined in the RCC, "property" must have *some* value.

Subsection (f) specifies penalties for each grade of the PSP offense.

Subsection (g) cross references definitions found elsewhere in the RCC.

Relation to Current District Law. *The revised PSP statute changes current District law in two main ways.*

First, the revised PSP statute requires that the defendant have "intent to deprive" an owner of the property. The current D.C. Code statute does not require intent to deprive.[3] Consequently, appears that a person commits a crime even if he or she only intends to temporarily possess the stolen property, or intends to return the stolen property to its rightful owner. Case law has not directly addressed the matter.[4] In contrast, by including intent to deprive as a statutory element, the revised offense ensures that a person who possesses stolen property with intent to return it to its rightful owner is not liable for PSP and places the burden of proof as to the element of intent on the government.[5] Under the RCC definition of "deprive,"[6] the PSP offense's intent to deprive element requires that the accused possessed or bought the property intending to permanently deprive an owner of the property or of a substantial benefit of the property. This change clarifies and improves the proportionality of the revised offense.

Second, the revised statute increases the number of penalty gradations. The current D.C. Code receiving stolen property offense is limited to two gradations based solely on value—first degree receiving stolen property involves property with a value of $1,000 or more and is punished as a felony; second degree receiving stolen property involves property valued at less than $1,000 and is a misdemeanor. In contrast, the revised PSP offense has a total of five gradations which span a much greater range in value, with a value of $250,000 or more being the most serious grade. The increase in gradations, differentiated by offense seriousness, improves the proportionality of the revised offense.

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[3] Although requiring intent to deprive is a departure from current District law, it is worth noting that up until 2012, the District's receiving stolen property offense included an intent to deprive element. RECEIVING STOLEN PROPERTY AND PUBLIC SAFETY AMENDMENT ACT of 2011. D.C. Law 19-120. D.C. Act 19-262.

[4] The D.C. Court of Appeals, in interpreting the prior version of the statute, had held that receiving stolen property is a "specific intent" crime. *Lihlakha v. United States*, 89 A.3d 479, 489 n.26 (D.C. 2014). In *Lihlakha*, the DCCA discussed whether there was sufficient evidence for "finding that, at the time appellant acted in receiving the stolen property, she intended to deprive Banks of the right to her computer or a related benefit." 89 A.3d at 484. The Court noted that although the "intent to deprive" element had been deleted from the receiving stolen property statute after the defendant's alleged conduct at issue, under the Ex Post Facto Clause, the prior statute's "intent to deprive" element was still required. This suggests that under the current statute, which does not include an intent to deprive element, a person could be convicted of receiving stolen property, even if he possesses the stolen property with intent to return it. However, the DCCA has never squarely addressed this issue for the current statute, since its holding in *Lihlakha*.

[5] Including an intent to deprive element is also intended to codify the return-for-reward defense recognized by the DCCA in *Lihlakha v. United States*, 89 A.3d 479, 786-87 (D.C. 2014) (Four conditions must be satisfied for the accused to have a valid defense that he or she intended to return the property for a reward: (1) The reward had been announced, or was believed to have been announced, before the property was possessed or agreed to be possessed; (2) the person claiming the reward had nothing to do with the theft; (3) the possessor returned the property without unreasonable delay to the rightful owner or to a law enforcement officer; and (4) the possessor imposed no condition on return of the property.).

[6] RCC § 22E-701.

Beyond these two main changes to current District law, one other aspect of the revised PSP statute may constitute a substantive change of law.

The revised PSP offense requires that the accused knowingly buys or possesses property. The current receiving stolen property statute does not specify a culpable mental state for these elements and there is no D.C. Court of Appeals (DCCA) case law on point. However, given the current and revised offenses' requirements that the accused at least believe the property to be stolen, a knowing culpable mental state as to buying or possessing property appears appropriate. Requiring a knowing culpable mental state also makes the revised PSP offense consistent with the revised trafficking stolen property statute and other property offenses, which generally require that the accused act knowingly with respect to the elements of the offense.[7] This change improves the clarity, completeness, and consistency of the revised offense.

Two other changes to the revised PSP statute are clarificatory in nature and are not intended to substantively change District law.

First, the revised statute criminalizes buying or possessing stolen property, but omits the words "receives" or "obtains control over." Omission of these words is not intended to change the scope of the offense. The words "buys" and "possesses" are intended to be broad enough to cover every instance in which a person receives or obtains control over property.

Second, using the inchoate "with intent" mental state with respect to whether the property is stolen is intended to clarify that the accused must have had an actual subjective belief that the property was stolen, but that the property need not have actually been stolen. The current statute requires that the accused either knew, or "[had] reason to believe that the property has been stolen[.]"[8] Although this language could be interpreted to mean that the accused *should* have known that the property was stolen, and a negligence mental state could suffice, the DCCA has rejected this interpretation. Instead, the DCCA has held that this language requires that the accused had an actual subjective belief, even if erroneous, that the property was stolen.[9] Using the "with intent" inchoate mental state is consistent with this case law. The current statute's subsection (b) also specifies that the "stolen property" need not be actually stolen if the accused otherwise committed the elements of the crime and he or she "believed" the property to be stolen.[10] The elimination of the current offense's subsection (b) is consistent with the revised definition's use of "intent" to indicate that the property need not actually be stolen so long as the accused was practically certain that it was stolen.

[7] *See, e.g.*, RCC § 22E-2101.
[8] D.C. Code § 22-3232.
[9] *Owens v. United States*, 90 A.3d 1118, 1123 (D.C. 2014) (noting that jury instructions "improperly focused on what a reasonable person would have believed without emphasizing the jury's duty to determine appellant's subjective knowledge").
[10] D.C. Code § 22-3231(b).

RCC § 22E-2402. Trafficking of Stolen Property.

Explanatory Note. *This section establishes the trafficking in stolen property (TSP) offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes knowingly buying or possessing stolen property, on two or more occasions, with intent to sell, trade, or pledge the property in exchange for anything of value. The five penalty gradations are based on the aggregate value of the property involved in the crime. The revised TSP offense replaces the trafficking stolen property*[1] *statute in the current D.C. Code.*

Subsection (a) specifies the elements of first degree TSP. Paragraph (a)(1) requires that the accused knowingly buys or possesses property. Possess is a term defined in RCC § 22E-701 to mean "to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." Property," is a term defined in RCC § 22E-701, means something of value which includes goods, services, and cash. Paragraph (a)(1) also specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which here requires that the accused must be aware to a practical certainty that he or she would buy or possess property.

Paragraph (a)(1) also specifies that the accused must have bought or possessed property on two or more occasions, an element that distinguishes TSP from the possession of stolen property (PSP) revised offense. TSP is directed at the conduct of habitual fences, who provide a market for stolen goods and thereby create further incentive for theft. An isolated incident of possessing stolen property with intent to sell, trade, or pledge it does not constitute a violation of this section. Even if a person sells multiple pieces of stolen property in a single transaction, this does not constitute two separate occasions required under the revised statute. The two occasions must be based on possession of different pieces of property at different points in time.[2] The "knowingly" mental state also applies to the "two or more separate occasions" element.

Paragraph (a)(2) requires that the accused acted "with intent that" the property be stolen. "Intent" is a defined term in RCC § 22E-206, here meaning that the accused was practically certain that the property was stolen. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the property was actually stolen, just that the accused believed to a practical certainty that the property was stolen.

Paragraph (a)(3) requires that the accused possessed the property with intent to sell, pledge as consideration, or trade the property. It is not required that the accused actually sells, pledges, or trades the property, but he or she must have consciously desired, or been practically certain that he or she would do so. If the accused possesses or buys stolen property on two separate occasions, but in only one of those occasions had intent to sell, pledge, or trade the property, that is insufficient for a TSP conviction.

Paragraph (a)(4) requires that the property, in fact, has a value of more than $250,000. "Value" is a defined in RCC § 22E-701. "In fact" is a defined term in RCC §

[1] D.C. Code § 22-3231.
[2] *See also* D.C. Crim. Jur. Instr. § 5-305.

22E-207, and indicates that there is no culpable mental state requirement as to the value of the property.

Subsections (b)-(e) specify the elements for second, third, fourth, and fifth degree TSP. The elements of each grade of TSP are identical to the elements of first degree TSP, expect for the value of the property. Each subsection specifies a minimum required property value, except for fifth degree TSP, which has no specific minimum value.[3] As with first degree TSP, strict liability applies to value in each grade of TSP.

Subsection (f) grades TSP according to the value of the property involved.[4] The value of the property that the defendant bought or possessed with intent to sell or trade may be aggregated to determine the appropriate grade of the offense.[5] The words "in fact" are a defined term in the RCC, and are used in every penalty gradation to specify that there is no culpable mental state as to the aggregated value of the property. The defendant is strictly liable as to the aggregated value of the property.

Subsection (g) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised TSP statute changes current District law in one main way.*

The revised statute increases the number and type of grade distinctions. The current TSP offense is limited to one penalty grade, irrespective of the value of the property involved.[6] In contrast, the revised TSP offense has a total of five gradations which span the same range in value as the possession of stolen property offense and other property offenses, with a value of $250,000 or more being the most serious grade. The increase in gradations, differentiated by offense seriousness, improves the proportionality of the offense.

[3] However, as defined in RCC § 22E-701, "property" means "anything of value[.]" Therefore, although fifth degree TSP does not specify any minimum value, as defined in the RCC, "property" must have *some* value.

[4] For example, if the value of the property is less than $250, it is fifth degree TSP; if the value of the property is $250,000 or more, it is first degree TSP.

[5] RCC § 22E-2001. The revised TSP statute allows for considerable prosecutorial discretion in determining how many counts to charge if the defendant has trafficked in stolen property on several occasions. For example, if a person traffics in stolen property on four separate occasions, and the value of the stolen property in each occasion is $525, the defendant could be charged with a single count of fourth degree TSP, since the aggregate value of the property is $2100, which falls within the value threshold for fourth degree TSP. This person at most could be convicted of a single count with a maximum [] sentence. However, the defendant could also be charged with *two* counts of fourth degree TSP, with each count relying on two occasions of trafficking stolen property with an aggregate value of $1050, which also falls within the value threshold for fourth degree TSP. Due to charging decisions, the person could face two convictions, and a maximum allowable sentence of six years. In these cases, even if the government could prove each occasion of trafficking and obtain two convictions, the sentencing judge would still retain discretion to merge the convictions if a single conviction were sufficient given the severity of the defendant's conduct. Alternatively, even if the defendant were convicted and sentenced on multiple counts, the sentencing judge could also order that the sentences be served concurrently.

[6] D.C. Code § 22-3231(d). Whether a person traffics in $1 stolen pens, or $1000 stolen watches, the current statute authorizes a ten year maximum sentence.

Beyond this main change to current District law, one other aspect of the revised TSP statute may constitute a substantive change of law.

The revised TSP offense requires that the accused knowingly buys or possesses property on two or more separate occasions. The current statute does not specify a culpable mental state for these elements and there is no relevant D.C. Court of Appeals (DCCA) case law. However, given the current and revised offenses' requirements that the accused at least believe the property to be stolen, a knowing culpable mental state as to buying or possessing property appears appropriate. Requiring a knowing culpable mental state also makes the revised TSP offense consistent with the revised possession of stolen property statute and other property offenses, which generally require that the accused act knowingly with respect to the elements of the offense.[7] This change improves the clarity, completeness, and consistency of the revised offense.

The remaining changes to the revised TSP statute are clarificatory in nature and are not intended to substantively change District law.

First, the revised statute requires that the accused either possess or buy property, with intent to sell, pledge as consideration, or trade the property. This is in contrast to the current statute, which, in part, defines "traffics" as "to buy, receive, possess, or obtain control of property with intent to [sell, pledge, transfer, distribute, dispense, or otherwise dispose of property to another]."[8] The revised offense eliminates redundant wording. The words "sell, pledge as consideration, or trade" in the revised statute are intended to be broad enough to cover conduct covered by "transfer, distribute, dispense, or otherwise dispose of property" as used in the current statute. Similarly, "buys" and "possesses" in the revised offense are intended to be broad enough to cover every instance in which a person receives or obtains control over property. The RCC's definition of possession requires that the person exercises control over property, whether or not the property is on one's person, for a period of time sufficient to allow the actor to terminate his or her control of the property. However, reference to this definition does not change the scope of the offense. Any time a person engages in conduct to "transfer, distribute, dispense, or otherwise dispose of property" that person necessarily exercises control over property for a period of time sufficient to allow the actor to terminate his or her control of the property.[9] The revised offense makes no change to the statute's scope by only requiring proof the accused buys or possesses property with intent to sell, pledge as consideration, or trade it.

Second, using the inchoate "with intent" mental state with respect to whether the property is stolen is intended to clarify that the accused must have had an actual subjective belief that the property was stolen, but that the property need not have actually been stolen. The current statute requires that the accused either knew, or "[had] reason to believe that the property has been stolen[.]"[10] Although this language could be interpreted to mean that the accused *should* have known that the property was stolen, and a negligence mental state could suffice, the DCCA has rejected this interpretation for

[7] *See, e.g.*, RCC § 22E-2101.
[8] D.C. Code § 22-3231.
[9] RCC § 22E-202.
[10] D.C. Code § 22-3231.

identical language in the current receiving stolen property statute.[11] The DCCA held that such language requires that the accused had an actual subjective belief, even if erroneous, that the property was stolen.[12] Using the "with intent" inchoate mental state is consistent with this case law. The current TSP statute's subsection (c) also specifies that the "stolen property" need not be actually stolen if the accused otherwise committed the elements of the crime and he or she "believed" the property to be stolen.[13] The elimination of the current statute's subsection (c) is consistent with the revised statute's use of "intent" to indicate that the property need not actually be stolen so long as the accused believed it was stolen.

[11] D.C. Code § 22-3232.
[12] *Owens v. United States*, 90 A.3d 1118, 1123 (D.C. 2014) (noting that jury instructions "improperly focused on what a reasonable person would have believed without emphasizing the jury's duty to determine appellant's subjective knowledge").
[13] D.C. Code § 22-3231(c).

RCC § 22E-2403. Alteration of a Motor Vehicle Identification Number.

Explanatory Note. *This section establishes the alteration of a vehicle identification number (AVIN) offense and penalty for the Revised Criminal Code (RCC). This offense criminalizes knowingly altering a vehicle identification number (VIN) with intent to conceal or misrepresent the identity of the motor vehicle or motor vehicle part. The revised AVIN offense replaces the existing offense of altering or removing motor vehicle identification numbers*[1] *in the current D.C. Code.*

Subsection (a) specifies the elements of first degree AVIN. Paragraph (a)(1) requires that the accused knowingly alters an identification number of a motor vehicle or motor vehicle part. "Alters" is an undefined term, intended to be broadly construed. "Motor vehicle" is a defined term in RCC § 22E-701, and includes any vehicle designed to be propelled only by an internal-combustion engine or electricity.[2] The term "identification number" is also a defined term in RCC § 22E-701, and means "a number or symbol that is originally inscribed or affixed by the manufacturer to a motor vehicle or motor vehicle part for purposes of identification." Paragraph (a)(1) also specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which here requires that the accused must be aware to a practical certainty that he or she would alter an identification number of a motor vehicle or motor vehicle part.

Paragraph (a)(2) further specifies that the accused must alter a VIN "with intent to" conceal or misrepresent the identity of the motor vehicle or motor vehicle part. "Intent" is a defined term in RCC § 22E-206, which here means the accused was practically certain that he or she would conceal or misrepresent the identity of the motor vehicle or motor vehicle part. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not required that the accused actually conceals or misrepresents the identity of the motor vehicle or motor vehicle part, only that the accused was practically certain that he or she would do so.

Paragraph (a)(3) requires that the value of such motor vehicle or motor vehicle part, in fact, is $2,500 or more. The reference in paragraph (a)(3) to "such" motor vehicle or motor vehicle part refers to paragraph (a)(2) and the object that the actor intended to conceal or misrepresent, be it a part or the whole motor vehicle. When the accused acts with intent to conceal or misrepresent the identity of a motor vehicle part, the value of that part, not the vehicle from which it was taken, shall be used to determine if this element is satisfied.[3] The term "in fact" is a defined term in RCC § 22E-207, and indicates that there is no culpable mental state requirement as to the value of the motor vehicle or part.

[1] D.C. Code § 22-3233.

[2] RCC § 22E-701. For example, an electric bicycle that is designed to be propelled both by electricity and human effort does not constitute a "motor vehicle."

[3] For example, if a person alters a VIN, with intent to conceal the identity of that part, the value of the motor vehicle is irrelevant—it is the value of the part that determines whether the conduct can be charged as first degree AVIN.

Subsection (b) specifies the elements of second degree AVIN. The elements of second degree AVIN are identical to the elements of first degree AVIN, expect that there is no value requirement for the motor vehicle or motor vehicle part.

Subsection (c) specifies penalties for each grade of the AVIN offense.

Subsection (d) cross references penalties found elsewhere in the RCC.

Relation to Current District Law. *The revised AVIN statute changes current District law in four main ways.*

First, the revised AVIN statute requires that the accused have intent to conceal or misrepresent the identity of the motor vehicle or motor vehicle part. Under the current D.C. Code statute, it appears that a person commits an offense by knowingly altering a VIN, regardless of the purpose for doing so.[4] No case law exists as to whether a person would be guilty under the current statute for altering a VIN for some other purpose. In contrast, the revised statute eliminates liability for a person who alters[5] a VIN for purposes besides concealing or misrepresenting identity. The change improves the proportionality of the revised offense.

Second, the provision in RCC § 22E-2001, "Aggregation to Determine Property Offense Grades," allows aggregation of value for the revised AVIN offense based on a single scheme or systematic course of conduct. The current AVIN offense is not part of the current aggregation of value provision for property offenses.[6] The revised AVIN statute permits aggregation for determining the appropriate grade of AVIN to ensure penalties are proportional to the accused's actual conduct.[7]

Third, by reference to the RCC's definition of "motor vehicle," the revised AVIN statute changes the scope of the offense. The term "motor vehicle" as used in the current AVIN statute is defined to include a "vehicle propelled by an internal-combustion engine, electricity, or steam[.]"[8] In contrast, the RCC's definition of "motor vehicle" requires that the vehicle be "designed to be propelled only by an internal-combustion engine or electricity."[9] This language excludes vehicles like mopeds that are designed to be propelled, in part, by human exertion, as well as steam powered vehicles. Vehicles that are designed to be propelled in part by human exertion are generally not as expensive and do not pose the same safety risks to others that a "motor vehicle" does. Steam powered vehicles have fallen out of use, and it is unnecessary to include them in the definition of

[4] D.C. Code § 22-3233.

[5] *E.g.* knowingly painting over or cutting off an automobile part with a VIN from one's own vehicle is criminal under the plain language of the current statute, but, without evidence of intent to conceal or misrepresent the identity thereof, such conduct would not be criminal under the revised offense.

[6] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")

[7] Inclusion of AVIN in RCC § 22E-2001 does not suggest however that multiple convictions are categorically barred when the accused alters multiple VINs, on multiple motor vehicles or motor vehicles parts, even when the alterations occur as part of a single act or course of conduct.

[8] D.C. Code § 22-3233.

[9] RCC § 22E-701.

"motor vehicle." This change improves the clarity and proportionality of the revised statute.

Fourth, the threshold value of the motor vehicle or motor vehicle part that determines liability for first degree AVIN is $2,500. The current statute sets the value threshold for the higher grade of AVIN at $1,000.[10] In contrast, the revised statute's $2,500 aligns with the grading differences in value in the RCC theft,[11] criminal damage to property,[12] possession of stolen property,[13] and other comparable offenses. This change improves the consistency and proportionality of the revised offense.

Beyond these four changes to current District law, two other aspects of the revised AVIN statute may constitute a substantive change of law.

First, by reference to the RCC's definition of "motor vehicle," the revised AVIN statute may change the scope of the offense as compared to current law. The current statute defines "motor vehicle" to include "any non-operational vehicle that is being restored or repaired." The RCC's "motor vehicle" definition omits this language, and is intended to include non-operational vehicles regardless of whether they are being restored or repaired, if they meet the other requirements of the definition. It is unclear whether the current definition of motor vehicle excludes non-operational vehicles that are *not* being restored or repaired, and there is no relevant DCCA case law. This change clarifies the revised statute.

Second, determination of value for the revised first degree AVIN statute depends on the object that the actor intended to conceal or misrepresent, be it a part or the whole motor vehicle. The current D.C. Code statute says a person is subject to the higher gradation "if the value of the motor vehicle or motor vehicle part is $1,000 or more…."[14] There is no case law interpreting this provision. To resolve ambiguities about the relevant value when a car contains a part with an obliterated identification number, paragraph (a)(3) of the first degree AVIN statute refers to "such" motor vehicle or motor vehicle (in paragraph (a)(2)) that the actor intended to conceal or misrepresent. Consequently, when the accused acts with intent to conceal or misrepresent the identity of just a motor vehicle part, the value of that part, not the vehicle from which it was taken, shall be used to determine valuation. This change clarifies the revised statute.

One other change to the revised AVIN statute is clarificatory in nature and is not intended to substantively change District law.

The current statute makes it a crime to "remove, obliterate, tamper with, or alter" a VIN.[15] The revised statute only uses the word "alter," omitting the words "remove," "obliterate," or "tamper with." The word "alter" is intended to be broadly construed to cover removing, obliterating, or tampering with a VIN. The change is not intended to narrow the scope of the offense.

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[10] D.C. Code § 22-3233(b)(2).
[11] RCC § 22E-2101.
[12] RCC § 22E-2503.
[13] RCC § 22E-2401.
[14] D.C. Code § 22-3233(b)(2).
[15] D.C. Code § 22-3233.

RCC § 22E-2404. Alteration of Bicycle Identification Number.

Explanatory Note. *This section establishes the alteration of a bicycle identification number (ABIN) offense and penalty for the Revised Criminal Code (RCC). This offense criminalizes knowingly altering a bicycle identification number (BIN), with the intent to conceal or misrepresent the identity of the bicycle or bicycle part. The revised ABIN offense replaces the current altering or removing bicycle identification numbers[1] statute in the current D.C. Code.*

Paragraph (a)(1) requires that the accused knowingly alters an identification number of a bicycle or bicycle part. "Alters" is an undefined term, intended to be broadly construed. The terms "identification number" and "bicycle" are defined in D.C. Code § 50-1609. Paragraph (a)(1) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which here requires that the accused must be practically certainty that he or she would alter an identification number of a bicycle or bicycle part.

Paragraph (a)(2) further specifies that the accused must alter a BIN "with intent to" conceal or misrepresent the identity of the bicycle or bicycle part. "Intent" is a defined term in RCC § 22E-206, here meaning the accused was practically certain that he or she would conceal or misrepresent the identity of the bicycle or bicycle part. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the accused actually concealed or misrepresented the identity of the bicycle or bicycle part, only that the accused was practically certain that he or she would do so.

Subsection (b) specifies the penalty for this offense. There is only one grade of ABIN, and the value of the bicycle or bicycle part is irrelevant.

Subsection (c) cross-references applicable definitions located elsewhere in the RCC and the current D.C. Code.

Relation to Current District Law. *The revised ABIN statute changes current District law in one main way.*

The revised ABIN statute requires that the accused act with intent to conceal or misrepresent the identity of the bicycle or bicycle part. Under the current statute, it appears that a person commits an offense by merely knowingly altering a BIN, regardless of the purpose for doing so.[2] No case law exists as to whether a person would be guilty under the current statute for altering a BIN for some other purpose. In contrast, the revised statute eliminates liability for a person who alters[3] a BIN for purposes besides concealment or misrepresentation of identity. The change improves the proportionality of the revised offense.

[1] D.C. Code § 22-3234.
[2] D.C. Code § 22-3234.
[3] *E.g.* knowingly painting over or cutting off an automobile part with a VIN from one's own vehicle is criminal under the plain language of the current statute, but, without evidence of intent to conceal or misrepresent the identity thereof, such conduct would not be criminal under the revised offense.

In addition to this one main change, one other change is clarificatory in nature and is not intended to substantively change District law.

The current statute makes it a crime to "remove, obliterate, tamper with, or alter" a BIN.[4] The revised statute only uses the word "alter," omitting the words "remove," "obliterate," or "tamper with." The word "alter" is intended to be broadly construed to cover removing, obliterating, or tampering with a BIN. The change is not intended to narrow the scope of the offense.

[4] D.C. Code § 22-3234.

RCC § 22E-2501. Arson.

Explanatory Note. *This section establishes the revised arson offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes knowingly starting a fire or causing an explosion that damages or destroys a dwelling or building. The penalty gradations are based on the harm or risk of harm to human life. The revised arson offense, in conjunction with the RCC reckless burning offense, replaces the current arson offense,[1] and the closely-related offenses of burning one's own property with intent to injure or defraud another person[2] and placing explosives with intent to destroy or injure property.[3]*

Subsection (a)(1) states the prohibited conduct for first degree arson—starting a fire or causing an explosion that damages or destroys a dwelling or building. "Dwelling" and "building" are defined terms in RCC § 22E-701. Subsection (a)(1) also specifies the culpable mental state for subsection (a)(1) to be "knowingly," a term defined at RCC § 22E-206 which here requires the accused to be aware to a practical certainty that his or her conduct starts a fire or causes an explosion that damages or destroys a "dwelling" or "building."

Subsection (a)(2) and subsection (a)(3) specify two additional requirements for first degree arson. Subsection (a)(2) requires that the accused is "reckless" as to the fact that a person who is not a participant in the crime is present in the dwelling or building. "Reckless" is a defined term in RCC § 22E-206 that here means the accused must disregard a substantial risk that the dwelling or building is occupied by someone not a participant in the crime. Subsection (a)(3) requires that the fire or explosion "in fact" cause death or serious bodily injury to another person who is not a participant in the crime. "Serious bodily injury" is a defined term in RCC § 22E-701. Subject to causation limitations, subsection (a)(3) may also include harm to first responders. "In fact," a term defined in RCC § 22E-207, is used to indicate here that there is no culpable mental state requirement as to whether the fire or explosion caused death or serious bodily injury to another person who is not a participant in the crime.

Subsection (b) specifies the requirements for second degree arson. The requirements in subsection (b)(1) and subsection (b)(2) are the same as the requirements in subsection (a)(1) and subsection (a)(2) for first degree arson. There are no additional requirements for second degree arson.

Subsection (c) specifies the requirements for third degree arson. The requirements in third degree arson are the same as the requirements in subsection (a)(1) for first degree arson. There are no additional requirements for third degree arson.

Subsection (d) establishes an affirmative defense that applies only to third degree arson. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that he or she had a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and that he or she complied with all the rules and regulations governing the use of the permit.

Subsection (e) specifies relevant penalties for the offense. [RESERVED].

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[1] D.C. Code § 22-301.
[2] D.C. Code § 22-302.
[3] D.C. Code § 22-3305.

Subsection (f) cross-references applicable definitions located elsewhere in the RCC

Relation to Current District Law. *The revised arson statute changes current District law in nine main ways.*

First, the revised arson statute specifies culpable mental states of knowledge, recklessness, and strict liability with respect to various elements. "Maliciously" is the only culpable mental state specified in the current arson statute,[4] and it is unclear whether all or just some of the current arson statute elements are modified by the term. The D.C. Court of Appeals (DCCA) has stated that the malice culpable mental state in the current arson requires the government to "prove that appellant acted intentionally, and not merely negligently or accidentally, while consciously disregarding the risk of endangering human life and offending the security of habitation or occupancy."[5] Beyond this, District case law holds that the meaning of malice in the current arson and current malicious destruction of property (MDP) offenses is the same.[6] And, in the context of MDP, the DCCA has recently clarified that as compared to the Model Penal Code (MPC) definitions of culpable mental states, malice either requires the defendant act "purposely" or with a blend of "knowingly" and "recklessly" culpable mental states.[7] In addition, the DCCA has held that use of the culpable mental state of malice requires "the absence of all elements of justification, excuse or recognized mitigation," which creates various defenses typically recognized in the context of murder.[8]

In contrast, the revised arson statute provides definitions for each culpable mental state and specifies the relevant culpable mental states for each of the elements of the revised offense—knowledge as to starting a fire or causing an explosion that damages or destroys a dwelling or building, recklessness as to occupancy, and strict liability as to causing death or serious bodily injury. The "knowingly" culpable mental state is consistent with, but somewhat narrower than existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. However, applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American

[4] D.C. Code § 22-301.

[5] *Phenis v. United States*, 909 A.2d 138, 164 (D.C. 2006) (internal citations omitted). The DCCA has further stated that the culpable mental state of the current arson offense is one of "general intent." *Phenis v. United States*, 909 at 163-64. "General intent" is not used in or defined in the current arson statute, but the DCCA has said that it is frequently defined as the "intent to do the prohibited act" which requires "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984).

[6] *Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987).

[7] *Harris v. United States*, 125 A.3d 704, 708 n. 3 (D.C. 2015).

[8] In the District, "[r]ecognized circumstances of mitigation" include, most notably, provocation: i.e., a situation "where the killer has been provoked or is acting in the heat of passion, with the latter including fear, resentment and terror, as well as rage and anger." *Comber*, 584 A.2d at 41. In addition to provocation, however, DCCA case law also recognizes *imperfect* justifications and excuses (i.e., defenses based upon *unreasonable* mistakes of fact and/or law), "such as when excessive force is used in self-defense or in defense of another and a killing is committed in the mistaken belief that one may be in mortal danger," as mitigating circumstances that preclude the formation of malice. *Id.*

jurisprudence.[9] The "reckless" culpable mental state that the revised statute applies to whether the building or dwelling is occupied also approximates, but is somewhat lower than existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. A recklessness requirement still requires subjective awareness of the critical facts that distinguish innocent from criminal conduct,[10] and provides liability for reckless behavior that may result in serious property damage. Finally, the strict liability requirement reflects the fact that the accused has already engaged in serious criminal conduct and no further mental state appears necessary for liability as to the consequences based on his or her recklessness at placing a person risk. In fact, if the defendant had a culpable mental state as to such harm, it may also constitute assault or murder. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[11] Eliminating malice from the revised arson statute also eliminates the special mitigation defenses applicable to the current arson offense.[12] This revision improves the clarity, completeness, and proportionality of the revised statute.

Second, the revised arson statute requires, in part, that the defendant "causes an explosion." The current arson statute merely requires that the defendant "burn or attempt to burn,"[13] and there is no case law on whether this would include all explosions. At common law, explosions were excluded from arson if they did not burn the property.[14] In contrast, the revised arson statute requires, in part, that the defendant "causes an explosion." Explosions can be as dangerous, if not more dangerous, than fire and raise similar concerns about occupancy of the location where the explosion takes place. This revision eliminates a possible gap in liability in current District law.[15]

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[9] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[10] *Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring in part, dissenting in part) ("And when Congress does not specify a mens rea in a criminal statute, we have no justification for inferring that anything more than recklessness is needed. It is quite unusual for us to interpret a statute to contain a requirement that is nowhere set out in the text. Once we have reached recklessness, we have gone as far as we can without stepping over the line that separates interpretation from amendment.").

[11] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

[12] *See* D.C. Crim. Jur. Instr. § 5.100 (requiring as an element of arson that the defendant "acted without mitigation" and defining mitigation, in part, as "Mitigating circumstances exist where a person acts in the heat of passion caused by adequate provocation.").

[13] D.C. Code § 22-301.

[14] John Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295, 362 (1986) ("At common law, it was not arson to damage a dwelling house by means of an explosion unless it caused the house to burn rather than first being torn apart by the blast . . . Yet explosions, like fires, entail the likelihood of extensive property damage accompanied by extreme risks to human life and limb.").

[15] As described below, another offense in the current D.C. Code also addresses explosives. D.C. Code § 22-3305 prohibits placing, or causing to be placed, near certain property explosives "with intent to destroy, throw down, or injure the whole or any part thereof."

Third, the revised arson statute applies only to railroad cars and watercraft that satisfy the RCC definition of "dwelling" in RCC § 22E-701. The current arson statute specifies a lengthy list of property,[16] including "any steamboat, vessel, canal boat, or other watercraft" and "any railroad car." The current arson statute also clearly applies to "dwellings" and "houses."[17] In contrast, the revised arson offense includes a railroad car or watercraft only when that railroad car or watercraft satisfies the definition of "dwelling" in § 22E-701.[18] Fires in railroad cars and watercraft that are not dwellings do not endanger human life the same as fires in buildings and dwellings. Damaging or destroying with fire or explosion railroad cars and watercraft that do not satisfy the definition of "dwelling" in RCC § 22E-701 is criminalized by the RCC criminal damage to property offense (RCC § 22E-2503). This revision clarifies and improves the proportionality of the revised statute.

Fourth, the revised arson statute eliminates the requirement that the dwelling or building be another person's property. The current arson statute requires that the property is "in whole or in part, of another person."[19] The limited DCCA case law construing this phrase merely asserts that the element is satisfied if a person other than the defendant legally owns the property.[20] In contrast, the revised arson statute removes the requirement that the property is "in whole, or in part, of another person." It is inconsistent to permit a defendant who otherwise satisfies the requirements of arson to avoid liability because another person owned all or part of the property. Under the revised arson statute, ownership of the property is irrelevant. This change clarifies the revised arson statute and eliminates a gap in liability under current law.

Fifth, the revised arson statute provides a new affirmative defense, in subsection (d), to third degree arson where a government permit has been issued regarding the actor's conduct.[21] No comparable statute or case law exists in current District law regarding such a defense. Under the revised arson statute's affirmative defense the accused must prove by a preponderance of the evidence that he or she had a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and that he or she complied with all the rules and regulations governing the

[16] D.C. Code § 22-301 ("any dwelling, or house, barn, or stable adjoining thereto, or any store, barn, or outhouse, or any shop, office, stable, store, warehouse, or any other building, or any steamboat, vessel, canal boat, or other watercraft, or any railroad car.").
[17] *Id*.
[18] Similarly, the revised arson statute includes a "motor vehicle," as that term is defined in RCC § 22E-701, only when it serves as a dwelling. Motor vehicles are not listed in the current arson statute—perhaps due to the fact that the current arson statute was enacted in 1901.
[19] D.C. Code § 22-301.
[20] *Posey v. United States*, 26 App. D.C. 302, 304-05 (D.C. Cir. 1906) (affirming the attempted arson conviction of a defendant that tried to burn down a building he was renting and noting that "the appellant was occupying the building as a tenant does not take it out of the terms of this section."); *Chaconas v. United States*, 326 A.2d 792, 793, 797 (D.C. 1974) (upholding the appellant's conviction for burning a store that his corporation rented); *Byrd v. United States*, 705 A.2d 629, 631, 635 (affirming appellant's conviction for arson and finding that appellant's testimony that is parents owned the house was sufficient for the house to be "in whole or in part, of another person.").
[21] Third degree arson prohibits knowingly damaging or destroying with fire or an explosion a dwelling or building that is either unoccupied, or when the property is occupied, but the defendant fails to satisfy the recklessly culpable mental state for occupancy required in first degree and second degree arson.

use of the permit. As there is less potential risk to human life in third degree arson, it is appropriate to permit a defendant to avoid liability when acting with property authority. This revision improves the proportionality of the revised offense.

Sixth, the revised arson statute punishes attempted arson differently than a completed arson. The current arson statute includes both an "attempt to burn" and "burn"[22] and case law appears to construe this language to mean that attempted arson is punished the same as completed arson.[23] In contrast, under the revised arson statute, the General Part's attempt provisions[24] establish liability for attempted arson consistent with other offenses. There is no clear rationale for such a special attempt provision in arson as compared to other offenses. This revision improves the proportionality of the revised offense.

Seventh, the revised arson statute creates three gradations of arson based primarily upon the actual harm or risk of harm to human life. The current arson statute does not have any gradations and makes no provision for instances where a person suffers serious injury or death as a result of the arson. Case law requires arson to endanger human life to some degree.[25] However, case law also suggests that liability for firefighters and first responders who are seriously injured or killed while responding to the fire or explosion is not covered in current District law.[26] In contrast, the revised arson statute has three gradations that differ on the seriousness of risk to human life. First degree arson provides liability when a defendant, in fact, caused serious bodily injury or death to any person that is not a participant in the crime. Subject to causation limitations, this would also include harm experienced by first responders.[27] No culpable mental state is required for this element because the defendant has already engaged in serious criminal conduct.[28] Second degree arson requires that the defendant is reckless as to the fact that a

[22] D.C. Code § 22-301 ("Whoever shall maliciously burn or attempt to burn any dwelling…").
[23] *Gilmore v. United States*, 742 A.2d 862, 870 (D.C. 1999).
[24] RCC § 22E-301.
[25] *See, e.g.*, *Phenis*, 909 A.2d at 164 ("With respect to arson, the government must prove that appellant acted intentionally, and not merely negligently or accidentally, while consciously disregarding the risk of endangering human life and offending the security of habitation or occupancy.) (internal citations omitted).
[26] In *Lewis v. United States*, the government argued that "by setting a fire which he knew would require the intervention of firefighters to extinguish, [the appellant] consciously disregarded a substantial risk to the lives of the firefighters." *Lewis v. United States*, 10 A.3d 646, 661 n.8 (D.C. 2010). The DCCA acknowledged that "there is some merit to this argument," but noted that in states in which "a risk to a firefighter safety satisfies an element of arson, this decision has been made by the legislature." *Id*. The court stated "[i]n light of these statutes applicable in other states, we refrain from extending the 'risk of harm to human life' element to include a risk to responding emergency personnel since we believe the legislature is more apt to make such a change in our arson law." *Id.*
[27] Where the harm to a first responder is by an unrelated or in no way a foreseeable event, for example an airplane crash landing at the location where the fire occurred, the causal connection between setting a fire to an occupied dwelling and the harm may be too tenuous to sustain liability. See commentary to RCC § 22A-204 Causation, for further explanation of causation requirements in the RCC.
[28] Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence. *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

person who is not a participant in the crime is present in the dwelling or building. Third degree arson applies to dwellings or buildings with no additional requirements and recognizes the heightened risk to human life at these properties even if they happen to be unoccupied at the time of the offense.[29] This revision improves the proportionality of the revised offense by distinguishing more and less culpable conduct.

Eighth, the RCC arson statute replaces two statutes that are closely related to the current arson statute: burning one's own property with intent to defraud or injure another person,[30] and placing explosives with intent to destroy or injure property.[31] In the RCC, conduct currently prohibited by burning one's own property with intent to defraud or injure another person is criminalized under multiple revised statutes, including the revised arson statute which now applies to property belonging to anyone.[32] Similarly, in the RCC, conduct currently prohibited by placing explosives with intent to injure or destroy property is criminalized under multiple statutes, including arson which now explicitly includes use of explosives to cause damage.[33] This revision reduces unnecessary overlap with the revised arson offense, the revised reckless burning offense in RCC § 22E-2502, and other offenses.

Ninth, under the revised arson statute the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "knowingly" due to his or her self-induced intoxication. The current statute is silent as to the effect of intoxication. However, the DCCA has held that the current arson statute is a general intent crime,[34] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming any of the

[29] All buildings, as enclosed spaces, pose greater risks of harm from a fire than open areas or business yards.

[30] D.C. Code § 22-302 ("Whoever maliciously burns or sets fire to any dwelling, shop, barn, stable, store, or warehouse or other building, or any steamboat, vessel, canal boat, or other watercraft, or any goods, wares, or merchandise, the same being his own property, in whole or in part, with intent to defraud or injure any other person, shall be imprisoned for not more than 15 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[31] 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.").

[32] Burning one's own property with intent to defraud or injure another person would be subject to the revised arson statute if the property was one of the specific property types covered by arson (dwelling or building) or the revised criminal damage to property statute if the property satisfied the definition of "property of another" in RCC § 22E-701. This conduct may also satisfy the RCC reckless burning offense, although with a significantly lower penalty than under the revised arson statute. In addition to these property damage offenses, such conduct may well constitute an attempt (RCC § 22E-301) to commit fraud (RCC § 22E-2201), assault (RCC § 22E-1202), or murder (RCC § 22E-1101) depending on the facts of the case.

[33] Placing explosives with intent to injure or destroy property would constitute an attempt (RCC § 22E-301) to commit arson if the property was one of the specific property types covered by the revised arson statute (dwelling or building) or criminal damage to property if the property satisfied the definition of "property of another" in RCC § 22E-701. This conduct could also satisfy an attempt (RCC § 22E-301) to commit reckless burning, although with a significantly lower penalty than under the revised arson statute.

[34] *See Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) (citing *Barrett v. United States*, 377 A.2d 62 (D.C. 1977); *Charles v. United States*, 371 A.2d 404 (D.C. 1977)).

culpable mental state requirements for the offense.[35] This DCCA holding would also likely mean that a defendant would be precluded from directly raising—though not necessarily presenting evidence in support of[36]—the claim that, due to his or her self-induced intoxicated state, the defendant did not possess any of the culpable mental state requirements for arson. By contrast, per the revised arson offense, a defendant would both have a basis for, and will be able to raise and present relevant and admissible evidence in support of, a claim that self-induced intoxication prevented the defendant from forming the knowledge required for various elements of arson. Likewise, where appropriate, the defendant would be entitled to an instruction, which clarifies that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge at issue in arson.[37] This change improves the clarity, consistency, and proportionality of the offense.

Beyond these nine main changes to current District law, one other aspect of the revised arson statute may constitute substantive changes of law.

The revised arson statute requires a defendant, in relevant part, to "start[] a fire." The current arson statute requires that the defendant "burn" the specified property.[38] Several DCCA arson cases refer to conduct to "set" the fire or "set fire to" as if this language were equivalent to "burn,"[39] but no decision is directly on point. Instead of this ambiguity, the revised arson statute requires "start[] a fire." This revision clarifies the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

The revised arson statute requires that the fire or explosion "damage[] or destroy[]" the specified property. The current arson statute requires only that the defendant "burn" (or attempt to burn) the property specified in the statute.[40] Insofar as

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[35] *See* D.C. Crim. Jur. Instr. § 9.404 ("If evidence of intoxication gives you a reasonable doubt about whether [name of defendant] could or did form the intent to [^] , then you must find him/her not guilty of the offense of [^] . On the other hand, if the government has proved beyond a reasonable doubt that [name of defendant] could and did form the intent to [^], along with every other element of the offense, then you must find him/her guilty of the offense of [^] .").

[36] Whether intoxication evidence may be presented when it cannot negate intent is less clear. *Compare Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) *with Cooper v. United States*, 680 A.2d 1370, 1372 (D.C. 1996); *Parker v. United States*, 359 F.2d 1009, 1012–13 (D.C. Cir. 1966)); *see also Buchanan v. United States*, 32 A.3d 990, 996 (D.C. 2011) (Ruiz, J., concurring) (discussing *Parker*).

[37] These results are a product of the logical relevance principle set forth in RCC § 22E-209(a) and the fact that knowledge is a mental state susceptible to negation by self-induced intoxication. *See* RCC § 22E-209(b).

[38] D.C. Code § 22-301.

[39] *Lewis v. United States*, 10 A.3d 646, 657 (D.C. 2010) (holding "there is sufficient evidence to prove that Lewis acted maliciously when *he set the fire*") and noting that the issue was whether "Lewis acted with the required *mens rea* of malice when he *set fire to* the house.") (emphasis added); *Phenis v. United States*, 909 A.2d 138, 164 (D.C. 2006) (concluding, in part, that the evidence was sufficient that the appellant "intentionally set fire to" his mother's apartment."); *In re D.M.*, 993 A.2d 535, 543 (D.C. 2010) ("the trial judge reasonably could find, as she did, that appellant intentionally set the fire . . .").

[40] D.C. Code § 22-301.

burning constitutes some kind of damage or destruction to the property at issue, this change merely clarifies the revised offense.

RCC § 22E-2502. Reckless Burning.

Explanatory Note. *This section establishes the reckless burning offense and penalty for the Revised Criminal Code (RCC). The offense proscribes knowingly starting a fire or causing an explosion with recklessness as to the fact that the fire or explosion damages or destroys a dwelling or building. Reckless burning is a lesser included offense of all the gradations of the revised arson offense (RCC § 22E-2401). It differs from the revised arson offense because it is limited to recklessly damaging or destroying the property at issue, whereas the revised arson statute requires knowingly damaging or destroying the property at issue. Along with the revised arson offense, the reckless burning offense replaces the current arson statute,[1] as well as the closely-related offenses of burning one's own property with intent to injure or defraud another person[2] and placing explosives with intent to destroy or injure property.[3]*

Subsection (a)(1) states the prohibited conduct—starting a fire or causing an explosion. Subsection (a)(1) also specifies the culpable mental state for subsection (a)(1) to be "knowingly," a term defined at RCC § 22E-206 which here requires the accused to be at least aware to a practical certainty that his or her conduct starts a fire or causes an explosion.

Subsection (a)(2) states that the fire or explosion must damage or destroy a "dwelling" or a "building" as those terms are defined in RCC § 22E-701. Subsection (a)(2) specifies a culpable mental state of "with recklessness," a defined term in RCC § 22E-206 that here means the accused must disregard a substantial risk that the fire or explosion will damage or destroy a "dwelling" or "building."

Subsection (b) establishes an affirmative defense to the reckless burning offense. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that he or she had a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and that he or she complied with all the rules and regulations governing the use of the permit.

Subsection (c) specifies the penalty for the offense. [RESERVED.]

Subsection (d cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The reckless burning statute changes current District law in seven main ways.*

First, the RCC reckless burning statute specifies culpable mental states of knowledge and recklessness with respect to various elements. "Maliciously" is the only culpable mental state specified in the current arson statute,[4] and it is unclear whether all or just some of the current arson statute elements are modified by the term. The D.C. Court of Appeals (DCCA) has stated that the malice culpable mental state in the current arson statute requires the government to "prove that appellant acted intentionally, and not merely negligently or accidentally, while consciously disregarding the risk of

[1] D.C. Code § 22-301.
[2] D.C. Code § 22-302.
[3] D.C. Code § 22-3305.
[4] D.C. Code § 22-301.

endangering human life and offending the security of habitation or occupancy."[5] Beyond this, District case law holds that the meaning of malice in the current arson and current malicious destruction of property (MDP) offenses is the same.[6] And, in the context of MDP, has recently clarified that as compared to the Model Penal Code (MPC) definitions of culpable mental states, malice either requires the defendant act "purposely" or with a blend of "knowingly" and "recklessly" culpable mental states.[7] In addition, the DCCA has held that use of the culpable mental state of malice requires "the absence of all elements of justification, excuse or recognized mitigation," which creates various defenses typically recognized in the context of murder.[8]

In contrast, the RCC reckless burning statute provides definitions for each culpable mental state and specifies the relevant culpable mental states for each of the elements of the revised offense—knowledge as to starting a fire or causing an explosion and recklessness as to the fact that the fire or explosion damages or destroys a dwelling or building. The "knowingly" culpable mental state is consistent with, but somewhat narrower than existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. However, applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[9] The "reckless" culpable mental state that applies to the fact that the fire or explosion damages or destroys and that the property is a dwelling or building approximates, but is somewhat lower than, existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. A recklessness requirement still requires subjective awareness of the critical facts that distinguish innocent from criminal conduct,[10] and provides liability for reckless behavior that may result in serious property damage. As a lesser included offense of arson, penalized at a lower level, the lower culpable mental state in the RCC reckless burning offense creates a wider range of conduct and punishments for arson-type

[5] *Phenis*, 909 A.2d at 164. (internal citations omitted). The DCCA has further stated that the culpable mental state of the current arson offense is one of "general intent." *Phenis v. United States*, 909 A.2d 138, 163-64 (D.C. 2006). "General intent" is not used in or defined in the current arson statute, but the DCCA has said that it is frequently defined as the "intent to do the prohibited act" which requires "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128,1132 (D.C. 1984).

[6] *Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987).

[7] *Harris v. United States*, 125 A.3d 704, 708 n. 3 (D.C. 2015).

[8] In the District, "[r]ecognized circumstances of mitigation" include, most notably, provocation: i.e., a situation "where the killer has been provoked or is acting in the heat of passion, with the latter including fear, resentment and terror, as well as rage and anger." *Comber*, 584 A.2d at 41. In addition to provocation, however, DCCA case law also recognizes *imperfect* justifications and excuses (i.e., defenses based upon *unreasonable* mistakes of fact and/or law), "such as when excessive force is used in self-defense or in defense of another and a killing is committed in the mistaken belief that one may be in mortal danger," as mitigating circumstances that preclude the formation of malice. *Id.*

[9] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[10] *Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring in part, dissenting in part) ("And when Congress does not specify a mens rea in a criminal statute, we have no justification for inferring that anything more than recklessness is needed. It is quite unusual for us to interpret a statute to contain a requirement that is nowhere set out in the text. Once we have reached recklessness, we have gone as far as we can without stepping over the line that separates interpretation from amendment.").

behavior. Eliminating malice from the RCC reckless burning statute also eliminates the special mitigation defenses applicable to the current arson offense.[11] This revision improves the clarity, completeness, and proportionality of the revised statute.

Second, the RCC reckless burning statute requires, in part, that the defendant "cause an explosion." The current arson statute merely requires that the defendant "burn or attempt to burn,"[12] and there is no case law on whether this would include all explosions. At common law, explosions were excluded from arson if they did not burn the property.[13] In contrast, the RCC reckless burning statute requires, in part, that the defendant "causes an explosion." Explosions can be as dangerous, if not more dangerous, than fire and raise similar concerns about occupancy of the location where the explosion takes place. This revision eliminates a possible gap in liability in current District law.[14]

Third, the revised arson statute applies only to railroad cars and watercraft that satisfy the RCC definition of "dwelling" in RCC § 22E-701. The current arson statute specifies a lengthy list of property,[15] including "any steamboat, vessel, canal boat, or other watercraft" and "any railroad car." The current arson statute also clearly applies to "dwellings" and "houses."[16] In contrast, the RCC reckless burning offense includes a railroad car or watercraft only when that railroad car or watercraft satisfies the definition of "dwelling" in § 22E-701.[17] Fires in railroad cars and watercraft that are not dwellings do not endanger human life the same as fires in buildings and dwellings. Damaging or destroying with fire or explosion railroad cars and watercraft that do not satisfy the definition of "dwelling" in RCC § 22E-701 is criminalized by the RCC criminal damage to property offense (RCC § 22E-2503). This revision clarifies and improves the proportionality of the revised statute.

Fourth, the RCC reckless burning statute eliminates the requirement that the dwelling, or building be another person's property. The current arson statute requires that the property is "in whole or in part, of another person."[18] The limited DCCA case law construing this phrase merely asserts that the element is satisfied if a person other

[11] *See* D.C. Crim. Jur. Instr. § 5.100 (requiring as an element of arson that the defendant "acted without mitigation" and defining mitigation, in part, as "Mitigating circumstances exist where a person acts in the heat of passion caused by adequate provocation.").
[12] D.C. Code § 22-301.
[13] John Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295, 362 (1986) ("At common law, it was not arson to damage a dwelling house by means of an explosion unless it caused the house to burn rather than first being torn apart by the blast . . . Yet explosions, like fires, entail the likelihood of extensive property damage accompanied by extreme risks to human life and limb.").
[14] As described below, another offense in the current D.C. Code also addresses explosives. D.C. Code § 22-3305 prohibits placing, or causing to be placed, near certain property explosives "with intent to destroy, throw down, or injure the whole or any part thereof."
[15] D.C. Code § 22-301 ("any dwelling, or house, barn, or stable adjoining thereto, or any store, barn, or outhouse, or any shop, office, stable, store, warehouse, or any other building, or any steamboat, vessel, canal boat, or other watercraft, or any railroad car.").
[16] *Id*.
[17] Similarly, the revised arson statute includes a "motor vehicle," as that term is defined in RCC § 22E-701, only when it serves as a dwelling. Motor vehicles are not listed in the current arson statute—perhaps due to the fact that the current arson statute was enacted in 1901.
[18] D.C. Code § 22-301.

than the defendant legally owns the property.[19] In contrast, the RCC reckless burning statute removes the requirement that the property is "in whole, or in part, of another person." It is inconsistent to permit a defendant who otherwise satisfies the requirements of reckless burning to avoid liability because another person owned all or part of the property. Under the RCC reckless burning statute, ownership of the property is irrelevant. This change clarifies the RCC reckless burning statute and eliminates a gap in liability under current law.

Fifth, the RCC reckless burning statute provides a new affirmative defense in subsection (b). The affirmative defense allows a person to recklessly damage or destroy with a fire or explosion a dwelling or building, regardless of its occupancy, with proper government authorization. No comparable statute or case law exists in current District law regarding such a defense. Under the RCC reckless burning statute's affirmative defense the accused must prove by a preponderance of the evidence that he or she had a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and that he or she complied with all the rules and regulations governing the use of the permit. As there is less risk to human life in reckless burning, in these circumstances it is appropriate to permit a defendant to avoid liability when acting with property authority. This change improves the proportionality of the RCC reckless burning offense.

Sixth, the revised reckless burning statute punishes attempted reckless burning differently than a completed reckless burning. The current arson statute includes both an "attempt to burn" and "burn"[20] and case law appears to construe this language to mean that attempted arson is punished the same as completed arson.[21] In contrast, under the RCC reckless burning statute, the General Part's attempt provisions[22] will establish liability for attempted reckless burning consistent with other offenses. There is no clear rationale for such a special attempt provision in arson or reckless burning as compared to other offenses. This revision improves the proportionality of the revised offense.

Seventh, in codifying a reckless burning offense, the RCC replaces two statutes that are closely related to the current arson statute: burning one's own property with intent to injure or defraud another person,[23] and placing explosives with intent to destroy

[19] *Posey v. United States*, 26 App. D.C. 302, 304-05 (D.C. Cir. 1906) (affirming the attempted arson conviction of a defendant that tried to burn down a building he was renting and noting that "the appellant was occupying the building as a tenant does not take it out of the terms of this section."); *Chaconas v. United States*, 326 A.2d 792, 793, 797 (D.C. 1974) (upholding the appellant's conviction for burning a store that his corporation rented); *Byrd v. United States*, 705 A.2d 629, 631, 635 (affirming appellant's conviction for arson and finding that appellant's testimony that is parents owned the house was sufficient for the house to be "in whole or in part, of another person.").

[20] D.C. Code § 22-301 ("Whoever shall maliciously burn or attempt to burn any dwelling…").

[21] *Gilmore v. United States*, 742 A.2d 862, 870 (D.C. 1999).

[22] RCC § 22E-301.

[23] D.C. Code § 22-302 ("Whoever maliciously burns or sets fire to any dwelling, shop, barn, stable, store, or warehouse or other building, or any steamboat, vessel, canal boat, or other watercraft, or any goods, wares, or merchandise, the same being his own property, in whole or in part, with intent to defraud or injure any other person, shall be imprisoned for not more than 15 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

or injure property.[24] In the RCC, conduct currently prohibited by burning one's own property with intent to defraud or injure another person is criminalized under multiple revised statutes, including the revised arson statute which now applies to property belonging to anyone.[25] Similarly, in the RCC, conduct currently prohibited by placing explosives with intent to injure or destroy property is criminalized under multiple statutes, including arson which now explicitly includes use of explosives to cause damage.[26] This revision reduces unnecessary overlap with the revised arson offense, the revised reckless burning offense in RCC § 22E-2502, and other offenses.

Beyond these seven main changes to current District law, one other aspect of the RCC reckless burning statute may constitute substantive changes of law.

The RCC reckless burning statute requires a defendant, in relevant part, to "start[]a fire." The current arson statute requires that the defendant "burn" the specified property.[27] Several DCCA arson cases refer to conduct to "set" the fire or "set fire to" as if this language were equivalent to "burn,"[28] but no decision is directly on point. Instead of this ambiguity, the revised arson statute requires "start[] a fire." This revision clarifies the revised statute.

Other changes to the RCC statute are clarificatory in nature and are not intended to substantively change District law.

The revised reckless burning statute requires that the fire or explosion damage or destroy a dwelling, building, or business yard. The current arson statute requires only that the defendant "burn" (or attempt to burn) the property specified in the statute.[29]

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[24] 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.").

[25] Burning one's own property with intent to defraud or injure another person would be subject to the revised arson statute if the property was one of the specific property types covered by arson (dwelling or building) or the revised criminal damage to property statute if the property satisfied the definition of "property of another" in RCC § 22E-701. This conduct may also satisfy the RCC reckless burning offense, although with a significantly lower penalty than under the revised arson statute. In addition to these property damage offenses, such conduct may well constitute an attempt (RCC § 22E-301) to commit fraud (RCC § 22E-2201), assault (RCC § 22E-1202), or murder (RCC § 22E-1101) depending on the facts of the case.

[26] Placing explosives with intent to injure or destroy property would constitute an attempt (RCC § 22E-301) to commit arson if the property was one of the specific property types covered by the revised arson statute (dwelling or building) or criminal damage to property if the property satisfied the definition of "property of another" in RCC § 22E-701. This conduct could also satisfy an attempt (RCC § 22E-301) to commit reckless burning, although with a significantly lower penalty than under the revised arson statute.

[27] D.C. Code § 22-301.

[28] *Lewis v. United States*, 10 A.3d 646, 657 (D.C. 2010) (holding "there is sufficient evidence to prove that Lewis acted maliciously when *he set the fire*") and noting that the issue was whether "Lewis acted with the required *mens rea* of malice when he *set fire to* the house.") (emphasis added); *Phenis v. United States*, 909 A.2d 138, 164 (D.C. 2006) (concluding, in part, that the evidence was sufficient that the appellant "intentionally set fire to" his mother's apartment."); *In re D.M.*, 993 A.2d 535, 543 (D.C. 2010) ("the trial judge reasonably could find, as she did, that appellant intentionally set the fire . . .").

[29] D.C. Code § 22-301.

Insofar as burning constitutes some kind of damage or destruction to the property at issue, this change merely clarifies the revised offense.

RCC § 22E-2503. Criminal Damage to Property.

Explanatory Note. *This section establishes the criminal damage to property (CDP) offense and penalty gradations for the Revised Criminal Code (RCC). The CDP offense proscribes damaging or destroying property without the effective consent of an owner. The penalty gradations are based on the amount of damage to the property, as well as the type of property and the defendant's culpable mental state in causing the damage or destruction. The CDP offense is closely related to the revised arson,[1] reckless burning,[2] and revised criminal graffiti offenses.[3] The CDP offense replaces the current malicious destruction of property (MPD) offense and multiple statutes[4] in the current D.C. Code that concern damage to particular types of property.*

Subsection (a)(1) specifies the prohibited conduct for first degree CDP—damaging or destroying the property of another. "Property" is a defined term in in RCC § 22E-701 that means an item of value and includes real property and tangible or intangible personal property. "Property of another" is a defined term in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the defendant cannot infringe upon without consent, regardless of whether the defendant also has an interest in that property. Subsection (a)(1) specifies a culpable mental state of "knowingly." Per the rule of construction in RCC § 22E-207, the "knowingly" mental state in subsection (a)(1) applies to all of the elements in subsection (a)(1)—damages or destroys the property of another. "Knowingly" is a defined term in RCC § 22E-206 that here requires the defendant to be aware to a practical certainty that his or her conduct damages or destroys the "property of another."

Subsection (a)(2) states that the proscribed conduct must be done "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires an indication of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, a coercive threat, or deception. "Owner" is a defined term in RCC § 22E-701 to mean a person holding an interest in property with which the accused is not privileged to interfere. Per the rule of construction in RCC § 22E-207, the "knowingly" mental state in subsection (a)(1) also applies to subsection (a)(2). "Knowingly" is a defined term in RCC § 22E-206, here requiring the accused to be aware to a practical certainty that he or she lacks effective consent of an owner.

Subsection (a)(3) requires that the amount of damage to the property for first degree CDP "in fact" be $250,000 or more. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the amount of damage to the property.

Subsection (b)(1) and subsection (b)(2) specify the prohibited conduct for second degree CDP. The requirements in subsection (b)(1) and subsection (b)(2) are the same as

[1] RCC § 22E-2501.
[2] RCC § 22E-2502.
[3] RCC § 22E-2404.
[4] D.C. Code §§ 22-3303, 22-3305, 22-3307, 22-3309, 22-3310, 22-3312.01, 22-3313, and 22-3314.

those in subsection (a)(1) and subsection (a)(2) for first degree CDP. Subsection (b)(3) requires that the amount of damage to the property for second degree CDP "in fact" be $25,000 or more. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the amount of damage to the property.

Subsection (c)(1)(A) and subsection (c)(1)(B) specify one type of prohibited conduct for third degree CDP. The requirements in subsection (c)(1)(A) and subsection (c)(1)(B) are the same as those in subsection (a)(1) and subsection (a)(2) for first degree CDP. Subsection (c)(1)(C)(i), subsection (c)(1)(C)(ii), and subsection (c)(1)(C)(iii) specify the gradation requirements for this type of third degree CDP. Each of these subsections uses "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Per RCC § 22E-207, "in fact" applies to any result element or circumstance element that is modified by the phrase "in fact." Here, there is no culpable mental state as to the amount of damage ($2,500 or more) or the type of property that is damaged or destroyed (cemetery, grave, other place for the internment of human remains, place of worship, or public monument).[5]

Subsection (c)(2) establishes an alternative set of requirements for third degree CDP that requires only recklessness as to the damage or destruction, but requires a higher amount of damage than the first alternative set of requirements in subsection (c)(1) (which involves knowingly damaging or destroying property that causes $2,500 or more in damage). Subsection (c)(2)(A) specifies the prohibited conduct for this type of third degree CDP—damages or destroys property. "Property" is a defined term in in RCC § 22E-701 that means an item of value and includes real property and tangible or intangible personal property. "Recklessly" is a defined term in RCC § 22E-206 that here requires that the defendant disregard a substantial risk that his or her conduct damages or destroys "property."[6] Subsection (c)(2)(B) further requires that the property be "property of another." "Property of another" is a defined term in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the defendant cannot infringe upon, regardless of whether the defendant also has an interest in that property. Subsection (c)(2)(B) specifies a culpable mental state of "knowing." "Knowing" is a defined term in RCC § 22E-206 that here requires that the defendant is practically certain that the property is "property of another." Subsection (c)(2)(C) requires that the prohibited conduct be "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires an indication of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701

[5] Harm to the specific types of property described gradations in third degree CDP—a "cemetery, grave, or other place for the internment of human remains" (subsection (c)(1)(C)(ii)) and a "place of worship or a public monument" (subsection (c)(1)(C)(iii))—may be charged at least as third degree CDP. However, depending on the amount of damage, damage or destruction of these types of property may also be charged as a higher gradation of CDP. Prosecutors are also able to charge conduct involving these types of property under a lower, lesser gradation.

[6] Although subsection (c)(2)(A) initially requires only a culpable mental state of "recklessly" for the fact that the item at issue is "property," subsection (c)(2)(B) requires a culpable mental state of "knowingly" for "property of another." The definition of "property of another" in RCC § 22E-701 incorporates the term "property" and its RCC definition. Thus, for this type of third degree CDP, a "knowing" culpable mental state ultimately applies to the fact that the item at issue is "property," consistent with the other gradations.

that means "consent other than consent induced by physical force, a coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, a coercive threat, or deception. "Owner" is a defined term in RCC § 22E-701 to mean a person holding an interest in property with which the accused is not privileged to interfere. Per the rule of construction in RCC § 22E-207, the "knowing" mental state in subsection (c)(2)(B) also applies to subsection (c)(2)(C). "Knowing" is a defined term in RCC § 22E-206, here requiring the accused to be aware to a practical certainty that he or she lacks effective consent of an owner. Finally, subsection (c)(2)(D) requires that the amount of damage "in fact" be $25,000 or more for this type of third degree CDP. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the amount of damage to the property.

Subsection (d)(1), subsection (d)(2), and subsection (d)(3) specify the prohibited conduct for fourth degree CDP. These requirements are the same as the same requirements for third degree CDP in subsection (c)(2)(A), subsection (c)(2)(B), and subsection (c)(2)(C).[7] Subsection (d)(4) requires that the amount of damage to the property for fourth degree CDP "in fact" be $250 or more. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the amount of damage to the property.

Subsection (e)(1), subsection (e)(2), and subsection (e)(3) specify the prohibited conduct for fifth degree CDP. These requirements are the same as the requirements for third degree CDP in subsection (c)(2)(A), subsection (c)(2)(B), and subsection (c)(2)(C).[8] Subsection (e)(4) requires that the amount of damage to the property for fifth degree CDP is "any amount." "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the amount of damage to the property.

Subsection (f) specifies relevant penalties for the offense. [RESERVED].

Subsection (g) cross-references applicable definitions located elsewhere in the RCC

Relation to Current District Law. *The CDP statute changes current District law in eight main ways.*

First, the revised CDP statute specifies culpable mental states of knowledge, recklessness, and strict liability with respect to various elements. "Maliciously" is the only culpable mental state specified in the current MDP statute,[9] and it is unclear whether

[7] Although subsection (d)(1) initially requires only a culpable mental state of "recklessly" for the fact that the item at issue is "property," subsection (d)(2) requires a culpable mental state of "knowing" for "property of another." The definition of "property of another" in RCC § 22E-701 incorporates the term "property" and its RCC definition. Thus, for fourth degree CDP, a "knowing" culpable mental state ultimately applies to the fact that the item at issue is "property," consistent with the other gradations.

[8] Although subsection (e)(1) initially requires only a culpable mental state of "recklessly" for the fact that the item at issue is "property," subsection (e)(2) requires a culpable mental state of "knowing" for "property of another." The definition of "property of another" in RCC § 22E-701 incorporates the term "property" and its RCC definition. Thus, for fifth degree CDP, a "knowing" culpable mental state ultimately applies to the fact that the item at issue is "property," consistent with the other gradations.

[9] D.C. Code § 22-303.

all or just some of the current MDP statute elements are modified by the term. The D.C. Court of Appeals (DCCA) has defined malice to mean: "(1) the absence of all elements of justification, excuse or recognized mitigation, and (2) the presence of either (a) an actual intent to cause the particular harm which is produced or harm of the same general nature, or (b) the wanton and willful doing of an act with awareness of a plain and strong likelihood that such harm may result."[10] Per the first part of this holding, MDP is subject to various defenses more typically recognized in the context of murder.[11] Per the second part of this holding, the DCCA has further clarified that, as compared to the Model Penal Code (MPC) definitions of culpable mental states, malice in MDP either requires the defendant act "purposely" (corresponding to an "actual intent to cause the particular harm") or with a blend of "knowingly" and "recklessly" culpable mental states (corresponding to a mental state of "wanton and willful…with awareness of a plain and strong likelihood").[12]

In contrast, the RCC provides standardized definitions for each culpable mental state and specifies the relevant culpable mental states for the revised CDP offense: knowledge or recklessness as to damaging or destroying property, knowledge for the fact that the item at issue is "property" and "property of another," as those terms are defined in RCC § 22E-701,[13] and knowledge for lacking the effective consent of an owner. In addition, the RCC specifies strict liability as to the amount of damage required, as well as to the type of property specified in some of the alternative requirements for third degree

[10] *Harris v. United States*, 125 A.3d 704, 708 (D.C. 2015) (quoting Guzman v. United States, 821 A.2d 895, 898 (D.C.2003)). The DCCA has further stated that the culpable mental state of the current MDP offense is one of "general intent." *Carter v. United States*, 531 A.2d 956, 962 (D.C. 1987). "General intent" is not used in or defined in the current MDP statute, but the DCCA has said that it is frequently defined as the "intent to do the prohibited act" which requires "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984).

[11] In the District, "[r]ecognized circumstances of mitigation" include, most notably, provocation: i.e., a situation "where the killer has been provoked or is acting in the heat of passion, with the latter including fear, resentment and terror, as well as rage and anger." *Comber*, 584 A.2d at 41. In addition to provocation, however, DCCA case law also recognizes *imperfect* justifications and excuses (i.e., defenses based upon *unreasonable* mistakes of fact and/or law), "such as when excessive force is used in self-defense or in defense of another and a killing is committed in the mistaken belief that one may be in mortal danger," as mitigating circumstances that preclude the formation of malice. *Id.*

[12] *Harris v. United States*, 125 A.3d 704, 708 n. 3 (D.C. 2015).

[13] The CDP statute consistently requires a culpable mental state of knowledge for the fact that the item at issue satisfies the RCC definitions of "property" and "property of another" in RCC § 22E-701, but the drafting varies. Subsection (a)(1) of first degree CDP, subsection (b)(1) of second degree CBP, and subsection (c)(1)(A) of third degree CDP each specify a "knowingly" culpable mental state for the element "property of another." Since the definition of "property of another" in RCC § 22E-701 incorporates the term "property," also defined in RCC § 22E-701, the "knowingly" culpable mental state also applies to the fact that the item is "property."

Subsection (c)(2)(A) of third degree CDP, subsection (d)(1) of fourth degree CDP, and subsection (e)(1) of fifth degree CDP require that the defendant "recklessly" damage or destroy "property." Although the "recklessly" culpable mental state applies to the element that the item at issue is "property," subsection (c)(2)(B) of third degree CDP, subsection (d)(2) of fourth degree CDP, and subsection (e)(2) of fifth degree CDP require that the defendant know that the item is "property of another," as that term is defined in RCC § 22E-701. Thus, given that the definition of "property of another" incorporates the definition of "property," these gradations ultimately require a "knowing" culpable mental state for the fact the item at issue is "property."

CDP. The "knowingly" culpable mental state is consistent with, but somewhat narrower than, existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. However, applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[14] The "reckless" culpable mental state that the revised CDP statute applies to lower grades of the statute is somewhat lower than existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. However, the recklessness requirement still requires subjective awareness of the critical facts that distinguish innocent from criminal conduct,[15] and provides liability for reckless behavior that may result in serious property damage. The strict liability requirement as to the amount of damage or type of property reflects the fact that the accused has already engaged in serious criminal conduct, and no further mental state appears necessary for liability as to the consequences based on his or her recklessly (or knowingly) damaging property. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[16] Finally, eliminating malice from the revised CDP statute also eliminates the special mitigation defenses applicable to MDP.[17] This revision improves the clarity, completeness, and proportionality of the revised statute.

Second, the revised CDP statute grades the offense, in part, based upon the "amount of damage" done to the property. The current MDP statute states that it is the "value" of the property that determines the gradation. DCCA case law has interpreted "value" for MDP to mean the fair market value of the object when the object is completely destroyed, or the "reasonable cost of the repairs necessitated" where an item is only partly damaged.[18] The DCCA further noted that where the cost of repair exceeds the fair market value of the item as a whole, the value would simply be the fair market

[14] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[15] *Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring in part, dissenting in part) ("And when Congress does not specify a mens rea in a criminal statute, we have no justification for inferring that anything more than recklessness is needed. It is quite unusual for us to interpret a statute to contain a requirement that is nowhere set out in the text. Once we have reached recklessness, we have gone as far as we can without stepping over the line that separates interpretation from amendment.").

[16] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

[17] *Brown v. United States*, 584 A.2d 537, 539 (D.C. 1990) ("Thus, provocation is a proper defense to the charge of malicious destruction of property, and we look to the doctrine of provocation as it has developed in the context of homicide, and elsewhere, to guide us in deciding this case."); *see also* D.C. Crim. Jur. Instr. § 5.400 (requiring as an element of MDP that the defendant "acted without mitigation" and defining mitigation, in part, as "when a person acts in the heat of passion caused by adequate provocation" and "when a person actually believes that s/he is in danger of serious bodily injury, and actually believes that the use of force that was likely to cause serious bodily harm was necessary to defend against that danger, but one or both of those beliefs are not reasonable.").

[18] *Nichols v. United States*, 343 A.2d 336, 342 (D.C. 1975).

value of the whole before the damage occurred.[19] In contrast, the revised CDP statute is graded simply on the amount of damage—not the value of the property as in the current MDP statute—and is intended to be consistent with existing case law. When the property is completely destroyed, the amount of damage is the whole item's "fair market value," a defined term in RCC § 22E-701. However, when the item is only partially damaged, the revised CDP statute provides greater flexibility as to how the amount of damage may be proven—it may either provide proof of the "reasonable cost of the repairs" as recognized in prior DCCA case law or it may provide proof of the change in the fair market value of the damaged property.[20] This revision improves the proportionality of the revised statute.

Third, the revised CDP statute treats attempted CDP differently than a completed CDP. The current statute includes an "attempts to injure or break or destroy" as well as "injur[es] or break[s] or destroy[s]"[21] and there is no District case law construing this language. In contrast, under the revised CDP statute, the General Part's attempt provisions[22] establish liability for attempted CDP consistent with other offenses. There is no clear rationale for such a special attempt provision in CDP as compared to other offenses. This revision improves the proportionality of the revised offense.

Fourth, the CDP statute increases the number and type of gradations for the offense. The current MDP offense is limited to two gradations based solely on the value of the property.[23] First degree MDP is for property that has a "value" of $1,000 or more, and is punished as a serious felony. Second degree MDP involves property valued at less than $1,000 and is a misdemeanor. In contrast, the revised CDP offense has a total of five gradations, which span a much greater range of loss in value to the property, including distinctions for destruction of property that is of special significance and distinctions based upon the defendant's mental state as to the damage or destruction. The dollar value cutoffs in the revised CDP are consistent with other revised offenses and the increase in gradations, differentiated by offense seriousness, improves the proportionality of the revised offense.

Fifth, the revised CDP offense consolidates most prohibited conduct in the D.C. Code that involves damage or destruction of property, and deletes multiple statutes that are closely related to the current MDP statute.[24] The revised CDP and revised criminal graffiti offense[25] will cover the vast majority of conduct these deleted statutes prohibit

[19] That is, in the instance that the value of the entire item or property is less than $200 (the then-current threshold for MDP) but the cost of repair is $200 or more, it would be "unjust to measure the value of the damaged portion by the cost of restoration." *Id.* at n.3.

[20] In rare cases, the method of calculating the amount of damage may lead to different conclusions. For example, a person who causes damage that is very inexpensive to repair but dramatically lowers the fair market value of the property would fare worse under the change in market value calculation as compared to a reasonable cost of repair calculation. However, a person who causes damage that is very expensive to repair but only slightly lowers the fair market value of the property would fare better under the change in market value calculation as compared to a reasonable cost of repair calculation.

[21] D.C. Code § 22-303 ("Whoever maliciously injures or breaks or destroys, or attempts to injure or break or destroy…").

[22] RCC § 22E-301.

[23] The DCCA has interpreted "value" in the MDP statute as meaning "fair market value." *Nichols v. United States*, 343 A.2d 336, 342 (D.C. 1975).

[24] D.C. Code §§ 22-3303, 22-3305, 22-3307, 22-3309, 22-3310, 22-3312.01, 22-3313, and 22-3314.

[25] RCC § 22E-2404.

pertaining to damaging property.[26] The only apparent exceptions are causing damage to boundary markers that are on one's property[27] and placing excrement or filth on property in a manner that does not damage it.[28] Notably, attempted CDP, the revised arson offense,[29] and the reckless burning offense[30] cover the conduct prohibited in the current District offense pertaining to placing explosive substances near property.[31] Several of the statutes pertaining to removing or concealing property[32] are also addressed by the revised theft,[33] unauthorized use of property,[34] and fraud[35] offenses. Deleting unnecessary overlap among criminal statutes reduces the penalty disparities in existing statutes and

[26] D.C. Code §§ 22-3307 ("Whoever maliciously or with intent to injure or defraud any other person defaces, mutilates, destroys . . . the whole or any part of" specified public records or papers); 22-3309 ("Whoever maliciously cuts down, destroys . . . any boundary tree, stone, or other mark or monument, or maliciously effaces any inscription thereon, either of his or her own lands or of the lands of any other person whatsoever . . . ."); 22-3310 ("It shall be unlawful for any person willfully to top, cut down . . . girdle, break, wound, destroy, or in any manner injure" trees, specified vegetation, or any boxes or protection thereof of another person); 22-3312.01 ("It shall be unlawful for any person or persons willfully and wantonly to disfigure, cut, chip . . . to write, mark, or print obscene or indecent figures representing obscene or objects upon; to write, mark, draw, or paint, without the consent of the owner or proprietor thereof, or, in the case of public property, of the person having charge, custody, or control thereof, any word, sign, or figure upon" property"); 22-3313 ("It shall not be lawful for any person or persons to destroy, break, cut, disfigure, deface, burn, or otherwise injure" any building materials, materials intended for the improvement of streets, avenues, highways, similar modes of passage, and inclosures, or "to cut, destroy, or injure any scaffolding, ladder, or other thing used in or about such building or improvement . . . ."; and 22-3314 ("If any person shall maliciously cut down, demolish, or otherwise injure any railing, fence, or inclosure around or upon any cemetery, or shall injure or deface any tomb or inscription thereon . . . .").

[27] D.C. Code § 22-3309 ("Whoever maliciously cuts down, destroys, or removes any boundary tree, stone, or other mark or monument, or maliciously effaces any inscription thereon, either of his or her own lands or of the lands of any other person whatsoever, even though such boundary or bounded trees should stand within the person's own land so cutting down and destroying the same, shall be fined not more than the amount set forth in § 22-3571.01 and imprisoned not exceeding 180 days."). The statute appears to include boundary markers regardless of ownership, unlike the revised CDP offense requirement that the property be "property of another."

[28] D.C. Code § 22-3312.01 ("It shall be unlawful for any person or persons willfully and wantonly to … cover, rub with, or otherwise place filth or excrement of any kind…."). Other conduct in D.C. Code § 22-3312.01 appears to be covered by the revised CDP statute or revised criminal graffiti statute in 22E-2404.

[29] RCC § 22E-2401.

[30] RCC § 22E-2402.

[31] D.C. Code § 22-3305.

[32] D.C. Code § 22-3303 ("Whoever, without legal authority or without the consent of the nearest surviving relative, shall disturb or remove any dead body from a grave" for specified purposes); D.C. Code § 22-3307 ("Whoever maliciously or with intent to injure or defraud any other person . . . abstracts, or conceals the whole or any part of" specified public records or papers); D.C. Code § 22-3309 ("Whoever maliciously . . . removes any boundary tree, stone, or other mark or monument . . . either of his or her own lands or of the lands of any other person whatsoever . . . ."); D.C. Code § 22-3310 ("It shall be unlawful for any person willfully to . . . remove" trees, specified vegetation, or any boxes or protection thereof of another person); D.C. Code § 22-3313 ("It shall not be lawful for any person or persons to . . . remove" any building materials, materials intended for the improvement of streets, avenues, highways, similar modes of passage, and inclosures, or any scaffolding, ladder, or other similar object).

[33] RCC § 22E-2101.

[34] RCC § 22E-2102.

[35] RCC § 22E-2201.

prevents a defendant from receiving multiple convictions and sentences for the same act or course of conduct.

Sixth, the provision in RCC § 22E-2001, "Aggregation of Property Value to Determine Property Offense Grades," allows aggregation of value for the revised CDP offense based on a single scheme or systematic course of conduct. The current MDP offense is not part of the current aggregation of value provision for property offenses.[36] The revised CDP statute permits aggregation for determining the appropriate grade of CDP to ensure penalties are proportional to defendants' actual conduct.

Seventh, under the revised CDP statute the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "knowingly" due to his or her self-induced intoxication.[37] The current MDP statute is silent as to the effect of intoxication. However, the DCCA has held that the current MDP statute is a general intent crime,[38] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming any of the culpable mental state requirements for the offense.[39] This DCCA holding would also likely mean that a defendant would be precluded from directly raising—though not necessarily presenting evidence in support of[40]—the claim that, due to his or her self-induced intoxicated state, the defendant did not possess any of the culpable mental state requirements for MDP. By contrast, per the revised CDP offense, a defendant would both have a basis for, and will be able to raise and present relevant and admissible evidence in support of, a claim of that self-induced intoxication prevented the defendant from forming the knowledge required for various elements of CDP. Likewise, where appropriate, the defendant would be entitled to an instruction, which clarifies that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge

[36] D.C. Code § 22-3202 ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.").

[37] With respect to those elements of CDP subject to a culpable mental state of recklessness, the Revised Criminal Code effectively precludes an intoxication defense where the intoxication is self-induced. *See* RCC § 209(c)("Imputation of Recklessness for Self-Induced Intoxication. When a culpable mental state of recklessness applies to a result or circumstance in an offense, recklessness is established if: (1) The person, due to self-induced intoxication, fails to perceive a substantial risk that the person's conduct will cause that result or that the circumstance exists; and (2) The person is negligent as to whether the person's conduct will cause that result or as to whether that circumstance exists.").

[38] *See Carter v. United States*, 531 A.2d 956, 962 (D.C. 1987).

[39] *See* D.C. Crim. Jur. Instr. § 9.404 ("If evidence of intoxication gives you a reasonable doubt about whether [name of defendant] could or did form the intent to [^] , then you must find him/her not guilty of the offense of [^] . On the other hand, if the government has proved beyond a reasonable doubt that [name of defendant] could and did form the intent to [^], along with every other element of the offense, then you must find him/her guilty of the offense of [^] .").

[40] Whether intoxication evidence may be presented when it cannot negate intent is less clear. *Compare Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) *with Cooper v. United States*, 680 A.2d 1370, 1372 (D.C. 1996); *Parker v. United States*, 359 F.2d 1009, 1012–13 (D.C. Cir. 1966)); *see also Buchanan v. United States*, 32 A.3d 990, 996 (D.C. 2011) (Ruiz, J., concurring) (discussing *Parker*).

at issue in CDP.[41] This change improves the clarity, consistency, and proportionality of the offense.

Eighth, the revised CDP statute requires a result element of "damages or destroys." The current MDP statute refers to "injures or breaks,"[42] but does not define these terms. The DCCA has twice made rulings that depended on the definition of "injury," and in doing so referred to a dictionary definition of the term as meaning: "detriment to, or violation of, person, character, feelings, rights, property, or interests, or value of the thing."[43] In one of these rulings the DCCA suggested that temporary disassembly of an object which does not involve loss or destruction of a part of the object constitutes injury so long as the immediate, ordinary purpose of the object is substantially affected.[44] In contrast, under the revised statute, damage does not include mere temporary disassembly of an object which does not involve loss or destruction of a part.[45] Instead, such a temporary disassembly would be a violation of the revised unauthorized use of property (UUP) offense in RCC § 22E-2102. This change clarifies and improves the proportionality of the revised offense.

Beyond these eight main changes to current District law, three other aspects of the revised CDP statute may constitute substantive changes of law.

First, the revised CDP statute requires the property be "property of another," defined in RCC § 22E-701, in part, as any property with which the actor is not privileged to interfere without consent, regardless of whether the actor also has an interest in that property. The current MDP statute refers to the affected property as being "not his or her own," and does not further define the meaning of this phrase. The DCCA has stated that the phrase "not his or her own" is "ambiguous" because "it could either refer to property that is fully owned by an individual or property that is at least partially owned."[46] However, the DCCA has found that a co-owner of property can be found liable under the current MDP for destroying jointly-owned property.[47] The use of the term "property of

[41] These results are a product of the logical relevance principle set forth in RCC § 22E-209(a) and the fact that knowledge is a mental state susceptible to negation by self-induced intoxication. *See* RCC § 22E-209(b).

[42] D.C. Code § 22-303.

[43] *Baker v. United States*, 891 A.2d 208, 215 (D.C. 2006) ("Second, using black spray paint to inscribe obscenities on walls and on an automobile causes damage sufficient under the statute. "Injury" is defined as "detriment to, or violation of, person, character, feelings, rights, property, or interests, or value of the thing." WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed.1947). Applying this definition to the facts here demonstrates that the graffiti, although temporary, caused sufficient "injury." In order to repair Boggs' vehicle, the paint had to be removed and then replaced with a new layer of paint, otherwise, the vehicle would have been significantly devalued."); *Thomas v. United States*, 985 A.2d 409, 412 (D.C. 2009).

[44] *Thomas v. United States*, 985 A.2d 409, 412 (D.C. 2009) ("As with, for example, most broken human arms, the effect is temporary, but nevertheless substantial and sufficient to defeat the immediate purpose of its ordinary or intended use.").

[45] This meaning of "damage" may affect the rulings in *Baker v. United States*, 891 A.2d 208 (D.C. 2006) and *Thomas v. United States*, 985 A.2d 409 (D.C. 2009) which relied upon a dictionary definition of "injury" to decide the case.

[46] *Jackson v. United States*, 819 A.2d 963, 965 (D.C. 2003).

[47] *Id.* at 964. Since the court determined the statutory language was ambiguous, it first looked to the legislative history. *Id.* at 965. The legislative history "provid[ed] no assistance," so the court then looked

another" in the revised CDP offense is consistent with case law holding that a person may be liable for destroying jointly-owned property without consent of the other where the joint owner has an interest the other joint owner is not privileged to infringe upon.[48] However, the revised CDP offense, by use of "property of another," excludes liability for damaging or destroying property in which the only sense in which the property belongs to another is that another has a security interest in the property. This is because the revised definition of "property of another" specifically excludes "property in the possession of the accused that the other person has only a security interest in." No case law has interpreted whether the current MDP statute's reference to "not his or her own" would include property in the possession of, and owned by, the accused except for a security interest held by another. This change in the revised CDP statute clarifies the offense and applies a consistent definition across theft and theft-related offenses in Chapter 20 of Subtitle III of the RCC through the definition of "property of another."

Second, the gradations in subsection (c), by use of the phrase "in fact," codify that no culpable mental state is required as to the amount of damage or as to the type of property required in some of the alternative variations of third degree CDP. The current MDP statute is silent as to what culpable mental state, if any, applies to the current MDP value gradations. There is no District case law on what mental state, if any, applies to the current MDP value gradations, although District practice does not appear to apply a mental state to the monetary values in the current gradations.[49] Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[50] Clarifying that the amount of the loss in value is a matter of strict liability in the revised CDP gradations clarifies and potentially fills a gap in District law.

Third, the revised CDP statute requires that the defendant act without the "effective consent of an owner" and applies a culpable mental state of "knowingly" to this element. The current MDP statute does not reference the defendant's lack of consent, although it does require that the property be "not his or her own," which may suggest that the defendant lack consent. DCCA case law interpreting the phrase "not his or her own" is limited to determining issues of joint ownership.[51] More broadly, it seems as though consent would negate the malice requirement in the current MDP statute, given that malice generally requires the absence of "justification, excuse, or mitigation."[52] To

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at case law from other jurisdictions, academic commentators, and the link between destruction of property and domestic violence. *Id.* at 965-67.

[48] Note that, under the revised definition of "property of another," joint owners are not categorically liable under CDP for destroying property of another.

[49] D.C. Crim. Jur. Instr. § 5.300.

[50] D.C. Crim. Jur. Instr. § 5.400.

[51] The DCCA has stated that the phrase "not his or her own" is "ambiguous" because "it could either refer to property that is fully owned by an individual or property that is at least partially owned." *Jackson v. United States*, 819 A.2d 963, 965 (D.C. 2003). However, the DCCA has found that a co-owner of property can be found liable under the current MDP for destroying jointly-owned property. *Id.* at 964. Since the court determined the statutory language was ambiguous, it first looked to the legislative history. *Id.* at 965. The legislative history "provid[ed] no assistance," so the court then looked at case law from other jurisdictions, academic commentators, and the link between destruction of property and domestic violence. *Id.* at 965-67.

[52] *See, e.g.*, *Thomas v. United States*, 985 A.2d 409, 412 (D.C. 2009).

resolve this ambiguity, the revised CDP statute requires that the defendant lack the "effective consent of an owner" and applies a "knowingly" culpable mental state to this element. This revision improves the clarity and proportionality of the revised statute and improves its consistency with other RCC property offenses that require that the defendant know that he or she lack the consent or effective consent of an owner, such as the criminal graffiti statute (RCC § 22E-2504).

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

For example, the revised CDP statute deletes "by fire or otherwise" and "any public or private property, whether real or personal" that are in the current MDP statute.[53] The language is surplusage and deleting it will not change the scope of the offense.

[53] D.C. Code § 22-303.

RCC § 22E-2504. Criminal Graffiti.

Explanatory Note. *This section establishes the revised criminal graffiti offense and penalty for the Revised Criminal Code (RCC). The revised criminal graffiti offense prohibits placing any inscription, writing, drawing, marking, or design on the property of another without the effective consent of an owner. There is a single penalty gradation for the offense. The revised criminal graffiti offense is closely related to the criminal damage to property offense (CDP).*[1] *The two offenses share several elements, but the revised criminal graffiti offense addresses a specific type of damage to property. The revised criminal graffiti offense replaces the current graffiti offense,*[2] *the current possessing graffiti material offense,*[3] *and the current defacing public or private property offense.*[4]

Subsection (a)(1) states the proscribed conduct—placing any inscription, writing, drawing, marking, or design on the property of another. "Property" is a defined term in in RCC § 22E-701 that means an item of value and includes real property and tangible or intangible personal property. "Property of another" is a defined term in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the defendant cannot infringe upon, regardless of whether the defendant also has an interest in that property. Subsection (a)(1) specifies a culpable mental state of "knowingly." Per the rule of construction in RCC § 22E-207, the "knowingly" mental state in subsection (a)(1) applies to all of the elements in subsection (a)(1)—placing any inscription, writing, drawing, marking, or design on the property of another. "Knowingly" is a defined term in RCC § 22E-206 that here requires the defendant to be aware to a practical certainty that his or her conduct places any inscription, writing, drawing, marking or design on the "property of another."

Subsection (a)(2) states that the proscribed conduct must be done "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires an indication of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, a coercive threat, or deception. "Owner" is a defined term in RCC § 22E-701 to mean a person holding an interest in property that the accused is not privileged to interfere with. Per the rule of construction in RCC § 22E-207, the "knowingly" mental state in subsection (a)(1) also applies to subsection (a)(2). "Knowingly" is a defined term in RCC § 22E-206, here requiring the accused to be aware to a practical certainty that he or she lacks effective consent of an owner.

Subsection (b) specifies the penalty for the offense. [RESERVED]

Subsection (c) cross-references applicable definitions located elsewhere in the RCC.

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[1] RCC § 22E-2403.
[2] D.C. Code § 22-3312.04(d).
[3] D.C. Code § 22-3312.04(e).
[4] D.C. Code § 22-3312.01. See commentary to criminal damage to property, RCC § 22E-2503.

Relation to Current District Law. *The revised criminal graffiti statute changes current District law in four main ways.*

First, the revised criminal graffiti punishes attempted criminal graffiti differently than a completed criminal graffiti offense. District law currently codifies a separate, attempt-type offense for graffiti that prohibits, in part, possessing graffiti material with the intent to place graffiti,[5] in addition to providing liability under the current general attempt statute.[6] In contrast, the revised criminal graffiti statute relies solely on the General Part's attempt provisions[7] to establish liability for attempts to place graffiti, consistent with other offenses. The General Part's attempt provisions differ from the current attempt-type offense for graffiti chiefly by requiring the person to be "dangerously close" to committing the offense for there to be liability. Such a requirement reflects longstanding District case law regarding criminal attempts generally.[8] There is no clear rationale for such a special attempt-type offense for graffiti as compared to other offenses. This revision improves the clarity and proportionality of the revised offense.

Second, the revised criminal graffiti offense specifies a culpable mental state of "knowingly" for all elements of the offense. The current graffiti offense[9] specifies a culpable mental state of "willfully." The current graffiti offense does not define the term "willfully" and there is no generally applicable definition in the District's current criminal code. No case law exists interpreting the culpable mental state of the graffiti statute. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[10] Requiring a knowing culpable mental state also makes the revised criminal graffiti offense consistent with the elements of higher gradations of the revised CDP statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[11] This revision improves the clarity and consistency of the revised statute.

Third, the revised criminal graffiti statute does not require that the graffiti be visible from a public right-of-way. The current D.C. Code statute defines "graffiti," in part, as requiring that the inscription, etc., be visible from a "public right-of-way."[12] There is no DCCA case law interpreting this requirement and it appears to have been

[5] D.C. Code §§ 22-3312.05(5) (defining "graffiti material"), 22-3312.04(e) ("Any person who willfully possesses graffiti material with the intent to place graffiti on property without the consent of the owner shall be fined not less than $100 or more than $1,000.").
[6] D.C. Code §§ 22-1803.
[7] RCC § 22E-301.
[8] See commentary to RCC § 22E-301.
[9] D.C. Code § 22-3312.04(e).
[10] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[11] *See, e.g.*, RCC § 22E-2503.
[12] D.C. Code § 22-3312.05(4) ("'Graffiti' means an inscription, writing, drawing, marking, or design that is painted, sprayed, etched, scratched, or otherwise placed on structures, buildings, dwellings, statues, monuments, fences, vehicles, or other similar materials that are on public or private property without the consent of the owner, manager, or agent in charge of the property, and the graffiti is visible from a public right-of-way.").

included for an abatement of graffiti provision that has since been repealed.[13] In contrast, the revised criminal graffiti offense does not require that the graffiti be visible from a public right-of-way. This requirement unnecessarily restricts the scope of the offense to places visible to the public, even though the harm to a property owner is the same whether or not the location is visible to the public. The requirement also is inconsistent with the revised criminal damage to property offense (RCC § 22E-2504), which applies to "property of another." This revision improves the proportionality and consistency of the revised statute.

Fourth, the revised criminal graffiti statute does not provide for mandatory restitution provision or have a specific parental liability provision. The current graffiti statute mandates restitution in addition to any fine or imprisonment,[14] and makes parents and guardians civilly liable for fines and abatement fees that their minor cannot pay.[15] However, there also is a substantially similar provision in D.C. Code § 16-2320.01 that states the court "may" enter a judgment of restitution in any case in which the court finds a child has committed a specified delinquent act and it also provides that the court may order the parent or guardian of a child, a child, or both to make such restitution.[16] With

[13] Subsection (c) of D.C. Code § 22-3312.04 establishes the current graffiti offense. Subsection (c) was added to D.C. Code § 22-3312.04 by the Anti-Graffiti Amendment Act of 2000 (Act 13-560). The Anti-Graffiti Amendment Act of 2000 also codified the definitions in D.C. Code § 22-3312.05, including the current definition of "graffiti," as well as an abatement of graffiti provision in former D.C. Code § 22-3312.03a. The abatement provisions in former D.C. Code § 22-3312.03a appear to depend, in part, on whether the graffiti is visible from a public right-of-way, as required in the definition of "graffiti" and as specified in the abatement provision. D.C. Code § 22-3312.03a(a), (b) ("(a) Any person applying graffiti on public or private property shall have the duty to abate the graffiti within 24 hours after notice by the Director, the Chief of Police, or the private owner of the property involved. Abatement shall be done in a manner prescribed by the Director. Any person applying the graffiti shall be responsible for the abatement or payment for the abatement. When graffiti is applied by a minor, the parents or legal guardian shall also be responsible for the abatement or payment for the abatement if the minor is unable to pay. (b) Subject to the availability of annual appropriations for that purpose, the Mayor shall provide graffiti removal services to abate graffiti on public property. The Mayor shall provide, subject to appropriations, graffiti removal services for the abatement of graffiti on private property that is visible from the public right-of-way without charge to the property owner if the property owner first executes a waiver of liability in the form prescribed by the Mayor."). (repl.).
The Anti-Graffiti Act of 2010 repealed the abatement provision in D.C. Code § 22-3312.03a and codified in Title 42 a new abatement provision and definition of "graffiti" that requires visibility from a public right-of-way. Anti-Graffiti Act of 2010 (Law 18-219). Despite the repeal of the abatement provision in D.C. Code § 22-3312.03a, the definition of "graffiti" in D.C. Code § 22-3312.05 was not repealed. The legislative history for the Anti-Graffiti Act of 2010 does not discuss whether the Council intentionally kept the visibility requirement in the definition of "graffiti" in D.C. Code § 22-3312.05.

[14] D.C. Code § 22-3312.04(f) ("In addition to any fine or sentence imposed under this section, the court shall order the person convicted to make restitution to the owner of the property, or to the party responsible for the property upon which the graffiti has been placed, for the damage or loss caused, directly or indirectly, by the graffiti, in a reasonable amount and manner as determined by the court.").

[15] D.C. Code § 22-3312.04(g) ("The District of Columbia courts shall find parents or guardians civilly liable for all fines imposed or payments for abatement required if the minor cannot pay within a reasonable period of time established by the court.").

[16] D.C. Code Ann. § 16-2320.01(a) ("(a)(1) Upon request of the Corporation Counsel, the victim, or on its own motion, the Division may enter a judgment of restitution in any case in which the court finds a child has committed a delinquent act and during or as a result of the commission of that delinquent act has: (A) Stolen, damaged, destroyed, converted, unlawfully obtained, or substantially decreased the value of the

respect to adults, D.C. Code § 16-711 provides judicial authority for (but does not require) ordering restitution. In contrast, the revised criminal graffiti statute deletes both the mandatory restitution provision and parental liability provision that apply to the current graffiti offense. Instead, matters of adult restitution are left to judicial discretion per D.C. Code § 16-711[17] and juvenile restitution and parental liability to judicial discretion per D.C. Code § 16-2320.01. This change improves the consistency and proportionality of the revised statute, and removes unnecessary overlap with other penalty provisions in the D.C. Code.

Beyond these four main changes to current District law, two other aspects of the revised criminal graffiti statute may constitute substantive changes of law.

First, the revised criminal damage to property statute requires that the "inscription, writing, drawing, marking, or design" be placed on the "property of another" and applies the definition of "property of another" in RCC § 22E-701. The current graffiti offense does not specify any ownership requirements for the property, although it does require the defendant to act "without consent of the owner." The definition of "property of another" in RCC § 22E-701 specifies that "property of another" is any property with which the actor is not privileged to interfere without consent, regardless of whether the actor also has an interest in that property. The definition of "property of another" also excludes from the revised criminal graffiti offense property that is in the possession of the accused in which the other person has only a security interest. This narrow exclusion for security interests is the same exclusion that applies to the revised criminal damage to property offense (RCC § 22E-2504) and other property offenses in Chapter 20 of Subtitle III of the RCC. As with the other offenses, the exclusion is justified because civil remedies such as contract liability, rather than criminal liability, address the situation when a debtor damages property and the other party has only a security interest in that property. However, under RCC the definition of "property of another," a third party could be criminally liable for damaging property that is in the possession of the debtor because the debtor has a possessory interest in that property. Given the nature of the revised criminal graffiti offense, it is unlikely that the security interest exclusion will often apply. However, the consistency of the RCC improves if the criminal damage to property and the revised criminal graffiti offenses cover the same range of property interests.

Second, the revised criminal graffiti statute requires a person to act "without the effective consent of an owner." "Consent," "effective consent," and "owner" are defined terms in RCC § 22E-701 that together generally require a person to lack some indication of an owner's agreement to the placement of graffiti from a person holding an interest in the property. The current graffiti offense requires that the defendant act "without the consent of the owner," but there is no statutory definition of these terms, and no District case law addresses the meaning of "without the consent" or "owner" in the graffiti

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property of another . . . (2) The Division may order the parent or guardian of a child, a child, or both to make restitution to: (A) The victim; (B) Any governmental entity; (C) A third-party payor, including an insurer, that has made payment to the victim to compensate the victim for a property loss under paragraph (1)(A) of this subsection or pecuniary loss under paragraph (1)(B) or (C) of this subsection.").

[17] RCC § 22E-602 generally authorizes courts to order restitution in accordance with D.C. Code § 16-711.

statute. Requiring a person to act "without the effective consent of an owner" and using the definitions in RCC § 22E-701 that apply to other property offenses in Chapter 20 of Subtitle III of the RCC improves the clarity and consistency of the revised offense.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

First, the revised criminal graffiti statute eliminates the "on public or private property" requirement that is in the current definition of "graffiti."[18] Similarly, the revised criminal graffiti offense deletes "on structures, buildings, dwellings, statues, monuments, fences, vehicles, or other similar materials" that is in the current definition of "graffiti."[19] Such language is surplusage and deletion will not change District law.

Second, the revised criminal graffiti statute deletes the language in the current definition of "graffiti"[20] that refers to a "manager, or agent in charge of the property" because the RCC relies on civil law principles of agency to determine when an individual is authorized to give "consent" on behalf of another person. Deleting the language will not change District law.

Finally, the revised criminal graffiti offense deletes specific reference to the methods of making graffiti that are in the current definition of "graffiti:"[21] "is painted, sprayed, etched, scratched, or otherwise placed." Instead, the revised criminal graffiti statute requires the defendant to "place[] "any inscription, writing, drawing, marking, or design." "Any inscription, writing, drawing, marking, or design" is taken from the current definition of "graffiti" without change. "Places" and the types of graffiti specified in the revised statute render "is painted, sprayed, etched, scratched, or otherwise placed" are surplusage. Deletion will not change District law.

[18] D.C. Code § 22-3312.05(4).
[19] D.C. Code § 22-3312.05(4).
[20] D.C. Code § 22-3312.05(4).
[21] D.C. Code § 22-3312.05(4).

RCC § 22E-2601. Trespass.

Explanatory Note. *This section establishes the trespass offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes knowingly entering or remaining in certain locations without a privilege or license to do so under civil law. The offense is graded based on the location at issue. The revised trespass offense is closely related to burglary,*[1] *with the primary difference that trespass does not require that the defendant intend to commit a crime on the premises. The revised trespass offense replaces the unlawful entry on property*[2] *and unlawful entry of a motor vehicle*[3] *statutes in the current D.C. Code.*[4]

Paragraphs (a)(1), (b)(1), and (c)(1) require that the defendant "enters or remains in" a given place. The "enters" element does not require complete or full entry of the body, and evidence of partial entry is sufficient proof for a completed trespass.[5] The alternate phrase "remains in" creates liability for a person who remains on property with knowledge that he or she has no right or permission to be there.[6] A person who 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.[7] Where a person is uncertain as to whether they can safely comply with a notice to quit, a justification defense may apply. Paragraphs (a)(1), (b)(1), and (c)(1) also specify the culpable mental state for these elements to be knowledge, a term defined at RCC § 22E-206 and here requiring that the defendant must at least be aware to a practical certainty that his or her conduct "enters or remains in" the prohibited space.

Paragraphs (a)(1), (b)(1), and (c)(1) also describe the places where a trespass can occur. Trespass into a dwelling is punished more severely per paragraph (a)(1) than

[1] RCC § 22E-2701.
[2] D.C. Code § 22-3302.
[3] D.C. Code § 22-1341.
[4] To the extent that the District's current unlawful entry statute also protects "other property," besides dwellings, buildings, land, watercrafts, and motor vehicles, the RCC punishes exercising control over any property of another as unauthorized use of property in RCC § 22E-2102.
[5] Evidence of unlawful entry of a body part or a camera, microphone, or other instrument held by an actor is sufficient proof for a completed trespass.
[6] A person may be notified that his or her presence is unlawful by someone other than the titleholder. *See, e.g., Smith v. United States*, 445 A.2d 961, 964 (D.C. 1982) (a Secret Service officer can demand that protestors leave the grounds of the White House, even though the officer was not the highest ranking officer at the White House); *Whittlesey v. United States*, 221 A.2d 86 (D.C. 1966) (President need not personally order protestors to leave the White House grounds); *Hemmati v. United States*, 564 A.2d 739, 746 (D.C. 1989) ("The evidence in this case was sufficient to permit a finding that Joan Drummond was in charge of the office and that she exercised her authority through her agent, Carol Kiser."); *Fatemi v. United States*, 192 A.2d 525, 528 (D.C. 1963) (an embassy minister asked intruder to leave); and *Grogan v. United States*, 435 A.2d 1069, 1071 (D.C. 1981) (a receptionist at an abortion clinic asked person to leave).
[7] *See* RCC § 22E-203 (requiring physical capacity to perform a required legal duty); *Conley v. United States*, 79 A.3d 270, 292-293 (D.C. 2013) (explaining voluntariness requires a reasonable opportunity to comply with a legal duty); *Lambert v. People of the State of California*, 355 U.S. 225, 229 (1957) (reversing a conviction where, on first becoming aware of her duty, the appellant had no opportunity to comply with the law and avoid its penalty); *see also Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006) (requiring an opportunity to comply with a dispersal order); *Dellums v. Powell*, 566 F.2d 167, 181 n.31 (D.C. Cir. 1977); *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 126 n.5 (D.C. Cir. 1977).

trespass into a building per paragraph (b)(1), which is punished more severely than trespass on land or into a watercraft or motor vehicle per paragraph (c)(1). The terms "dwelling," "building," and "motor vehicle" are defined in RCC § 22E-701. The phrase "or part thereof" makes clear that while a person may have a right to enter one part of a parcel, building, or vehicle, that person may not have a right to enter another area in the same location.[8] The "knowingly" mental state requires that the defendant at least be aware to a practical certainty that the identity of the location is a dwelling, building, land, watercraft, or motor vehicle.

Paragraphs (a)(2), (b)(2), and (c)(2) state that the proscribed conduct must be done "[w]ithout a privilege or license to do so under civil law."[9] Determining criminal liability for trespass depends on a wide array of non-criminal laws[10] to establish whether a person is "[w]ithout a privilege or license to do so under civil law."[11] In some instances, it may be obvious that a person has a right to be present.[12] However, particularly where there are competing rights,[13] or where there is public access[14] to a given parcel, building, or vehicle, it may be less clear whether an individual is legally

[8] For example, a retail store may give members of the general public effective consent to enter the floor room to shop and simultaneously withhold consent to enter a locked storage room in the rear of the store.

[9] A license may be specific or general and need not be communicated directly to the accused. For example, a private homeowner may be indifferent to children using her yard as a shortcut to and from school. A child who uses the yard for that purpose does not commit a trespass.

[10] The determination of whether a person is without a privilege or license under civil law to enter a location may depend on property law, contract law, family law, civil procedure, or other legal sources. For example, a landlord who seeks to evict a tenant must follow the notice and hearing requirements that govern evictions and may not instead have the tenant arrested and removed pursuant to the revised trespass statute. *See generally* D.C. Code § 42-3505, et seq.

[11] *See Spriggs v. United States*, 52 A.3d 878, n. 2 (D.C. 2012) (explaining, "The law relating to occupancy and the procedures required to resolve disputes is complicated with respect to trespassers, guests, roomers, lodgers, licensees, and true tenants, including holdover tenants.").

[12] Consider, for example, a person who owns and inhabits a home or a person who is shopping a local store that is open to the public.

[13] Compare, for example, a roommate who bars another roommate's paramour from a shared apartment with a situation where a parent bars a teenage child's paramour from a shared apartment. *See, e.g., Saidi v. United States*, 110 A.3d 606, 611-12 (D.C. 2015) (discussing the authority of one co-occupant to countermand the invitation of another co-occupant).

[14] When public property is involved, the court has previously explained, "[O]ne must be without legal right to trespass upon the property in question." *Leiss v. United States*, 364 A.2d 803, 806 (D.C. 1976). The court construed the current unlawful entry statute to require "some additional specific factor establishing the party's lack of a legal right to remain," so as to protect a citizens First Amendment rights by ensuring that his "otherwise lawful presence is not conditioned upon the mere whim of a public official." Accepted "additional specific factors" include: a published WMATA free speech regulation (*O'Brien v. United States*, 444 A.2d 946 (D.C. 1982)), the issuance of a Capitol police order (*Abney v. United States*, 616 A.2d 856 (D.C. 1992)), the existence of a chain that separated a tourist line from the White House lawn (*Carson v. United States*, 419 A.2d 996, 998 (D.C. 1980)), a "pair of gates which WMATA personnel closed every night at the conclusion of the day's business," (*United States v. Powell*, 563 A.2d 1086 (D.C. 1989)), and a regulation prohibiting sitting or lying down combined with a police officer's warning that the defendant was in violation of the regulation (*Berg v. United States*, 631 A.2d 394, 399 (D.C. 1993)). However, additional specific factors that the DCCA has rejected includes: closing early the public buildings early in response to the defendant-protestors themselves (*Wheelock v. United States*, 552 A.2d 503, 505 (D.C. 1988)), and an invalid arrest under a different statute (*Hasty v. United States*, 669 A.2d 127, 135 (D.C. 1995)).

licensed to enter or remain. Even if a person apparently has obtained permission to enter or remain, the means by which the person obtained permission may render an entry unlawful.[15] Or, a person may commit a trespass by unlawfully exceeding the scope of a permission that is limited in time, place, or purpose.[16] Per the rule of construction in RCC § 22E-207, the "knowingly" mental state also applies to paragraphs (a)(2), (b)(2), and (c)(2), requiring the defendant to be at least aware to a practical certainty or consciously desire that his or her presence at the location is unlawful.[17]

Paragraph (d)(1) cross-references the U.S. Constitution, the District's First Amendment Assemblies Act, and the District's Open Meetings Act. This conflict-of-laws provision is intended to encourage readers to consider what First Amendment polices, if any, are implicated by prosecutions of the offense and makes clear that this language leaves the Acts unchanged. Not all conduct involved in the offense, of course, will implicate First Amendment rights.

Paragraph (d)(2) codifies the proof requirements in cases alleging unlawful entry onto the grounds of public housing. Where the government seeks to prove unlawful entry premised on a violation of a District of Columbia Housing Authority ("DCHA") barring notice,[18] it must prove that the barring notice was issued for a reason described in DCHA regulations.[19] Additionally, the government must offer evidence that the DCHA official who issued the barring notice had an objectively reasonable basis for believing that the criteria identified in the relevant regulation were satisfied.[20] Even if sufficient cause for barring in fact exists, the issuance of a DCHA barring notice without objectively reasonable cause will render the notice invalid.[21]

Paragraph (d)(3) excludes from trespass liability the failure to pay an established transit fare to the Washington Metropolitan Area Transit Authority. Such conduct is punished exclusively under D.C. Code § 35-252.

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[15] For example, a person who obtained permission by making a coercive threat may nevertheless commit a trespass.

[16] For example, a person who obtains permission to enter a home for the purpose of completing a repair may commit a trespass by instead (or additionally) entering another part of the home unrelated to the repair.

[17] For example, an investigative journalist who gains entry by going undercover does not commit a trespass unless she is practically certain that she does not have a privilege or license to do so under civil law.

[18] This means any temporary, extended, or permanent notice barring a person from a location that is owned, operated, developed, administered, or financially assisted by the Department of Housing and Urban Development or District of Columbia Housing Authority. It includes notices issued by parties other than DCHA officials, including property managers and law enforcement officers.

[19] *See* 14 DCMR § 9600, et seq.

[20] *Winston v. United States*, 106 A.3d 1087, 1090 (D.C. 2015) (reversing a conviction where the defendant was barred from public housing for being an unauthorized person without first verifying whether the defendant was the guest of a resident.)

[21] Consider, for example, the facts in *Winston v. United States*, 106 A.3d 1087 (D.C. 2015). A security guard observed a non-resident on the grounds of a public housing complex unaccompanied by a resident and, based on this information alone, barred Mr. Winston as unauthorized, pursuant to 14 DCMR § 9600.4. The officer's actions were found to be objectively unreasonable because no steps were taken to verify that Mr. Winston was not a guest of a resident, permitted to enter pursuant to 14 DCMR § 9600.2. Accordingly, the barring notice was ruled invalid and the violation of the barring notice did not amount to an unlawful entry. It was deemed of no consequence whether Mr. Winston was, in fact, a guest or an unauthorized person.

Subsection (e) specifically provides that a factfinder may infer that a person lacks a privilege or license to enter or remain in an otherwise vacant[22] location when there are at least two indicia of unlawful entry. The premises must show signs of forced entry[23] and either be secured in a manner that reasonably conveys that it is not to be entered[24] or display signage that is reasonably visible prior to or outside the location's points of entry that says "no trespassing" or similarly indicates that a person may not enter.

Subsection (f) provides a right to a jury trial for defendants charged with trespass or attempted trespass onto or into public and quasi-public spaces. The District has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve exercise of civil liberties.[25] Paragraph (f)(1) authorizes a trial by jury for locations that are owned or occupied by a government,[26] government agency,[27] or government-owned corporation.[28] This includes private areas within publicly owned buildings and public buildings at the time they are closed to the public.[29] Paragraph (f)(2) authorizes a trial by jury for violations of DCHA barring notices.

Subsection (g) provides the penalties for each grade of the offense. [RESERVED.]

Subsection (h) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised trespass statute changes current District law in five main ways.*

First, the revised offense includes three penalty gradations. Current law separately criminalizes, with three different penalties, unlawful entry into a dwelling, building, or other property,[30] and unlawful entry of a motor vehicle.[31] In contrast, the revised trespass offense includes both real property and vehicles, but grades intrusions into dwellings more severely than intrusions into other buildings, which in turn are

[22] Here, "vacant" means that the property is uninhabited, not merely unoccupied at a particular moment in time.

[23] Signs of forced entry are not limited to broken doors or windows. *See Dist. of Columbia v. Wesby*, 138 S. Ct. 577 (2018) (finding it was objectively reasonable for police to believe partygoers entered a near-empty house unlawfully when they scattered at first sign of police, they claimed to be having bachelor party with no bachelor, they gave vague and implausible responses to who had given them permission to be in the home, the source of their claimed invitation admitted that she had no right to be in the house, and the owner confirmed that fact).

[24] For example, boarding up the property or locking a gate or entryway to the property may be means of reasonably conveying that the public is not free to enter.

[25] *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.").

[26] E.g., District of Columbia, federal government.

[27] E.g., Washington Metropolitan Transit Authority.

[28] E.g., Amtrak.

[29] For example, a defendant is entitled to a trial by jury if he is alleged to have trespassed into a café inside a courthouse or a museum after hours. *See Frey v. United States*, 137 A.3d 1000, 1004 (D.C. 2016) (explaining that the court must focus on the public or private character of the building as a whole, not on the time of entry).

[30] D.C. Code § 22-3302 (providing a 180-day penalty for trespass of private buildings and a 6-month penalty for trespass of public buildings).

[31] D.C. Code § 22-1341 (providing a 90-day penalty).

graded more severely than intrusions on land and vehicles. This change logically reorganizes the revised offenses and improves the consistency and proportionality of the revised offenses.

Second, the revised statute punishes an attempt to trespass differently from a completed trespass. Current D.C. Code § 22-3302 punishes an attempt to trespass the same as a completed trespass. In contrast, the revised offense punishes attempted trespass in a manner consistent with other revised offenses, relying on the general part's common definition of attempt[32] and penalty for an attempt.[33] This change improves the consistency and proportionality of the revised offenses.

Third, under the revised trespass statute, the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "knowingly" or with "intent" due to his or her self-induced intoxication. The current unlawful entry statutes are silent as to the availability of an intoxication defense, however, the DCCA has characterized the current statute is a general intent crime.[34] Under the RCC trespass statute, a defendant will be able to raise and present relevant and admissible evidence in support of a claim of that voluntary intoxication prevented the defendant from forming the knowledge or intent required to prove a trespass. Likewise, where appropriate, a defendant will be entitled to an instruction on intoxication.[35]

Fourth, the permissive inference in the revised offense requires that the affected property be vacant and shows signs of forced entry. Current D.C. Code § 22-3302 provides, "The presence of a person in any private dwelling, building, or other property that is otherwise vacant and boarded-up or otherwise secured in a manner that conveys that it is vacant and not to be entered, or displays a no trespassing sign, shall be prima facie[36] evidence that any person found in such property has entered against the will of the person in legal possession of the property." This language is unclear as to whether the location must be vacant if it displays a no trespassing sign, and there is no case law on point. The current D.C. Code statute, however, clearly does not require evidence of forced entry as part of the permissive inherence. Legislative history indicates that the permissive inference was added to "make it easier to arrest unlawful occupants on vacant

[32] RCC § 22E-301(a).
[33] RCC § 22E-301(c)(1).
[34] *See Ortberg*, 81 A.3d at 305.
[35] These results are a product of the logical relevance principle set forth in RCC § 22E-209(a) and the fact that knowledge and intent is a mental state susceptible to negation by self-induced intoxication. *See* RCC § 22E-209(b).
[36] The phrase "prima facie" is not defined by statute or in case law interpreting the current unlawful entry statutes. However, the same phrase, in the context of the bail reform act (D.C. Code § 22-1327), has been construed as "a permissive inference, not a presumption." *Trice v. United States*, 525 A.2d 176, 182 (D.C. 1987); see also *Raymond v. United States*, 396 A.2d 975, 976-77 ("although the wording…may be read to imply that the inference of willfulness is mandatory…the trier of fact has merely been permitted and not required to infer willfulness. We conclude that this instruction, incorporating a permissive inference, properly construes the statute."). As the phrase may be unnecessarily confusing to lawyers and lay people alike, the revised offense uses more straightforward language to convey that the inference is optional. This approach appears to be in line with current District practice. *See* D.C. Crim. Jur. Instr. § 5.401 ("You may, but you are not required to, presume that [name of defendant] entered the property against the will" of the lawful occupant.).

property."[37] In contrast, the inference in the revised offense requires signs of forced entry, to ensure that the inference meets the legal standard of being an indicator that it is "more likely than not" that the accused is acting without a privilege or license to do so.[38] A homeowner, real estate agent, or repair person who enters a vacant location that displays a "no trespassing" sign should not be able to be found guilty without further evidence of wrongdoing. This change improves the proportionality and may improve the constitutionality of the revised offense.

Fifth, the revised offense confers a right to a trial by jury for persons who are accused of trespassing onto or into government owned or occupied housing, or in violation of a District of Columbia Housing Authority barring notice. Current D.C. Code § 22-3302(b) generally provides a jury trial right (by providing a 6-month penalty) when a person enters or attempts to enter a public building or other property. However, D.C. Code § 22-3302(a) more specifically defines as a "private dwelling" (not subject to a jury trial demand) as including "housing that is owned, operated, or financially assisted by the District of Columbia Housing Authority." Legislative history indicates that this jury trial right to public buildings or other property was conferred to provide greater public scrutiny where First Amendment concerns may be at issue.[39] In contrast, the revised statute extends the right to a jury trial to persons accused of violating a DCHA barring notice. Although visiting public housing does not constitute protected speech as in other public fora,[40] other civil rights such as freedom of movement, freedom of intimate association, due process, and equal protection may be implicated.[41] The District has generally recognized a heightened need to provide jury trials to defendants accused of crimes that may involve exercise of civil liberties.[42] This change improves the proportionality of the revised offense.

Beyond these five substantive changes to current District law, three other aspects of the revised trespass statute may constitute a substantive change of law.

First, the revised trespass statute specifies knowledge as the culpable mental state required for all offense elements. The current District statutes do not specify a culpable mental state for any element of the unlawful entry on property or unlawful entry of a motor vehicle offenses. The District of Columbia Court of Appeals ("DCCA") has

[37] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 11.
[38] *See Leary v. United States*, 395 U.S. 6 (1969); *Reid v. United States*, 466 A.2d 433, 435-36 (D.C. 1983).
[39] Report on Bill 18-151, the "Public Safety and Justice Amendments Act of 2009," Council of the District of Columbia Committee on the Judiciary (June 29, 2009) (statement of Patricia A. Riley, Special Counsel to the United States Attorney for the District of Columbia: "[Trespass], like other six-month offenses, was apparently overlooked when one-year misdemeanors were reduced to 180 days in the Misdemeanor Streamlining Act of 1994. It is time to fix it. Concern has been expressed about eliminating a jury trial particularly in protester cases…Such cases would continue to be tried to a jury under the proposed amendment.").
[40] *Virginia v. Hicks*, 539 U.S. 113 (2003).
[41] *See, e.g., Winston v. United States*, 106 A.3d 1087, n. 12 (D.C. 2015).
[42] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Committee on the Judiciary (April 28, 2006) at pg. 7 ("Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties.").

generally said that trespass is a general intent crime,[43] while also stating that it must be proven that the actor "knew or should have known" that entry was unwanted,[44] and also upholding a requirement that the actor "entered, or attempted to enter the property voluntarily, on purpose, and not by mistake or accident." [45] In addition, the court also has consistently recognized that a person who holds a bona fide belief that she has a right to remain does not commit a trespass.[46] To resolve these ambiguities, the revised statute requires a culpable mental state of knowingly, using the RCC standard definition. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[47] This change improves the consistency of the revised offense and the proportionality of penalties.

Second, under the revised trespass offense, criminal liability turns on whether the accused acted without privilege or license to do so under civil law. Current D.C. Code § 22-3302 prohibits entering property "against the will of the lawful occupant or of the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit…" An array of DCCA cases have construed, in light of specific fact patterns, the meaning of, and exceptions to, the terms "against the will,"[48] "the lawful occupant,"[49] "the person lawfully in charge thereof,"[50] and "without lawful authority."[51] Current D.C. Code § 22-1341 prohibits entering or

[43] *Ortberg v. United States*, 81 A.3d 303, 305 (D.C. 2013); *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984) (requiring "general intent" and "the absence of an exculpatory state of mind").

[44] *See Ortberg v. United States*, 81 A.3d 303, 308 (D.C. 2013); *see also Ronkin v. Vihn*, 71 F. Supp. 3d 124, 133 (D.D.C. 2014).

[45] *See Ortberg v. United States*, 81 A.3d 303, 309 (D.C. 2013).

[46] *McGloin v. United States*, 232 A.2d 90, 91 (D.C. 1967); *Gaetano v. United States*, 406 A.2d 1291, 1294 (D.C. 1979); *Darab v. United States*, 623 A.2d 127, 136 (D.C. 1993).

[47] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted.)).

[48] *Compare Bowman v. United States*, 212 A.2d 610, 611 (D.C. 1965) ("the entry must be against the expressed will, that is, after a warning to keep off") *with McGloin v. United States*, 232 A.2d 90, 90 (D.C. 1967) ("*Bowman* must be read in the light of the facts of that case. It concerned an unlawful entry into a restricted area of the Union Station, a semi-public building. In such a building the public generally is permitted to enter and if there are portions which are not obviously private or restricted, it is only reasonable that warning of some kind be given the public to stay out. Even in a semi-public or public building there are portions obviously not open to the public; and surely no one would contend that one may lawfully enter a private dwelling house simply because there is no sign or warning forbidding entry.").

[49] *See Smith v. Unite States*, 445 A.2d 961, 964 (D.C. 1982) (finding a secret service agent is a lawful occupant of the White House); *Moore v. United States*, 136 A.2d 868, 869 (D.C. 1957) (explaining that whether the complainant is a lawful occupant is a question for the jury); *see also Bodrick v. United States*, 892 A.2d 1116, 1121 (D.C. 2006) (explaining that, in the case of a stay away order, a person's interest as leaseholder is subordinate to her occupancy and use).

[50] *See Whittlesey v. U. S.*, 221 A.2d 86, 91 (D.C. 1966) ("[A] person may be lawfully in charge even though there are other persons who could, if they chose to do so, countermand or override his authority."); *Hemmati v. United States*, 564 A.2d 739, 746 (D.C. 1989) ("[T]he person in charge may act through an agent in ordering someone to leave.") (citing *Grogan v. United States*, 435 A.2d 1069, 1071 (D.C.1981)); *Woll v. United States*, 570 A.2d 819, 822 (D.C. 1990) (finding a lessee's right to the use of a corridor is sufficient to bring her within the meaning of "person lawfully in charge thereof.").

[51] *See, e.g., Dent v. United States*, 271 A.2d 699, 700 (D.C. 1970) (affirming a conviction where defendant was told "never to come back to the apartment, since he didn't know how to act.").

being inside a motor vehicle "without the permission of the owner or person lawfully in charge," and lists a few statutory exceptions where permission is not needed.[52]

The revised statute more broadly refers to whether an actor has a "privilege or license"[53] for entry (or remaining) under civil law.[54] This standard more plainly alludes to the many instances in which a person is entitled to occupy a particular space or vehicle over the express objection of an owner, occupant, manager, or security guard.[55] Unlike theft[56] (requiring unlawful taking) and burglary[57] (requiring intent to commit a crime), trespass criminalizes mere presence. Considerations of freedom of expression, assembly, movement, and association are, therefore, of paramount concern. Accordingly, criminality turns entirely on the entitlements of accused and not merely on the express objection of others. This change improves the clarity and consistency of the revised statute.

Third, the revised statute's permissive inference provision includes an explicit reasonableness requirement. The current trespass statute's evidentiary inference applies to a "property that is otherwise vacant and boarded-up or otherwise secured in a manner that conveys that it is vacant and not to be entered, or displays a no trespassing sign…" There is no case law on what manner of securing conveys a location is vacant or what standards may apply to the display of a no trespassing sign. To resolve these ambiguities, the revised permissive inference requires the manner in which the premises are secured to "reasonably convey" that it is not to be entered, or that the "no trespassing" signage be "reasonably visible" prior to or outside the property's points of entry. The reasonableness requirements provide courts with a degree of flexibility in assessing whether the manner of securing or signage is sufficient to infer that the defendant was on

[52] D.C. Code § 22-1341(b) ("Subsection (a) of this section shall not apply to: (1) An employee of the District government in connection with his or her official duties; (2) A tow crane operator who has valid authorization from the District government or from the property owner on whose property the motor vehicle is illegally parked; or (3) A person with a security interest in the motor vehicle who is legally authorized to seize the motor vehicle.").

[53] The phrasing "license or privilege" follows the Model Penal Code and many other jurisdictions' use. *See* § 21.2(a) Nature of the intrusion, 3 Subst. Crim. L. § 21.2(a) (3d ed.). The RCC does not intend to limit construction of these terms to that of any other particular jurisdiction, but the basic distinction held by some jurisdictions seems appropriate that "licensed" refers to a consensual entry while "privileged" refers to a nonconsensual entry. *Id.*

[54] The term "civil law" is intended to refer broadly to non-criminal law. Black's Law Dictionary (10th ed. 2014).

[55] For example, current D.C. Code § 22-1341 includes several exclusions from liability for the government, tow truck operators, and re-possessors to enter a motor vehicle without the owner's permission. Similarly, there are many legitimate reasons for a person to occupy real property without permission from the titleholder. For example, a person may have rights in contract or landlord-tenant law (D.C. Code § 42-3505.01); under local or federal housing regulations (14 DCMR § 9600 et seq.; *Winston v. United States*, 106 A.3d 1087, 1090 (D.C. 2015)); by private necessity (*Saidi v. United States*, 110 A.3d 606, 611-12 (D.C. 2015)), or as protected by the First Amendment or the District's protections of traditional public forums (*O'Brien v. United States*, 444 A.2d 946 (D.C. 1982); D.C. Code § 5-331.01 et seq.; D.C. Code § 2-575). *See also Bodrick v. United States*, 892 A.2d 1116, 1121 (D.C. 2006) (explaining that, in the case of a stay away order, a person's interest as leaseholder is subordinate to her occupancy and use).

[56] *See* RCC § 22E-2101.

[57] *See* RCC § 22E-2701.

notice that the entry was unlawful.[58] The reasonableness requirements are an objective matter, to be determined from the perspective of an ordinary person entering or remaining in the location. Of course, even if the reasonableness requirements are not met, the government may prove the defendant's guilt without the benefit of the permissive inference.[59] This change clarifies the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

First, the revised offense replaces the reference to "other property" in the current unlawful entry on property statute with a specific list of locations where trespass may occur. The current statute[60] protects "any private dwelling, building, or other property" as well as "any public building, or other property," and parts thereof. The DCCA has not provided clear or comprehensive guidance, however, on how broadly "or other property" should be read.[61] The revised trespass offense clarifies that the protected locations are dwellings, buildings, land, watercraft, and motor vehicles. Use of other property[62] without a privilege or license under civil law may be punishable in the RCC as unauthorized use of property.[63]

Second, the revised statute replaces the phrase "refuses to quit" with the more modern "remains in." This does not appear to be a substantive change, merely a stylistic one supported by modern usage.[64]

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[58] Depending on the particular facts of the case, the reasonableness requirement may narrow the applicability of the permissive inference as compared to current law. *E.g.*, a single "No trespassing" sign that is obscured or at one entrance of a building with multiple entrances accessible to the public may not "reasonably" indicate that the building is not to be entered, but arguably may provide adequate notice under the current statute. On the other hand, the reasonableness requirement in the revised offense also may expand the applicability of the permissive inference, as compared to the current statute. For example, sign that read, "Employees Only," "Keep Out," or "Authorized Personnel Only" would all be included within the ambit of the RCC permissive inference, while they might not be included within the current statute.

[59] *See, e.g., Culp v. United States*, 486 A.2d 1174 (D.C. 1985) (Where police officers observed defendant inside a vacant building, and had reason to believe that defendant did not belong there, and the property itself revealed indications of a continued claim of possession by the owner or manager, police had probable cause to arrest defendant for unlawful entry); *Smith v. United States*, 281 A.2d 438 (D.C. 1971) (Where a construction company, the occupant of lot, had posted signs indicating its rightful control of the site, it had never authorized defendant to use the site at night when no one was present, and where site was protected at night by locked gates and a mesh chain link fence topped by barbed wire, there was no need that an explicit "keep out" sign be posted to establish that defendant was acting against the will of the construction company when he entered the site).

[60] D.C. Code § 22-3302.

[61] The DCCA has affirmed convictions for intrusions into places other than buildings or dwellings, including a Home Depot parking lot (*Gray v. United States*, 100 A.3d 129 (D.C. 2014)), the steps of the United States Capitol (*Abney v. United States*, 616 A.2d 856 (D.C. 1992)), the area immediately surrounding the Farragut West Metro station *(United States v. Powell*, 536 A.2d 1086 (D.C. 1989)), and the White House grounds (*Leiss v. United States*, 364 A.2d 803 (D.C. 1976)).

[62] For example, a bicycle.

[63] RCC § 22E-2102.

[64] The DCCA has used the term "remaining" in construing the elements of the offense. *Leiss v. United States*, 364 A.2d 803, 806 (D.C. 1976) (the offense prohibits "the act of entering or *remaining* upon any property when such conduct is both without legal authority and against the expressed will of the person lawfully in charge of the premises.") (emphasis added). *See also* § 21.2(a) Nature of the intrusion, 3 Subst.

Third, the revised offense includes 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.

Fourth, the revised statute codifies an exclusionary rule for violations of DCHA barring notices. In *Winston v. United States*, 106 A.3d 1087 (D.C. 2015), the DCCA required an objectively reasonable basis for believing that valid grounds exist to bar a person from public housing pursuant the regulations in 14 DCMR § 9600 et seq. Where a barring notice is issued incorrectly or arbitrarily—in that case, without first verifying that the person was not a guest—violation of the notice does not amount to a criminal unlawful entry.

Fifth, the revised trespass offense clarifies that fare evasion may not be prosecuted as a trespass. The Fare Evasion Decriminalization Amendment Act of 2018 provides that fare evasion may be prosecuted as a civil infraction only, not as trespass or theft.[65]

Sixth, the statutory text of the revised offense does not list the exclusions from liability that are enumerated in current D.C. Code § 22-1341(b).[66] The revised offense's requirement that the accused know that they are acting without privilege or license under civil law renders this language superfluous.

Crim. L. § 21.2(a) (3d ed.) ("The 'enters or remains' language of the Model Penal Code is used in the great majority of the state criminal trespass statutes…").

[65] Prior to this legislation being enacted, fare evasion may have been prosecuted as a trespass. *See Bowman v. U.S., 212 A.2d 610* (D.C. 1965) (finding defendants were properly convicted under statute for unlawful entry where they, without a ticket and intent to board a train, had entered restricted area despite sign and public announcements whereby only persons having tickets were permitted through the gate to the restricted area.)

[66] "Subsection (a) of this section shall not apply to: (1) An employee of the District government in connection with his or her official duties; (2) A tow crane operator who has valid authorization from the District government or from the property owner on whose property the motor vehicle is illegally parked; or (3) A person with a security interest in the motor vehicle who is legally authorized to seize the motor vehicle."

RCC § 22E-2701. Burglary.

Explanatory Note. *This section establishes the burglary offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes knowingly and fully entering or surreptitiously remaining in certain locations without a privilege or license to do so under civil law, with intent to commit a crime inside. The offense is graded based on the location at issue. The revised burglary offense is closely related to trespass,[1] with the primary difference that trespass does not require that the defendant intend to commit a crime on the premises. The revised burglary offense replaces the burglary statute in the current D.C. Code.[2]*

Paragraphs (a)(2), (b)(1), and (c)(1) require that the defendant "fully enters or surreptitiously remains in" a given place. The "fully enters" element requires complete entry of the body, and evidence of partial entry of the body is insufficient proof for a completed burglary.[3] The alternate phrase "surreptitiously remains in" creates liability for a person who hides[4] on property with knowledge that he or she has no permission to be there.[5] Paragraphs (a)(1), (b)(1), and (c)(1) also specify the culpable mental state for these elements to be knowledge, a term defined at RCC § 22E-206 and here requiring that the defendant must at least be aware to a practical certainty that his or her conduct "enters or remains in" the prohibited space.

Paragraphs (a)(2), (b)(1), and (c)(1) also describe the places where a burglary can occur. Burglary into an occupied dwelling is punished more severely than burglary into an unoccupied dwelling[6] or into an occupied building, which are punished more severely than burglary into an unoccupied building[7] or a business yard. The terms "dwelling," "building," and "business yard" are defined in RCC § 22E-701.[8] The phrase "or part thereof" makes clear that while a person may have a right to enter one part of a dwelling, building, or business yard, that person may not have a right to enter another area in the

[1] RCC § 22E-2601.
[2] D.C. Code § 22-801.
[3] Fact patterns involving a person's nonconsensual reaching—but not full body entry—into a dwelling, building, or business yard with intent to commit a crime inside may constitute attempted burglary (e.g., a person caught on top of a fence to a business yard) or an attempted or completed form of the predicate crime (e.g., theft, where a person reaches through a window to take an object from a building).
[4] A person who remains without hiding may commit a trespass, in violation of RCC § 22E-2601, but not a burglary. Consider, for example, a person who enters a store open to the public, makes a scene and is asked to leave by a manager, and who thereafter refuses and makes a criminal threat against the manager—such a person may be liable for trespass and criminal threats, but not burglary.
[5] A person may be notified that his or her presence is unlawful by someone other than the titleholder. *See, e.g., Smith v. United States*, 445 A.2d 961, 964 (D.C. 1982) (a Secret Service officer can demand that protestors leave the grounds of the White House, even though the officer was not the highest ranking officer at the White House); *Whittlesey v. United States*, 221 A.2d 86 (D.C. 1966) (President need not personally order protestors to leave the White House grounds); *Hemmati v. United States*, 564 A.2d 739, 746 (D.C. 1989) ("The evidence in this case was sufficient to permit a finding that Joan Drummond was in charge of the office and that she exercised her authority through her agent, Carol Kiser."); *Fatemi v. United States*, 192 A.2d 525, 528 (D.C. 1963) (an embassy minister asked intruder to leave); and *Grogan v. United States*, 435 A.2d 1069, 1071 (D.C. 1981) (a receptionist at an abortion clinic asked person to leave).
[6] Or, an occupied dwelling, when the defendant is not reckless as to occupancy.
[7] Or, an occupied building, when the defendant is not reckless as to occupancy.
[8] The term "dwelling" may include houseboats and other structures that are not buildings.

same location.[9] The "knowingly" mental state requires that the defendant at least be aware to a practical certainty that the identity of the location is a dwelling, building, or business yard.

Paragraphs (a)(3), subparagraphs (b)(1)(A) and (b)(1)(B), and paragraph (c)(2) state that the entering or remaining must be done "[w]ithout a privilege or license to do so under civil law."[10] Determining criminal liability for burglary depends on a wide array of non-criminal laws[11] to establish whether a person is "[w]ithout a privilege or license to do so under civil law."[12] In some instances, it may be obvious that a person has a right to be present.[13] However, particularly where there are competing rights,[14] or where there is public access[15] to a given building or business yard, it may be less clear whether an individual is legally licensed to enter or remain. Even if a person apparently has obtained permission to enter, the means by which the person obtained permission may render an entry unlawful.[16] Or, a person may commit a burglary by unlawfully exceeding the scope

[9] For example, a retail store may give members of the general public effective consent to enter the floor room to shop and simultaneously withhold consent to enter a locked storage room in the rear of the store.

[10] A license may be specific or general and need not be communicated directly to the accused.

[11] The determination of whether a person is without a privilege or license under civil law to enter a location may depend on property law, contract law, family law, civil procedure, or other legal sources. For example, a landlord who seeks to evict a tenant must follow the notice and hearing requirements that govern evictions and may not instead have the tenant arrested and removed pursuant to the revised trespass statute. *See generally* D.C. Code § 42-3505, et seq.

[12] *See Spriggs v. United States*, 52 A.3d 878, n. 2 (D.C. 2012) (explaining, "The law relating to occupancy and the procedures required to resolve disputes is complicated with respect to trespassers, guests, roomers, lodgers, licensees, and true tenants, including holdover tenants.").

[13] Consider, for example, a person who owns and inhabits a home or a person who is shopping a local store that is open to the public.

[14] Compare, for example, a roommate who bars another roommate's paramour from a shared apartment with a situation where a parent bars a teenage child's paramour from a shared apartment. *See, e.g., Saidi v. United States*, 110 A.3d 606, 611-12 (D.C. 2015) (discussing the authority of one co-occupant to countermand the invitation of another co-occupant).

[15] When public property is involved, the court has previously explained, "[O]ne must be without legal right to trespass upon the property in question." *Leiss v. United States*, 364 A.2d 803, 806 (D.C. 1976). The court construed the current unlawful entry statute to require "some additional specific factor establishing the party's lack of a legal right to remain," so as to protect a citizens First Amendment rights by ensuring that his "otherwise lawful presence is not conditioned upon the mere whim of a public official." Accepted "additional specific factors" include: a published WMATA free speech regulation (*O'Brien v. United States*, 444 A.2d 946 (D.C. 1982)), the issuance of a Capitol police order (*Abney v. United States*, 616 A.2d 856 (D.C. 1992)), the existence of a chain that separated a tourist line from the White House lawn (*Carson v. United States*, 419 A.2d 996, 998 (D.C. 1980)), a "pair of gates which WMATA personnel closed every night at the conclusion of the day's business," (*United States v. Powell*, 563 A.2d 1086 (D.C. 1989)), and a regulation prohibiting sitting or lying down combined with a police officer's warning that the defendant was in violation of the regulation (*Berg v. United States*, 631 A.2d 394, 399 (D.C. 1993)). However, additional specific factors that the DCCA has rejected includes: closing early the public buildings early in response to the defendant-protestors themselves (*Wheelock v. United States*, 552 A.2d 503, 505 (D.C. 1988)), and an invalid arrest under a different statute (*Hasty v. United States*, 669 A.2d 127, 135 (D.C. 1995)).

[16] For example, a person who obtained permission by deceit may nevertheless commit a burglary. *See, e.g., McKinnon v. United States* 644 A.2d 438, 440 (D.C. 1994).

of a permission that is limited in time, place, or purpose.[17] Per the rule of construction in RCC § 22E-207, the "knowingly" mental state in paragraphs (a)(2), (b)(1) and (c)(1) also apply to the element "without a privilege or license," requiring the defendant to be at least aware to a practical certainty or consciously desire that his or her presence at the location is unlawful.

Paragraphs (a)(4), (b)(3), and (c)(3) require the defendant act "with intent to" commit one or more District crimes inside involving bodily injury, a sexual act, a sexual contact, confinement, loss of property, or damage to property. The terms "bodily injury," "sexual act," "sexual contact," and "property" are defined in RCC § 22E-701. "Intent" is a defined term in RCC § 22E-206 that here means here means the accused was practically certainty that his or her conduct constitutes a criminal offense under District of Columbia law. The defendant must have the intent to commit the crime at the moment he or she enters or begins to surreptitiously hide inside.[18] And, the Defendant must intend to commit the criminal harm in that location. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary that the accused attempted or completed the predicate offense, only that the accused believed to a practical certainty that he or she would attempt or complete the predicate offense.

Sub-subparagraph (b)(1)(B)(i) and subparagraph (c)(1)(B) specify that buildings and business yards must not be open to the general public at the time of the offense. "Open to the general public" is defined in RCC § 22E-701 to mean no payment or permission is required to enter. A person does not commit a burglary by entering a public space with intent to commit a crime.[19]

Paragraph (a)(1) and sub-subparagraph (b)(1)(B)(ii) provide heightened liability where a defendant is reckless as to a dwelling or building being occupied. "Recklessly" is defined in RCC § 22E-206 and here requires that the accused consciously disregard a substantial risk that the location is occupied by someone other than a participant in the burglary at the moment he or she enters or begins to surreptitiously hide inside.[20] Sub-subparagraph (b)(1)(B)(ii) further requires that a non-participant directly perceive the

[17] For example, a person who obtains permission to enter a home for the purpose of completing a repair may commit a burglary by instead (or additionally) entering another part of the home unrelated to the repair with intent to commit a crime.

[18] For example, a person who decides to steal an item after noticing it inside may commit a theft but not a burglary. *See* RCC § 22E-2101.

[19] For example, a person who enters a store during business hours with intent to steal and does steal may commit theft, but not burglary. *See* RCC § 22E-2101. A person who enters a tavern with intent to fight and does fight may commit an assault but not a burglary. *See* RCC § 22E-1202.

[20] Where an occupant returns home after the burglary commences and the burglary is immediately discovered, the offense is punished as second degree burglary only, not first degree. However, where an occupant returns home after the burglary commences and the burglar remains surreptitiously on the premises, the offense is punished as first degree burglary.

actor, by sight or sound or touch.[21] Entering a building undetected is punished as third degree burglary but not as second degree.[22]

Subsection (d) provides the penalties for each grade of the offense. [RESERVED.]

Subsection (e) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised burglary statute changes current District law in seven main ways.*

First, the revised burglary statute prohibits surreptitiously remaining in a specified location. Current D.C. Code § 22-801 punishes unlawfully entering but not unlawfully remaining. In contrast, the revised statute provides liability in instances where a person lawfully enters a location and then hides to facilitate commission of a crime at a later time.[23] This change eliminates an unnecessary gap in liability.

Second, the revised burglary statute requires fully entering or remaining. Although current D.C. Code § 22-801 does not define the term "enter," District case law that previously has held that the term includes entering with "any part of a person's body."[24] In contrast, the RCC punishes partial entry of the body or a camera, microphone, or other instrument held by an actor as trespass[25] but reserves the revised burglary statute's more severe penalties for instances in which the potential for harm to another person or property is greater. This change improves the organization and proportionality of the revised offenses.

Third, the revised burglary offense requires proof that the defendant's presence in the location is "without a privilege or license…under civil law"—i.e. trespassory. The current burglary statute does not require that the defendant's presence is otherwise unlawful.[26] The lack of a trespassory element in burglary leads to some counterintuitive outcomes. For example, a witness who enters a courthouse intending to commit perjury, a government official who enters her office intending to accept a bribe, a drug user who enters his friend's home to use drugs with his companion, and a shoplifter who enters a store intending to steal a candy bar would all be guilty of burglary under current District law, even though their presence in the specified location was invited. In contrast, the

[21] Where a building occupant observes a burglar remotely, through a camera system, the burglar commits a third degree burglary only, not second degree.

[22] Consider, for example, a person who enters the lobby and mailroom of a large building, undetected by an employee on the fifth floor.

[23] Consider, for example, a person enters a store during business hours and hides away, intending to steal from the store once it is closed.

[24] *Edelen v. United States*, 560 A.2d 527, 529 (D.C. 1989); *Davis v. United States*, 712 A.2d 482, 485 (D.C. 1998).

[25] RCC § 22E-2601.

[26] *United States v. Kearney*, 498 F.2d 61, 65 (D.C. Cir. 1974) ("It is thus apparent that since the District of Columbia first degree burglary statute makes it an offense to enter an occupied dwelling with intent to commit a crime therein and that such offense can be committed without a violation of the unlawful entry statute, the entry need not necessarily be against the will of the occupants."); *see also Spriggs v. United States*, 52 A.3d 878 (D.C. 2012) (affirming a conviction for burglary of an apartment where the defendant was himself staying); *Bodrick v. United States*, 892 A.2d 1116, 1120 (D.C. 2006) (affirming a conviction for burglary of a marital home after a separation and court order to stay away).

revised burglary statute requires that the defendant's presence in the location amount to a trespass. This change improves the clarity and proportionality of the revised offenses.

Fourth, the revised burglary offense includes three penalty gradations. The current burglary statute contains two gradations: first degree burglary, which punishes those who burgle a dwelling where another person is present;[27] and second degree burglary which punishes other invasions such as dwellings where no one is present, all other buildings, and the miscellaneous watercraft and railroad cars discussed below.[28] The revised burglary offense includes an intermediate gradation that applies in two circumstances: burglary of an unoccupied dwelling[29] and burglary of an occupied building. This change improves the proportionality of the revised offense.

Fifth, the first and second degrees of the revised burglary statute require recklessness as to a location being occupied at the time of the burglary[30] while knowledge is the required culpable mental state for all other elements of the offense besides an intent to commit a crime. Current D.C. Code § 22-801 is silent as to applicable the culpable mental states required, other than "intent" (undefined) to commit another crime at the time of the entry.[31] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[32] A reckless culpable mental state is consistent with a wide range of penalty enhancements in the RCC related to the complainant's characteristics,[33] and has been recognized by some authorities as an appropriate minimal basis for liability.[34] This change improves the clarity and completeness of the revised offense.

Sixth, the revised burglary offense only protects a stable, watercraft, or railroad car if it is being used as a dwelling[35] or is affixed to land. The current second degree burglary statute expressly protects any "stable…steamboat, canalboat, vessel, or other watercraft, [or] railroad car."[36] In contrast, although the RCC punishes a trespass onto any land, watercraft, or motor vehicle,[37] it punishes only burglary of dwellings, buildings, or business yards. "Building" is broadly defined to include any "structure affixed to land that is designed to contain one or more natural persons."[38] Unlike trespass, burglary is an

[27] D.C. Code § 22-801(a).
[28] D.C. Code § 22-801(b).
[29] Or, an occupied dwelling, when the defendant is not reckless as to occupancy.
[30] A person who is not at least reckless as to the presence of others in a location remains liable for burglary, but is subject to a lower penalty. This change improves the consistency and proportionality of the revised offenses.
[31] *See also* D.C. Crim. Jur. Instr. § 5.101.
[32] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted.)).
[33] *See, e.g.*, RCC § 22E-1202. Assault.
[34] *See Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (J. Alito, concurring in part and dissenting in part) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.").
[35] E.g., a berth in an Amtrak sleeping car.
[36] D.C. Code § 22-801(b).
[37] RCC § 22E-2601(c).
[38] RCC § 22E-701.

inchoate offense that, in practice, provides a location enhancement for confined places where a person may be surprised by a burglar and where a person there is a special expectation of privacy. This change improves the organization and proportionality of the revised offenses.

Seventh, the revised burglary offense requires intent to commit a District crime involving bodily injury, a sexual act, a sexual contact, confinement, loss of property, or damage to property. Current D.C. Code § 22-801 refers broadly to "intent to break and carry away any part thereof, or any fixture or other thing attached to or connected thereto or to commit *any* criminal offense" (emphasis added). However, a least one District Court opinion has interpreted this statutory language to be narrower,[39] requiring that the nature of the intended criminal offense be reasonably related to the sanctity of the place entered—usually a crime of violence against persons or a crime involving the taking or destruction of property.[40] The same court has declined to state that the District's burglary statute reaches an intent to commit *any* misdemeanor[41] and specifically held that trespass may not itself be the basis for a burglary conviction.[42] In contrast, the revised statute limits burglary to specified types of crimes. The terms "bodily injury," "sexual act," "sexual contact," and "property" are defined in RCC § 22E-701, consistent with the use of these terms in other parts of the revised code. This change improves the clarity, consistency, and proportionality of the revised offense.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

First, by use of the word "inside," the revised burglary statute clarifies that the defendant must intend to commit the offense within the trespassed location. Although this requirement does not appear in the statutory text, the DCCA has included this requirement in some of its recitations of burglary's elements.[43] The purpose is to exclude

[39] *United States v. Frank*, 225 F. Supp. 573 (D.D.C 1964) (dismissing a burglary charge premised on intent to operate a radio apparatus without a station license, in violation of the Federal Communications Act).
[40] *United States v. Frank*, 225 F. Supp. 573, 576 (D.D.C 1964) (rejecting a broader reading of "any criminal offense" that would criminalize as housebreaking entry of any room with an intent to violate the anti-trust laws or the regulations of the Securities & Exchange Commission, for instance).
[41] *See United States v. Fox*, 433 F.2d 1235, 1236-37 (D.C. Cir. 1970).
[42] *See United States v. Melton*, 491 F.2d 45, 47 (D.C. Cir. 1973) ("The element that distinguishes burglary from unlawful entry is the intent to commit a crime once unlawful entry has been accomplished. To allow proof of unlawful entry, ipso facto, to support a burglary charge is, in effect, to increase sixty-fold the statutory penalty for unlawful entry."); *Lee v. United States*, 37 App. D.C. 442, 445 (D.C. Cir. 1911) ("To constitute the crime of housebreaking, it is necessary to show an unlawful entry, with the intent to commit *some other* offense") (emphasis added).
[43] *Shelton v. United States*, 505 A.2d 767, 769 (D.C. 1986) ("A conviction for burglary requires a finding that the defendant entered the premises having already formed the intent to commit a criminal offense inside."); *Marshall v. United States*, 623 A.2d 551, 557 (D.C. 1992) ("In order to prove armed first degree burglary, the government must establish beyond a reasonable doubt, an armed entry (by appellant or by a principal aided and abetted by appellant) into an occupied dwelling with the intent to commit a crime therein. The intent to commit the crime inside the premises must have been formed by the time of the entry.") (internal citations omitted); *Lee v. United States*, 699 A.2d 373, 383 (D.C. 1997) ("To prove burglary, the government must establish that the defendant entered the premises having already formed an intent to commit a crime therein.") (internal quotations and citations omitted).

from liability instances where a person passes through one property *en route* to the property where he or she intends to commit the crime.[44]

Second, the revised burglary statute specifies that participants in the crime cannot be the "other person" required in first-degree and second-degree burglary. The current statute is silent on this matter. The basis for treating burglaries of occupied places more seriously is the added danger and terror those occupants may experience. Such danger and terror are far less likely to occur if the other person present during the crime is an accomplice, co-conspirator, or aider and abettor.

Third, the revised burglary statute updates and modernizes the language of the offense in various other ways that do not change the scope of the offense. For instance, the revised offense simply eliminates a number of contradictory and redundant phrases.[45]

[44] For example, imagine adjacent houses A and B. A burglar plans to enter House B to steal property; but to do so, she knows she must cross over the backyard of House A to get to House B. She does so. Absent the requirement that the burglar must intend to commit an offense "therein," it appears that the burglar has actually committed burglary twice, once as to House A and once as to House B. Although counterintuitive, the burglar did trespass with intent to commit an offense when she entered the backyard of House A. Under the revised statute, the burglar would only be guilty of a trespass as to House A, and a burglary as to House B.

[45] The phrases are, "in the nighttime or in the daytime," which is pure surplusage; "break and enter, or enter without breaking," which is also surplusage; "room used as a sleeping apartment in any building," which is covered by the RCC's definition of dwelling; and "with intent to break and carry away any part thereof, or any fixture or other thing attached to or connected thereto," which is surplusage to the phrase "with intent to commit any criminal offense therein." D.C. Code § 22-801. In the case of second-degree burglary, "bank, store, warehouse, shop, stable," are redundant because each is covered by the broader term "building."

RCC § 22E-2702. Possession of Tools to Commit Property Crime.

Explanatory Note. *This section establishes the possession of tools to commit property crime offense for the Revised Criminal Code (RCC). The offense criminalizes possession of a tool designed or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door, with intent to use the tool to commit a property offense. The revised possession of tools to commit property crime statute replaces the possession of implements of crime[1] statute and a sentencing provision related to the statute[2] in the current D.C. Code.*

Paragraph (a)(1) specifies that the defendant must "possess" the prohibited item, a term defined at RCC § 22E-701. Paragraph (a)(1) also specifies the culpable mental state for paragraph (a)(1) of the offense to be knowledge, a term defined at RCC § 22E-206 to mean the defendant must be aware to a practical certainty that he possesses an item or items[3] that is a property crime tool. Paragraph (a)(1) specifies that the types of tools that are covered by the offense are limited to tools for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door.[4] The tools must be designed or specifically adapted for such use, and do not include unmodified, common, general use objects.[5]

Paragraph (a)(2) clarifies that the person must act "with intent to" use the tool to commit a District crime involving the trespass, misuse, taking, or damage of property. "Intent" is a term defined at RCC § 22E-206 that here means the defendant was practically certain that he or she would use the tool to commit a crime of the specified sort. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the defendant actually used the tool to commit a crime, only that the defendant was practical certainty that he or she would do so. The person did not have to be practically certain or have any culpable mental state about the elements of the target crime beyond being practically certain that the conduct that the tools would be used for was a District crime, and that the crime would involve the trespass, misuse, taking, or damage of property.

Subsection (b) specifies that attempted possession of tools to commit property crime is not an offense.

Subsection (c) establishes the penalty for this offense. [RESERVED.]

Subsection (d) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised possession of tools to commit property crime statute changes current District law in five main ways.*

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[1] D.C. Code § 22-2501.

[2] D.C. Code § 24-403.01(f)(3).

[3] Possession of multiple tools at a given time amounts to only one count of the possession of tools to commit property crime offense.

[4] *E.g.*, lock picks, lock shims, bolt-cutters, computer software to deactivate security systems, and specialty tools to slide under locked doors to open them from the inside.

[5] *E.g.*, an unmodified small (jeweler's) screwdriver would not be designed or specifically adapted for picking locks.

First, the revised statute changes the range of prohibited items by including tools that are designed or specifically adapted for "picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door" and by eliminating tools for picking pockets. The current statute only covers tools "for picking locks or pockets."[6] District case law has explicitly held that bolt-cutters, for example, are not tools covered by the current statute because they would destroy, not pick, a lock.[7] In contrast, the revised statute broadens the scope of the statute to include tools designed or specifically adapted for other purposes, including "cutting chains," which likely would include bolt-cutters. Such tools may commonly be used in gaining access to an object or location to commit a property crime. The revised statute reduces unnecessary gaps in the existing offense

Second, the revised offense limits the offense to tools "designed or specifically adapted for" the specified purposes. The current statute is silent as to whether the tool must be fashioned in a manner suited for the specified purposes of picking locks, etc. In contrast, the revised statute no longer covers objects that are not designed or specifically adapted for one of the stated purposes. This change eliminates liability for many common items carried by citizens that could be used for—but are not designed or specifically adapted for—picking locks or pockets.[8] This change clarifies and improves the proportionality of the revised offense.

Third, the revised statute eliminates the repeat offender penalty provision in the current statutes. In current law, the offense ordinarily is punishable by a maximum term of imprisonment of 180 days and a maximum fine of $1,000.[9] However, if the defendant has ever been previously convicted of the offense, or of any felony, the offense is punishable by a minimum term of imprisonment of one year, a maximum term of imprisonment of five years, and a maximum fine of $12,500.[10] By contrast, the revised offense is subject to a single, standard penalty classification, unless the RCC's general repeat offender penalty enhancement applies for having two or more prior convictions for a comparable offense.[11] This change improves the consistency and proportionality of revised statutes.

Fourth, the revised offense bars any attempt liability. Under current law, possession of implements of crime is subject to the general attempt statute.[12] In contrast, under the revised offense, even if a person satisfies the required elements for attempt liability under RCC § 22E-301 as to revised possession of tools to commit property crime, that person has committed no offense under the revised code. Completed possession of tools to commit property crime is already an inchoate crime, closely related

[6] D.C. Code § 22-2501.
[7] *In re J.W.*, 100 A.3d 1091, 1092-94 (D.C. 2014) (holding that bolt-cutters do not constitute tools for "picking" locks or pockets).
[8] *E.g.*, nail files, nail clippers, or pocket knives.
[9] D.C. Code § 22-2501.
[10] D.C. Code §§ 22-2501; 24-403.01(f)(3).
[11] RCC §§ 22E-606(a) and (b).
[12] D.C. Code § 22-1803 ("Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both.").

to an attempted form of theft or burglary, for which the RCC provides liability. This change improves the proportionality of the revised statute.

Fifth, the revised offense limits the target crimes within the scope of the revised statute to District crimes involving the trespass, misuse, taking, or damage of property. The District's current possession of implements of a crime statute refers broadly to "a crime."[13] In contrast, the revised offense requires an intent to commit a broad range of District property crimes. The revised statute consequently excludes the use of such tools to commit assault or drug crimes, or exclusively federal[14] crimes. By requiring intent to commit a property crime, the revised offense punishes only intended conduct that, by its nature, is logically related to the use of the tools that are within the scope of the statute. Possession[15] and use[16] of such tools as dangerous weapons to commit offenses against persons are addressed in other sections of the RCC. This change clarifies and improves the proportionality of the revised offense.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

The revised offense requires a culpable mental state of knowledge for paragraph (a)(1). The current statute does not specify a culpable mental state for these elements and no case law exists on point. However, given the current and revised offenses' requirements that the defendant have an intent to commit a crime with the tool,[17] a knowing culpable mental state as to the facts that the defendant possessed a relevant kind of tool appears appropriate. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[18] Requiring a knowing culpable mental state also makes the revised possession of tools to commit property crime offense consistent with the revised burglary statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[19] This change improves the clarity and consistency of the revised statute.

[13] D.C. Code § 22-2501.
[14] *See, e.g., U.S. v. Frank*, 225 F. Supp. 573 (D.D.C. 1964) (Construing "intent…to commit any criminal offense" in the District's burglary statute to not include an intent to violate the Federal Communications Act insufficient to support burglary prosecution.).
[15] [CCRC recommendations regarding weapon offenses are forthcoming.]
[16] RCC § 22E-1202.
[17] D.C. Code § 22-2501 ("No person shall have in his or her possession [an implement of crime] with the intent to use [the implement] to commit a crime.").
[18] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citations omitted.)).
[19] *See, e.g.*, RCC § 22E-2702.

COMMENTARY
SUBTITLE IV. OFFENSES AGAINST GOVERNMENT OPERATION

RCC § 22E-3401. Escape from a Correctional Facility or Officer.

Explanatory Note. *This section establishes the escape from a correctional facility or officer offense and penalty gradations for the Revised Criminal Code (RCC). The offense prohibits knowingly absconding from the lawful custody of a government actor or agency. It replaces D.C. Code § 22-2601, Escape from institution or officer, and D.C. Code § 10-509.01a,[1] Escape from juvenile facilities.*

Subsection (a) establishes the first degree gradation of escape, which prohibits leaving confinement in a correctional facility or secure juvenile detention facility without effective consent. "Correctional facility" is defined in RCC § 22E-701 to mean any building or building grounds located in the District of Columbia operated by the Department of Corrections for the secure confinement of persons charged with or convicted of a criminal offense.[2] The word "secure" makes clear that placements in an unsecured inpatient drug treatment program or independent living program are excluded. "Secure juvenile detention facility" is defined in RCC § 22E-701 to mean any building or building grounds, whether located in the District of Columbia or elsewhere, operated by the Department of Youth Rehabilitation Services for the secure confinement of persons committed to the Department of Youth Rehabilitation Services.[3] The word "secure" makes clear that a placement at home or in a community-based residential facility is excluded.[4] These definitions do not include facilities such as behavioral health hospitals that are principally concerned with providing medical care. Nor do they include buildings used by private businesses to detain suspected criminals.[5] The term "building" is also defined in RCC § 22E-701 and means "a structure affixed to land that is designed to contain one or more natural persons." Building grounds refers to the area of land occupied by the correctional facility and its yard and outbuildings, with a clearly identified perimeter.[6]

The phrase "in fact" in paragraph (a)(1) indicates that the accused is strictly liable[7] with respect to whether he or she was under a court order at the time the elements of the escape offense were completed.[8] The term "court order" includes any judicial directive, oral or written. The word "authorizing" makes clear that an order permitting a

[1] The penalty for this offense appears in D.C. Code § 10-509.03.
[2] E.g., Central Detention Facility ("D.C. Jail"), Central Treatment Facility ("CTF"). The term does not include locations operated by the Metropolitan Police Department or the United States Marshals Service. However, escaping from the lawful custody of such an agency may be punished as second degree escape.
[3] E.g., Youth Services Center (located inside the District of Columbia), New Beginnings Youth Development Center (located outside the District of Columbia).
[4] Community-based residential facilities include group homes, therapeutic foster care, extended family homes, and independent living programs.
[5] For example, a person who runs from the booking room of a retail store does not commit an escape under RCC § 22E-3401(a)(1)(A).
[6] *See, e.g.*, D.C. Code § 22-2603.01.
[7] RCC § 22E-207.
[8] A good faith belief that the order was expired or vacated is not a defense.

custodial agency[9] to choose either a secured or unsecured residential placement is sufficient.[10]

Paragraph (a)(2) specifies that the person must act knowingly, a term defined in RCC § 22E-206. Applied here, it means the person must be practically certain that he or she does not have the effective consent of the Mayor, the Director of the Department of Corrections, or the Director of the Department of Youth Rehabilitation Services, to leave.[11] A person leaves a facility when they depart from the building grounds.[12] "Effective consent" is a defined term and excludes consent that was obtained by the application of physical force, a coercive threat, or deception.[13]

Subsection (b) establishes the second degree gradation of escape, which prohibits escaping the lawful custody of a law enforcement officer. "Custody" is defined in paragraph (f)(2) to mean full submission after an arrest or substantial physical restraint after an arrest.[14] For example, custody may include being detained by an officer on the street, being securely confined to a holding cell, or being securely transported to a court appearance or medical facility.[15]

The phrase "in fact" in paragraph (b)(1) indicates that the accused is strictly liable[16] with respect to whether he or she was in lawful custody at the time the elements of the escape offense were completed. For liability to attach, the custody must, in fact, be lawful. Where a law enforcement officer has detained a person without requisite cause or authority, in violation of any federal or District law, the person is not in lawful custody. The term "law enforcement officer" is defined in RCC § 22E-701 and includes persons with limited arrest powers, such as special police officers[17] and community supervision officers acting in their official capacity,[18] but excludes private actors who are performing a citizen's arrest.[19] The officer must be employed by the District or federal government.

Paragraph (b)(2) specifies that the person must act knowingly, a term defined in RCC § 22E-206. Applied here, it means the person must be practically certain that the

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[9] E.g., Department of Corrections, Bureau of Prisons, United States Parole Commission, Department of Youth Rehabilitation Services.

[10] For example, if a person who was ordered to participate in a work release program violates the rules of the program and is administratively remanded to D.C. Jail, that person may not escape from D.C. Jail and defend on grounds that the court order did not explicitly "require" him to stay at the jail.

[11] Where an individual employee of the detaining agency allows a person to leave without requisite authority from the warden or from the court, liability for the escape offense likely turns on the defendant's mental state. A person who is erroneously told she is free to leave may not commit an escape, whereas a person who bribes the employee to release her does commit an escape because she was practically certain she did not have the facility's effective consent and that the employee was acting *ultra vires*.

[12] A person who leaves the building but is apprehended on building grounds does not commit a completed escape from a correctional facility but may have committed an attempted escape.

[13] RCC § 22E-701. Accordingly, a person who obtains permission to leave by impersonating another resident or an employee commits an escape.

[14] *Davis v. United States*, 166 A.3d 944, 948 (D.C. 2017). Efforts to forcibly evade arrest may create liability for resisting arrest, but not escape. *See* D.C. Code § 22-405.01.

[15] *See* D.C. Code §§ 22-3001(6)(A) and (B).

[16] RCC § 22E-207.

[17] D.C. Code § 23-582(a).

[18] 18 U.S.C. § 3606; *see also* 2017 H.R. 1039, the Probation Officer Protection Act of 2017 (a proposal to extend federal probation officers' arrest authority beyond supervisees to third parties who physically obstruct an officer or cause an officer physical harm).

[19] See D.C. Code § 23-582(b).

person detaining him or her is a law enforcement officer[20] and that they do not have the effective consent of the law enforcement officer to leave custody.[21] A person leaves custody when they distance themselves from the officer in an effort to avoid apprehension.[22] "Effective consent" is a defined term and excludes consent that was obtained by the application of physical force, a coercive threat, or deception.

Subsection (c) establishes the third degree gradation of escape, which punishes unlawful absences from correctional facilities and halfway houses.

The phrase "in fact" in paragraph (c)(1) indicates that the accused is strictly liable[23] with respect to whether he or she was under a court order at the time the elements of the escape offense were completed.[24] The term "court order" includes any judicial directive, oral or written. The word "authorizing" makes clear that an order permitting a custodial agency[25] to choose either a secured or unsecured residential placement is sufficient.[26]

Paragraph (c)(2) specifies that the person must act knowingly, a term defined in RCC § 22E-206. Applied here, it means the person must be practically certain that he or she does not have the effective consent of the Mayor, the Director of the Department of Corrections, or the Director of the Department of Youth Rehabilitation Services, to leave or remain away.[27] "Effective consent" is a defined term and excludes consent that was obtained by the application of physical force, a coercive threat, or deception.[28]

Under subparagraphs (c)(2)(A) and (c)(2)(B), a person may commit a third degree escape by omission. Failing to return to custody after a lawful absence[29] or failing to report to custody as ordered[30] amounts to a third degree escape. Under subparagraph

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[20] Consider, for example, a person who is tackled by an undercover officer and cannot understand the officer identifying himself as a policeman.

[21] Where an individual employee of the detaining agency allows a person to leave without requisite authority from the facility or from the court, liability for the escape offense likely turns on the defendant's mental state. A person who is erroneously told she is free to leave may not commit an escape, whereas a person who bribes the employee to release her does commit an escape because she was practically certain she did not have the facility's effective consent and that the employee was acting *ultra vires*.

[22] For example, a person who maneuvers her way out of handcuffs but stays seated in a police car has not committed a completed escape. On the other hand, a person who remains handcuffed and runs three blocks may have committed an escape.

[23] RCC § 22E-207.

[24] A good faith belief that the order was expired or vacated is not a defense.

[25] E.g., Department of Corrections, Bureau of Prisons, United States Parole Commission, Department of Youth Rehabilitation Services.

[26] For example, if a person who was ordered to participate in a work release program violates the rules of the program and is administratively remanded to D.C. Jail, that person may not escape from D.C. Jail and defend on grounds that the court order did not explicitly "require" him to stay at the jail.

[27] Where an individual employee of the detaining agency allows a person to leave without requisite authority from the facility or from the court, liability for the escape offense likely turns on the defendant's mental state. A person who is erroneously told she is free to leave may not commit an escape, whereas a person who bribes the employee to release her does commit an escape because she was practically certain she did not have the facility's effective consent and that the employee was acting *ultra vires*.

[28] RCC § 22E-701. Accordingly, a person who obtains permission to leave by impersonating another resident or an employee commits an escape.

[29] E.g., work release, unsupervised furlough.

[30] *See Williams v. United States*, 832 A.2d 158 (D.C. 2003) (where the defendant failed to serve all required consecutive weekends at D.C. Jail); *Mundine v. United States*, 431 A.2d 16 (D.C. 1981) (where the defendant failed to report to DC halfway house after being released in Virginia).

(c)(2)(C), leaving a halfway house without permission also amounts to third degree escape. A person leaves a facility when they depart from the building grounds.

Subsection (d) excludes prosecution for second degree escape for a person who is within a correctional facility (i.e. inside the building or on the building grounds). A person who is lawfully confined to a facility may be subject to first or third degree liability, depending on the facility, but not second degree liability.[31]

Subsection (e) specifies the penalties for each grade of the revised offense. [RESERVED.]

Subsection (f)(1) cross-references applicable definitions in the RCC. Subsection (f)(2) defines "custody," for RCC § 22E-3401(f) only, to mean full submission after an arrest or substantial physical restraint after an arrest.[32] For example, custody may include being detained by an officer on the street, being securely confined to a holding cell, or being securely transported to a court appearance or medical facility.[33]

Relation to Current District Law. *The revised escape from a correctional facility or officer statute changes current District law in five main ways.*

First, the revised escape offense has three gradations. The current statute provides only one penalty for all escape offenses.[34] Thus, under current law, a person who returns late to a work release program faces the same maximum penalty as a person who tunnels out of D.C. Jail.[35] Notably, a failure to return to a halfway house may, alternatively, be prosecuted as a misdemeanor by the Attorney General for the District of Columbia,[36] whereas there is no alternative charge in District law for a conventional prison break. In contrast, the revised offense distinguishes between escaping the confinement of an institution, escaping the lawful custody of a police officer, and failing to return or report to an institution.[37] This change improves the proportionality of the revised offense.

Second, the revised statute punishes an attempt to escape as less serious than a completed escape. Current D.C. Code §§ 22-2601[38] and 10-509.01a[39] punish an attempt to escape the same as a completed escape. In contrast, the revised statute relies on the general part's common definition of attempt[40] and penalty for an attempt[41] to define and

[31] For example, a person who is *confined* within a correctional facility does not commit an escape from the lawful *custody* of a law enforcement officer by wriggling out of an officer's grasp and returning to their designated cell.

[32] *Davis v. United States*, 166 A.3d 944, 948 (D.C. 2017). Efforts to forcibly evade arrest may create liability for resisting arrest, but not escape. *See* D.C. Code § 22-405.01.

[33] *See* D.C. Code §§ 22-3001(6)(A) and (B).

[34] D.C. Code § 22-2601.

[35] Although the verb "escape" is not defined in the statute, District case law has held that escape is "knowingly or deliberately leaving physical confinement, *or failing to return to it*, without permission." *Hines v. United States*, 890 A.2d 686 (D.C. 2006) (emphasis added); *see also Days v. United States*, 407 A.2d 702, 704 (D.C. 1979) (finding the extension of leave beyond that which is granted is the legal equivalent of an escape).

[36] D.C. Code § 24-241.05(b).

[37] Escaping the lawful custody of a police officer is graded more severely than failing to report or return because it is more likely to provoke a hot pursuit, which may endanger the arresting officers, the defendant, and bystanders.

[38] The statute begins: "No person shall escape or attempt to escape…".

[39] The statute begins: "No child who has been committed to a juvenile facility shall escape or attempt to escape from…"

[40] RCC § 22E-301(a).

penalize attempts the same as for other revised offenses. This change improves the consistency and proportionality of the revised offense.

Third, the revised statute punishes accomplice liability consistently with other revised offenses. Current D.C. Code § 10-509.01a, Escape from juvenile facilities, prohibits aiding or abetting an escape from a juvenile facility. In contrast, the revised escape statute relies on the definition of accomplice liability in the revised code's general part,[42] as well as related provisions that establish a rule for crimes that exploit other persons as innocent instruments,[43] and carves out exceptions to accomplice liability.[44] This change improves the clarity, consistency, completeness, and the proportionality of the revised offense.

Fourth, the revised statute requires the person whose personal custody is escaped be a law enforcement officer and defines the term "law enforcement officer"[45] consistently with other revised offenses. Current D.C. Code § 22-2601(a)(2) prohibits escaping the lawful custody of "an officer or employee of the District of Columbia or of the United States." In contrast, the revised code clarifies that the person must be a law enforcement officer, as defined, who is acting within their arrest authority.[46] While the revised definition of law enforcement officer is broad and includes individuals such as probation officers, the revised definition is narrower than the current statute's reference to any person employed by the District or federal government. This change improves the clarity and consistency of the revised offenses.

Fifth, the scope of the revised statute is more precisely defined so as to only include secure locations. Current D.C. Code § 22-2601(a)(1) prohibits escape from "any penal or correctional institution or facility" or from "[a]n institution or facility, whether located in the District of Columbia or elsewhere, in which a person committed to the Department of Youth Rehabilitation Services is placed." DCCA case law has held that, in addition to the Central Detention Facility ("D.C. Jail"), the statute also includes the District's halfway houses.[47] Case law is silent as to which, if any, other locations qualify. The revised offense defines "correctional facility" to include any jails and prisons that are or may be erected in the District[48] and "secure juvenile detention facility" so as to include any physically secure juvenile placement.[49] The revised statute may broaden current law by including escapes from the Youth Services Center, pre-adjudication[50] or pre-

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[41] RCC § 22E-301(c)(1).
[42] RCC § 22E-210.
[43] RCC § 22E-211.
[44] RCC § 22E-212.
[45] RCC § 22E-701.
[46] For example, if a person who happens to be a probation officer performs a citizen's arrest on personal time of someone who is not their supervisee, fleeing from that officer would not amount to an escape.
[47] *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).
[48] E.g., Central Detention Facility ("D.C. Jail") and Central Treatment Facility ("CTF").
[49] E.g., Youth Services Center (located inside the District of Columbia) and New Beginnings Youth Development Center (located outside the District of Columbia).
[50] The DCCA has not considered or decided whether the Youth Services Center qualifies as a "penal or correctional institution or facility," under D.C. Code § 22-2601(a)(1). However, the Center is not described as penal or correctional in nature in Title 16. *See, e.g.*, D.C. Code § 16-2310 (authorizing shelter care placement if a child has no parent, guardian, custodian, or other person or agency able to provide

commitment.[51] The revised statute may narrow current law by excluding escapes from unsecured congregate care placements such as group homes.[52] This change clarifies and may eliminate a gap in liability and improve the proportionality of the revised offense.

Beyond these changes to current District law, one other aspect of the revised statute may constitute substantive changes of law.

The revised statute specifies that whether a person is subject to a court order or in lawful custody of a law enforcement officer is a matter of strict liability. The current escape statute does not specify any culpable mental state for this offense element, nor has the DCCA directly addressed the matter. The revised statute resolves this ambiguity by not requiring any culpable mental state as to being subject to a court order or as to the lawfulness of the custody. For example, a person who mistakenly believes an arrest warrant is invalid, nevertheless commits an escape if all of the offense elements are satisfied, including the fact that the person knew they lacked effective consent of the institution or officer. It is generally recognized that a person may be held strictly liable for elements of an offense that do not distinguish innocent from guilty conduct.[53] This change clarifies the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

First, the revised statute specifies that a "knowing" culpable mental state is required for leaving custody or failure to return or report to custody, and for lacking effective consent to do so. The current escape statute does not specify any culpable mental state. However, the DCCA has explained that escaping is "knowingly or deliberately leaving physical confinement, or failing to return to it, without permission."[54] The revised statute clarifies that the accused must be practically certain that he or she is acting without permission. Consequently, a mistake of fact is an available defense in some, but not all, cases.[55] Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a

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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.

[51] Persons held at the Youth Services Center post-commitment currently are subject to escape liability, under D.C. Code § 22-2601(a)(3).

[52] The DCCA has not considered or decided whether any location other than New Beginnings Youth Development Center qualify as "[a]n institution or facility, whether located in the District of Columbia or elsewhere, in which a person committed to the Department of Youth Rehabilitation Services is placed," under D.C. Code § 22-2601(a)(3).

[53] *See Elonis v. United States*," 135 S. Ct. 2001, 2010, (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'").

[54] *Hines v. United States*, 890 A.2d 686 (D.C. 2006). This is also consistent with federal escape case law. "Although § 751(a) does not define the term 'escape,' courts and commentators are in general agreement that it means absenting oneself from custody without permission." *United States v. Bailey*, 444 U.S. 394, 407 (1980).

[55] For example, a person who mistakenly appears at the wrong halfway house is not liable for escape.

well-established practice in American jurisprudence.[56] This change clarifies the revised statute.

Second, the revised statute requires the accused to leave or fail to return without "effective consent." The current escape statute is silent as to whether lack of effective consent to the person's behavior, or a similar element, must be proven. District case law requires the accused escape without "permission," but does not specify whose permission is required or further define that term.[57] The revised statute requires a lack of "effective consent," of the person in charge of the facility, a defined term which means consent obtained by means other than the application of physical force, a coercive threat, or deception.[58] This change improves the revised offenses by describing all elements that must be proven and applying consistent definitions throughout the revised code.

Third, the revised statute codifies a clear consecutive sentencing provision. Current D.C. Code § 22-2601(b) states in pertinent part, that the "…sentence [is] to begin, if the person is an escaped prisoner, upon the expiration of the original sentence or disposition for the offense for which he or she was confined, committed, or in custody at the time of his or her escape." The DCCA has interpreted the phrase "original sentence" to mean the sentence being served at the time of the escape.[59] The revised statute more concisely states that the sentence for escape is to be served consecutive to the sentence being served during the escape. This change clarifies the revised statute.

[Fourth, the RCC provides for a general duress defense[60] that is consistent with other revised offenses. The current statute is silent as to whether any duress offense exists to escape. However, District case law has recognized a duress defense to escape in limited circumstances.[61] The revised statute does not separately codify a duress defense to escape, but instead relies on the duress defense in the general part of the RCC. This change clarifies and improves the consistency of the revised statutes.]

[56] *See*, *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted.)).
[57] *United States v. Bailey*, 444 U.S. 394, 407 (1980); *Hines v. United States*, 890 A.2d 686 (D.C. 2006).
[58] RCC § 22E-701.
[59] *Veney v. United States*, 738 A.2d 1185, 1199 (D.C. 1999) (requiring resentencing for a person who escaped during a street encounter).
[60] [A recommendation to codify this general defense is planned, but has not yet been completed, by the Commission.]
[61] [*Stewart v. United States*, 370 A.2d 1374 (D.C. 1977).]

RCC § 22E-3402. Tampering with a Detection Device.

Explanatory Note. *This section establishes the tampering with a detection device offense for the Revised Criminal Code (RCC). The offense prohibits purposely removing or interfering with a wearable monitoring device, such as a GPS ankle bracelet. It replaces D.C. Code § 22-1211, Tampering with a detection device.*

Paragraph (a)(1) specifies that for criminal liability to attach, the person must know she was legally required to wear a detection device at the time the elements of the tampering offense were completed. The term "detection device" is defined in RCC § 22E-701 and is any technology installed on a person's body or clothing that is capable of monitoring the person's whereabouts.[1] The term refers to the physical device itself and does not include the records or reports that it generates.[2] The term "knowingly" is defined in the general part of the revised code[3] and here means the person must be practically certain that compliance with electronic monitoring was required. The monitoring may be required as a condition of release or as a sanction for noncompliance with other release conditions.[4] The requirement must be valid at the time of the offense.[5]

Subparagraphs (a)(1)(A)-(E) establish five categories of people who are prohibited from tampering with a detection device. Namely, the revised statute applies to persons who must wear the device while subject to a protection order; while on pretrial release; while on presentence or predisposition release;[6] while committed to the Department of Youth Rehabilitation Services or incarcerated; or while on supervised release, probation, or parole. The revised statute does not apply to persons who are required to wear a monitoring device before a court proceeding is initiated or after a sentence is completed. Nor does it apply to people who are required to wear a monitoring device as a result of a judgment issued outside of the Superior Court of District of Columbia.

Paragraph (a)(2) specifies that the person must purposely tamper with the detection device. The term "purposely" is defined in the general part of the revised code[7]

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[1] Examples include mechanisms such as bracelets, anklets, tags, and microchips. It explicitly includes the global position systems ("GPS") that are currently used by the Pretrial Services Agency, Court Services and Offender Supervision Agency, and Court Social Services. It also explicitly includes the radio frequency identification technology ("RFID") that is currently used by the Department of Corrections.

[2] A person does not commit tampering with a detection device by destroying or manipulating the data generated by the device after it has been transmitted. Consider, for example, a person who hacks into his supervision officer's computer and deletes or alters the monitoring records. Such conduct may, however, constitute tampering with physical evidence, in violation of D.C. Code § 22-723.

[3] RCC § 22E-206.

[4] D.C. Code § 22-1211 was amended in 2016 to include sanctions, following the D.C. Court of Appeals decision in *Hunt v. United States*, 109 A.3d 620, 621 (D.C. 2014).

[5] Electronic monitoring, like any release condition, may only be authorized by a judicial officer or by the United States Parole Commission ("USPC"). *See Hunt v. United States*, 109 A.3d 620, 621-22 (D.C. 2014). Accordingly, if a supervision officer employed by the Pretrial Services Agency, Court Services and Offender Supervision Agency, or Court Social Services were to require electronic monitoring without authorization from the court or USPC, the requirement would be invalid. Additionally, if the period of release specified by the court expires before the tampering occurs, criminal liability does not attach.

[6] "Predisposition" refers to minors who have been adjudicated delinquent and are awaiting the juvenile equivalent of sentencing.

[7] RCC § 22E-206.

and here means the person must consciously desire that the device be removed or that the device's capability be compromised.

Subparagraph (a)(2)(A) prohibits purposely removing the wearable monitor or allowing another to remove it.[8] An unauthorized person refers to a person other than someone that the court or parole commission authorized to remove the device.[9]

Subparagraph (a)(2)(B) prohibits interfering with the operation of the device,[10] and allowing an unauthorized person to do so.[11] "Interfere" includes failing to charge the power for the device or allowing the device to lose the power required to operate,[12] when done purposely, meaning with the conscious desire to interfere with the operation of the device. An unauthorized person refers to a person other than someone that the court or parole commission authorized to interfere with the device.[13]

Subsection (b) provides the penalties for the revised offense. [RESERVED.]

Subsection (c) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised tampering with a detection device changes current District law in two main ways*

First, the revised statute punishes an attempt to tamper with a detection device as less serious than a completed tampering. Current D.C. Code § 22-1211 punishes an attempt to interfere with the operation of the device the same as a completed tampering.[14] In contrast, the revised statute relies on the general part's common definition of attempt[15] and penalty for an attempt[16] to define and penalize attempts the same as for other revised offenses. This change improves the consistency and proportionality of revised offense.

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[8] A person may violate this statute by an act or by an omission, provided that the person behaves purposely. *See* RCC § 22E-202.

[9] Examples of persons authorized by the court or the parole commission to install and remove monitoring devices may include employees of the Pretrial Services Agency, Court Services and Offender Supervision Agency, Department of Youth Rehabilitation Services, or Court Social Services. Electronic monitoring, like any release condition, may only be authorized by a judicial officer or by the United States Parole Commission ("USPC"). *See Hunt v. United States*, 109 A.3d 620, 621-22 (D.C. 2014). In extenuating circumstances unauthorized persons (e.g. a paramedic providing care) may have a justification defense for removing a bracelet. [The Commission has not yet issued recommendations for a general justification defense.]

[10] Unless one has a purpose to interfere with the operation of the device, and does so, a person does not violate the revised statute merely by decorating the device, applying a case to make it waterproof, or applying a substance to make it more comfortable to wear.

[11] A person may violate this statute by an act or by an omission, provided that the person behaves purposely. *See* RCC § 22E-202.

[12] *See* D.C. Code § 22-1211(a)(1)(C).

[13] Examples of persons authorized by the court or the parole commission to install and remove monitoring devices may include employees of the Pretrial Services Agency, Court Services and Offender Supervision Agency, Department of Youth Rehabilitation Services, or Court Social Services. Electronic monitoring, like any release condition, may only be authorized by a judicial officer or by the United States Parole Commission ("USPC"). *See Hunt v. United States*, 109 A.3d 620, 621-22 (D.C. 2014). In extenuating circumstances unauthorized persons (e.g. a paramedic providing care) may have a justification defense for removing a bracelet. [The Commission has not yet issued recommendations for a general justification defense.]

[14] D.C. Code § 22-1211(a)(1)(B).

[15] RCC § 22E-301(a).

[16] RCC § 22E-301(c)(1).

Second, the revised statute limits the offense to tampering with detection devices that are required in connection with a District of Columbia court case. The plain language of the current statute appears to provide liability for interference with detection devices worn by a person under any jurisdiction's court order. However, it is not clear that this was intended by the Council or that the statute has been applied in such circumstances. There is no case law on point. In contrast, the revised statute excludes violations of court orders imposed by other jurisdictions, where the District has no control over the underlying statutes and procedures that allowed for the placement of a detection device. This revision clarifies the revised statute.

Beyond these changes to current District law, one other aspect of the revised statute may constitute a substantive change of law.

The revised statute requires knowing and purposeful conduct. The current tampering statute does not specify a culpable mental state for the circumstance of being under court-ordered detention or supervision that requires electronic monitoring, and there is no case law on point. Current D.C. Code § 22-1211 requires that the defendant "intentionally" remove, alter, mask, or interfere with a device. However, the term "intentionally" is not defined in the statute or in case law. By contrast, the revised statute requires that the person know that they are required to wear a detection device. Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[17] The revised statute also specifies that the person must act purposely in removing or interfering with the device, and the definition of that term provides that someone acts purposely with respect to a result when they consciously desire to cause the result.[18] This change improves the revised offenses by describing all elements, including mental states, that must be proven in a clear, consistent manner.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

First, the revised statute amends the word "committed" in paragraph (a)(1) of the current statute to the phrase "committed to the Department of Youth Rehabilitation Services." This clarifies that the statute refers to minors who have been adjudicated delinquent and not to adults who are civilly committed to the Department of Behavioral Health for psychiatric services. This change clarifies the revised statute.

Second, the revised statute strikes the terms "alter" and "mask" as superfluous. The word "interferes" broadly encompasses all interference with the emission and detection of the device's signal. The revised statute does not capture "altering" or "masking" a device in a way that does not affect its functionality, such as decorating a device or covering it with clothing, unless such conduct is also done with a purpose of interfering with the device's monitoring functions. This change clarifies the revised statute.

[17] *See*, *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted.)).
[18] RCC § 22E-206.

Third, the revised statute strikes language in D.C. Code § 22-1211(a)(1)(C)[19] as unnecessary and potentially confusing. This meaning of this provision is unclear in light of the possibility of changing technology, the lack of any standard for measuring a "failure to charge," and differing responsibilities of a person to maintain charges for different devices. Moreover, failing to adequately charge a device's battery may be one means of interfering with the operability of the device, in violation of RCC § 22E-3402(a)(2)(B). This change clarifies the revised statute.

Fourth, the revised statute clarifies that the term "protection order" refers to the civil protection orders that are issued after formal notice and hearing under Title 16 of the D.C. Code. This change clarifies the revised statute.

[19] "Intentionally fail to charge the power for the device or otherwise maintain the device's battery charge or power."

RCC § 22E-3403. Correctional Facility Contraband.

Explanatory Note. *This section establishes the correctional facility contraband offense and penalty gradations for the Revised Criminal Code (RCC). The offense punishes knowingly bringing certain prohibited items to a person confined in a secure facility. It also punishes a person confined to a facility who knowingly possesses certain prohibited items. The revised statute replaces D.C. Code § 22-2603.02, Unlawful possession of contraband; D.C. Code § 22-2603.03, Penalties; D.C. Code § 22-2603.01, Definitions; and D.C. Code § 22-2603.04, Detainment Power.*

Subparagraphs (a)(1)(A), (a)(2)(A), (b)(1)(A), and (b)(2)(A) specify that one way of committing correctional facility contraband is by bringing a prohibited item to a correctional facility[1] or secure juvenile detention facility[2] with intent that it reach someone who is confined there. It is not an element that the prohibited item actually was received by someone confined. "With intent" is a defined culpable mental state[3] that here requires the person believe their conduct is practically certain to cause the prohibited item to be received by someone who is confined to the facility.[4] Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary that the person intend that the item reach a particular resident of the facility.[5] The terms "correctional facility" and "secured juvenile detention facility" are defined in RCC § 22E-701 to include buildings and building grounds.

Subparagraphs (a)(1)(A), (a)(2)(A), (b)(1)(A), and (b)(2)(A) specify that the person must act knowingly, a culpable mental state that is defined in the general part of the revised code.[6] Applied here, it means the person must be practically certain that they have the item[7] and be practically certain that they brought the item to correctional facility grounds.[8] However, causing an innocent third party, such as a mail delivery person, to bring a prohibited item to a facility may be sufficient for liability if the other elements of the offense are satisfied.[9]

Subparagraphs (a)(1)(B), (a)(2)(B), (b)(1)(B), and (b)(2)(B) require that the person bring the item to the facility without the effective consent of the Mayor, the Director of the Department of Corrections, or the Director of the Department of Youth Rehabilitation Services. "Effective consent" is a defined term and means consent that

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[1] E.g., Central Detention Facility ("D.C. Jail"), Central Treatment Facility ("CTF").

[2] E.g., Youth Services Center, New Beginnings Youth Development Center.

[3] RCC § 22E-206.

[4] For example, an attorney who brings a cellular phone into D.C. Jail to take personal phone calls in the waiting room does not commit a contraband offense because she did not intent to give it to a resident.

[5] Consider, for example, a person who places a weapon on the outer wall of a correctional facility's recreation yard, hopeful that any resident might retrieve it. The government is not required to prove which resident was the intended recipient.

[6] RCC § 22E-206.

[7] Consider, for example, an attorney who brings his college backpack to D.C. Jail, without realizing there is a decades-old marijuana cigarette in the bottom of the bag. That attorney has not committed a correctional facility contraband offense.

[8] Consider, for example, a person who attempts to bring contraband into a halfway house, believing it is a temporary housing shelter or a rehabilitation center. That visitor has not committed a correctional facility contraband offense.

[9] See RCC § 22E-211, Liability for causing crime by an innocent or irresponsible person.

was not obtained by the application of physical force, a coercive threat, or deception.[10] Where a person has the effective consent of the facility to bring the otherwise-prohibited item to the location, that item does not subject the person to correctional facility contraband liability.[11] Per the rule of interpretation in RCC § 22E-207(a), the culpable mental state of knowingly specified in subparagraphs (a)(1)(A) and (b)(2)(A) apply to this element of the offense. The person must be practically certain that they lack effective consent to bring the item to the facility.[12]

Subparagraphs (a)(1)(C) and (a)(2)(C) require that the item constitute Class A contraband. Subparagraphs (b)(1)(C) and (b)(2)(C) require that the item constitute Class B contraband. The term "in fact" is defined in the revised code to indicate that the actor is strictly liable with respect to this element of the revised offense.[13] Accordingly, it is of no consequence that the person does not know that the item is classified as Class A or Class B contraband.

Paragraphs (a)(2) and (b)(2) state that the second type of person subject to liability for correctional facility contraband is someone who is confined to a correctional facility or secure juvenile detention facility. The word "confined" refers to the person's legal custodial status and not to the physical strictures of the building. For instance, a corrections officer may, as a practical matter, be securely confined inside D.C. Jail during a shift in a physical sense, but the officer not legally "confined" to the custody of the correctional facility.

Subsection (c)(1) clarifies that the statute excludes all constitutionally protected activity from its reach.[14]

Subparagraph (c)(2)(A) excludes from liability the use of a portable electronic communication device by any person during a legal visit.[15] Subparagraph (c)(2)(B) excludes from liability a person's possession of their prescription medication when there is a medical necessity to access the item immediately or to be constantly accessible, and subparagraph (c)(2)(C) excludes from liability a person's possession of a syringe, needle, or other medical device when there is a medical necessity to access the item immediately or to be constantly accessible.[16]

Subsection (d) limits the correctional facility's authority to detain a person on suspicion of bringing contraband to a facility under paragraphs (a)(1) and (b)(1) to a period of two hours, pending surrender to the Metropolitan Police Department or, for facilities outside the District of Columbia, to a law enforcement agency designated by the Mayor. Probable cause is both sufficient and required.[17]

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[10] RCC § 22E-701.

[11] For example, the department may allow a barber to bring a razor blade to use for cutting and shaving hair.

[12] Consider, for example, a person who gives papers fastened with a binder clip to a resident at D.C. Jail, without knowing that binder clips are disallowed. That person has not committed a contraband offense.

[13] RCC § 22E-207.

[14] RCC § 22E-3403(d)(1).

[15] Prohibiting contraband in this context may offend the right to effective assistance of counsel under the Sixth Amendment.

[16] These exceptions apply to medicines and medical devices necessary to treat chronic, persistent, or acute conditions that require constant or immediate medical response such as diabetes, severe allergies, or seizures. Depending on the facts of the case, criminalizing the possession of contraband in this context may offend the prohibition of cruel and unusual punishment in the Eighth Amendment.

[17] *See* D.C. Code § 23-582.

Subsection (e) specifies the penalties for each grade of the revised offense.[18] [RESERVED.] The revised statute punishes contraband that may be used to cause an injury or facilitate an escape more severely than other contraband.

Subsection (f) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised correctional facility contraband statute changes current District law in five main ways.*

First, the revised offense reclassifies contraband according to the danger presented. Current statutory law roughly classifies contraband as (A) any item prohibited by law, weapons, escape implements, and drugs;[19] (B) alcohol, drug paraphernalia, and cellular phones;[20] and (C) any item prohibited by rule.[21] The current statute penalizes possession of class C contraband as a criminal offense, even though only administrative sanctions are authorized.[22] In contrast, the revised statute classifies contraband into: (A) weapons and escape implements; and (B) alcohol, drugs, drug paraphernalia, and cellular phones. The revised statute does not otherwise criminalize violations of other facility rules regarding what items that can be possessed. In the RCC, such matters are subject to only administrative processing and sanctions. This reclassification of what constitutes contraband reorders and limits criminal sanctions to items posing significant dangers. This change improves the proportionality of the revised statutes.

Second, the revised statute narrows the list of Class A contraband in two ways. First, the current statute includes as Class A contraband the possession of any civilian clothing[23] and "[a]ny item, the mere possession of which is unlawful under District of Columbia or federal law."[24] There is no District case law interpreting this phrase, but the language would seem to include not only weapons and controlled substances listed separately as Class A contraband, but items that pose no apparent threat to the safety or order of a correctional facility.[25] In contrast, the revised statute criminalizes as Class A contraband only the possession of a uniform, and punishes possession of any weapon or drug that is prohibited by the District's criminal code, without including any (unspecified) item prohibited by federal or District law. Second, the current statute includes as Class A contraband, "Any object designed or intended to facilitate an escape."[26] In contrast, the revised statute refers more specifically to "A tool created or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door."[27] The revised language creates a more objective basis for identifying contraband—rather than intent to facilitate escape—and is consistent with language in the revised possession of tools to commit property

[18] [The Commission will assess specific merger issues for this offense after developing recommendations for RCC drug and weapons offenses.]
[19] D.C. Code § 22-2603.01(2)(A).
[20] D.C. Code § 22-2603.01(3)(A).
[21] D.C. Code § 22-2603.01(4)(A).
[22] D.C. Code § 22-2603.03(e).
[23] D.C. Code § 22-2603.01(2)(A)(viii).
[24] D.C. Code § 22-2603.01(2)(A)(i).
[25] *See, e.g.*, 16 U.S.C. § 668 (criminalizing possession of a bald eagle feather).
[26] D.C. Code § 22-2603.01(2)(A)(iv).
[27] RCC § 22E-701.

crime offense.[28] These changes improve the clarity and consistency of the revised offense and improve the proportionality of penalties.

Third, the revised statute does not criminalize a failure to report contraband except to the extent such conduct meets the requirements for accomplice liability. The current contraband statute compels District employees to report contraband and criminally punishes a failure to do so.[29] In contrast, the revised contraband statute relies on the definition of accomplice liability in the revised code's general part,[30] as well as related provisions that establish a rule for crimes that exploit other persons as innocent instruments,[31] and carves out exceptions to accomplice liability.[32] Offenses relating to public corruption and obstructing justice may also punish employee accomplices in this context.[33] This change improves the consistency and the proportionality of the revised offenses.

Fourth, the revised statute leaves concurrent versus consecutive sentencing decisions to the discretion of the sentencing court. The current contraband statute requires that a sentence for unlawful possession of contraband run consecutive to any term of imprisonment imposed in the case in which the person was being detained at the time this offense was committed.[34] This provision has two notable features that distinguish it from any other sentencing provision in the D.C. Code. First, it applies to persons who are pre-sentence in any jurisdiction at the time of the contraband offense.[35] Second, it applies to persons who are pre-trial in any jurisdiction at the time of the contraband offense.[36] Legislative history does not clarify why such an infringement on the court's discretion is applied to contraband offenses and not to other correctional facility offenses such as escape. In contrast, the revised statute does not require consecutive sentencing, leaving such a decision to the sentencing court. This change improves the consistency and the proportionality of revised offenses.

Fifth, the revised statute adds an exception to liability for possession of a syringe, needle, or other medical device when that person has a medical necessity to have the substance immediately or constantly accessible. The current D.C. Code contraband statute only provides an exception for possession of a prescribed controlled substance that is medically necessary to carry. [37] In contrast, the revised statute excepts liability for syringes, needles, or other medical devices where there is a medical necessity or immediate access. The offense's exclusion of liability does not create an affirmative right for a confined person to possess such items, and administrative sanctions may be imposed for such possession. There may also be criminal liability for misuse of a needle,

[28] RCC § 22E-2702.
[29] D.C. Code § 22-2603.02(c).
[30] RCC § 22E-210.
[31] RCC § 22E-211.
[32] RCC § 22E-212.
[33] [The Commission has not yet issued recommendations for reformed public corruption and obstructing justice offenses.]
[34] D.C. Code § 22-2603.03(d).
[35] By contrast, the District's escape statute only requires the sentence be consecutive to an original sentence that is being served at the time of the. D.C. Code § 22-2601(b).
[36] The United States Supreme Court held that a federal judge did not violate the federal Sentencing Reform Act by running a federal sentence consecutive to an anticipated state sentence after a finding of guilt by the state court. *Setser v. United States*, 566 U.S. 231 (2012).
[37] D.C. Code § 22-2603.03(f).

syringe, or medical device under another statute,[38] and possession of a needle, etc. with intent to give the item to a confined person may be liable as an attempt or give rise to accomplice liability. However, a person's mere possession of such a medically necessary item is not grounds for a contraband conviction. This change improves the proportionality of the revised offense.

Beyond these changes to current District law, four other aspects of the revised correctional facility contraband statute may constitute substantive changes of law.

First, the revised statute specifies that a knowing culpable mental state is required for confined persons as to their possession of contraband, just as it is for persons who deliver it. Current D.C. Code § 22-2603.02(b) merely states, "It is unlawful for an inmate, or securely detained juvenile, to possess Class A, Class B, or Class C contraband, regardless of the intent with which he or she possesses it." This language is ambiguous as to whether a person is strictly liable as to whether the item possessed is contraband, or whether a person's intent to use contraband for a non-harmful purpose is irrelevant to liability but they must be aware that they possess contraband.[39] There is no case law on point. District practice appears to treat as a matter of strict liability the fact that an item possessed by a confined person is contraband, while the possession itself must be purposeful.[40] In contrast, the revised statute requires a confined person to knowingly possess an item, similar to the requirements for someone bringing contraband into a correctional facility. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[41] This change improves the proportionality of the revised statutes.

Second, the detainment authority provision in the revised offense authorizes and limits detention pending surrender to certain law enforcement authorities to investigate and arrest a person for commission correctional facility contraband. Current D.C. Code § 22-2603.04 refers only to the Metropolitan Police Department as an authorized authority. However, under a separate D.C. Code provision, other officials, may be granted specific authority by the Mayor to make arrests on the District's behalf for offenses occurring out of the District, including at New Beginnings Youth Development Center in Laurel, Maryland under D.C. Code § 10-509.01. There is no case law on whether or how to resolve the potential conflict between these provisions of law. To resolve this ambiguity,

[38] For example, an inmate who uses a syringe or other device to assault another inmate may face more severe criminal liability for using a dangerous weapon in the assault. See RCC § 22E-1202.

[39] The current statutory definition of Class C contraband also states: "The rules shall be posted in the facility to give notice of the prohibited articles or things," but does not provide any relief to the accused if the notice is not posted. D.C. Code § 22-2603.01(4)(a).

[40] Criminal Jury Instructions for the District of Columbia Instruction 6.603 (2018) ("The elements of possessing contraband in [a penal institution] [a secure juvenile residential facility], each of which the government must prove beyond a reasonable doubt, are that: 1. [Name of defendant] was [an inmate] [a securely detained juvenile] in [name of penal institution or secure juvenile residential facility]; 2. S/he possessed [name of object]; [and] 3. S/he did so voluntarily and on purpose, and not by mistake or accident[.] [; and] [4. The [name of object] was [insert applicable definition of contraband from statute].] "voluntarily and on purpose, and not by mistake or accident.").

[41] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

the revised statute includes in the detainment provision a reference to an agency designated per D.C. Code § 10-509.01. This change improves the clarity and consistency of the revised statute.

Third, the revised statute punishes accomplice liability consistently with other revised offenses. Current D.C. Code § 22-2603.02(a)(2) makes it unlawful to "cause another" to bring contraband to a secured facility. By contrast, the revised statute relies on the definitions of accomplice liability,[42] solicitation,[43] and criminal conspiracy[44] in the revised code's general part. This change improves the consistency and the proportionality of revised offenses.

Fourth, the revised statute requires a person to know that their possession or introduction of the contraband item is without the effective consent of the person in charge of the facility, and eliminates the exclusions from liability enumerated in D.C. Code § 22-2603.02(d) for items "issued" to a facility employee or law enforcement officer. The current D.C. Code excludes from liability for a contraband offense any item "issued" to a facility employee or a law enforcement officer that is being used in the performance of her official duties.[45] Case law has not addressed the scope or meaning of this provision. The RCC's requirement that the person knowingly act without the facility's effective consent renders this statutory exception to liability unnecessary.[46] It also ensures the revised offense does not reach possession of items that the facility authorized but did not "issue," such as personal medication. This change improves the proportionality of the revised offenses.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

First, the phrase "brings…to a correctional facility or secured juvenile detention facility" replaces the phrases "bring…into or upon the grounds of"[47] and "place in such proximity to."[48] Current D.C. Code § 22-2603.02(a) is grammatically difficult to understand. Presumably, paragraph (a)(3) intends to say either, "place in close proximity with intent to give access" or "place in such proximity as to give access." Because the revised statute defines the terms "correctional facility" and "secured juvenile detention facility" to include the building grounds, the word "to" adequately captures all trafficking scenarios targeted by the current law.[49]

Second, the revised code defines "possession" in RCC § 22E-701. The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or

[42] RCC § 22E-210.
[43] RCC § 22E-302.
[44] RCC § 22E-303.
[45] D.C. Code § 22-2603.02(d).
[46] For example, where a facility has permitted an employee to carry a billy or a law enforcement officer to use tear gas, correctional facility contraband liability does not attach.
[47] D.C. Code § 22-2603.02(a)(1).
[48] D.C. Code § 22-2603.02(a)(3).
[49] For example, if a person places contraband on the outer wall of the correctional facility's secured yard, that person has brought contraband to the correctional facility.

constructively or jointly possessed an unlawful item.[50] In contrast, the RCC codifies a definition to be used uniformly for all possessory elements throughout the code.

Third, the revised offense simplifies the defined term "Cellular telephone or other portable communication device and accessories thereto."[51] Current law defines this term with references to specific technology, several of which are already rare or obsolete.[52] The revised statute uses a simpler reference to portable electronic communication devices and accessories thereto.[53]

Fourth, the revised statute clarifies the correctional facilities' detention authority. D.C. Code § 22-2603.04 states that a person who "introduces or attempts to introduce" contraband to a facility may be detained for no more than two hours until police arrive. The statute does not include a standard of proof and the District of Columbia Court of Appeals has not interpreted the statute. The revised statute clarifies that probable cause is required, just as it is for any other warrantless detention.[54]

[50] *See* D.C. Crim. Jur. Instr. 3.104.
[51] D.C. Code § 22-2603.01(a)(3)(c).
[52] "Cellular telephone or other portable communication device and accessories thereto" means any device carried, worn, or stored that is designed, intended, or readily converted to create, receive or transmit oral or written messages or visual images, access or store data, or connect electronically to the Internet, or any other electronic device that enables communication in any form. The term "cellular telephone or other portable communication device and accessories thereto" includes portable 2-way pagers, hand-held radios, cellular telephones, Blackberry-type devices, personal digital assistants or PDAs, computers, cameras, and any components of these devices. The term "cellular telephone or other portable communication device and accessories thereto" also includes any new technology that is developed for communication purposes and includes accessories that enable or facilitate the use of the cellular telephone or other portable communication device.
[53] RCC § 22E-701.
[54] *See* D.C. Code § 23-582.

COMMENTARY
SUBTITLE V. PUBLIC ORDER AND SAFETY OFFENSES

RCC § 22E-4201. Disorderly Conduct.

Explanatory Note. *This section establishes the disorderly conduct offense for the Revised Criminal Code (RCC). The offense proscribes a broad range of conduct that disrupts or potentially disrupts a public place and is not protected by the First Amendment or District law. The RCC disorderly conduct statute addresses conduct that: causes a person reasonably to believe a specified criminal harm is likely to occur to them; directs someone present to engage in a specified criminal harm where the harm is likely to occur; directs abusive speech to a person that is likely to provoke a specified retaliatory criminal harm; or involves continued fighting after receiving a law enforcement officer's order to cease. The disorderly conduct statute uniquely addresses inchoate conduct that may not constitute an attempted criminal threat, menace, assault, destruction of property, or theft. The revised offense replaces subsection (a) and, in concert with other provisions of the RCC,[1] subsection (g) of D.C. Code § 22-1321, the District's disorderly conduct statute.[2] The revised offense also replaces the District's affrays statute in D.C. Code § 22-1301.[3]*

Paragraph (a)(1) provides that the accused's conduct must occur in a place that is either open to the general public or the communal area of multi-unit housing. The phrase "open to the general public" is defined to mean no payment or permission is required to enter.[4] "In fact," a defined term,[5] is used to indicate that there is no culpable mental state requirement as to whether the location is open to the general public or a communal area of multi-unit housing.

Paragraph (a)(2) specifies four basic types of disorderly conduct: causing fear of crime, inciting crime, provoking crime, and public fighting.

Subparagraph (a)(2)(A) punishes reckless conduct other than speech that causes another person to fear that they will sustain a bodily injury, taking of property, or damage to property. The accused's conduct must actually cause another person to reasonably believe that one of those dangers is likely to occur immediately and that he or she will be the victim.[6] "Speech" is a defined term and means oral or written language, symbols, or gestures.[7] "Bodily injury" is a defined term and means physical pain, illness, or any

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[1] *See* commentary regarding theft from a person RCC § 22E-2101(c)(4) and RCC § 22E-1205 offensive physical contact.

[2] Other subsections of D.C. Code § 22-1321, concerning nuisance and stealthily looking into a dwelling where there is an expectation of privacy, are addressed in different sections of the RCC. *See* RCC §§ 22E-4002 and § 22E-[X].

[3] D.C. Code § 22-1301 ("Whoever is convicted of an affray in the District shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both.").

[4] RCC § 22E-701. For example, in a Metro train station, a location outside the fare gates normally would be open to the general public during business hours, but a location inside the fare gates would not be open to the general public. Similarly, a restaurant and bar may be open to the general public during the day but impose an age limit and require identification late at night. Locations for which the general public always needs special permission to enter, such as public schools while in session or the Central Detention Facility (D.C. Jail), are not "open to the general public" for the purposes of this statute.

[5] RCC § 22E-207.

[6] "We hold that § 22-1321 (a)(1) requires proof that the defendant's charged conduct placed another person in fear of harm to his or her person." *Solon v. United States*, 196 A.3d 1283, 1288 (D.C. 2018).

[7] RCC § 22E-701.

impairment of physical condition.[8] "Property" is a defined term and means anything of value. The affected person must be placed in fear of a criminal harm.[9] The affected person must fear that the criminal harm will occur immediately, not in the future. And, the affected person's fear must be objectively reasonable.[10]

Subparagraph (a)(2)(A) also specifies the culpable mental state required is recklessness, a term defined in RCC § 22E-206. As applied here, the accused must be aware that there was a substantial risk that the conduct will cause another person to be afraid of suffering a criminal harm.[11] The conduct must also be clearly blameworthy under the circumstances. A person does not commit disorderly conduct when he or she exercises reasonable caution or where he or she deviates only slightly from the ordinary standard of care.[12]

Subparagraph (a)(2)(B) punishes publicly inciting others to violence consisting of a criminal harm involving bodily injury, taking of property, or damage to property. It also must be proven that the harm is likely[13] to occur. This provision requires two culpable mental states. First, the person must act purposely, a defined term,[14] which here means the person must consciously desire to cause another person to immediately engage in criminal harm. The person's statement must be a specific directive to act now, not merely general encouragement of violence against a particular group or in the name of a particular cause. Second, the person must be reckless as to the fact that the solicited harm is likely to occur. "Recklessness" is defined in the revised code,[15] and here means that the person must be aware of a substantial risk that the listener will follow the command and the person's conduct must be clearly blameworthy under the circumstances.

Subparagraph (a)(2)(C) punishes directing "fighting words"[16] to someone in a public place, which are likely[17] to provoke immediate, violent retaliation. To commit

[8] RCC § 22E-701.

[9] Consider, for example, a person who becomes afraid that a repossession officer will tow away their car, due to delinquent payments. That harm (alone) is not a criminal taking of property and, without more, the officer's conduct is not disorderly.

[10] For example, a fear of theft or violence based on prejudicial beliefs about race or sex is not objectively reasonable.

[11] For example, a person who enters an area of a park that, on inspection, appears to be vacant. She then swings a stick wildly while screaming obscenities, scaring someone who walks into the area, thinking they are being attacked. She has not committed disorderly conduct because she was not aware of a substantial risk that any person could see her or hear her.

[12] For example, a person playing kickball in a public park who chases the ball near a group of uninvolved bystanders, alarming them. However agile or clumsy the athlete might be, it is unlikely that her movements will rise to the level of disorderly conduct because a person of ordinary caution would likely chase after the ball in the same manner, under the same circumstances.

[13] Whether a harm is likely to occur is a fact-sensitive inquiry. For example, where a person commands one unarmed person to "attack" a group of four well-armed police officers, it may not be likely that the listener will heed the command. Consider also, a person who tries to persuade a group of pacifist protestors to burn down the city.

[14] RCC § 22E-206.

[15] RCC § 22E-206.

[16] Fighting words are words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, (1942).

[17] Whether a harm is likely to occur is a fact-sensitive inquiry. For example, where a person commands one unarmed person to "attack" a group of four well-armed police officers, it may not be likely that the listener will heed the command. Consider also, a person who tries to persuade a group of pacifist protestors to burn down the city.

disorderly conduct by fighting words, a person must act with the purpose of directing abusive speech to another person.[18] "Purposely" is a defined term[19] and here means that the speaker must consciously desire that the manner of the speech be seriously upsetting the listener.[20] The term "speech" is defined in RCC § 22E-701 to mean oral or written language, symbols,[21] or gestures.[22] The person must also be reckless as to the fact that the speech is likely to provoke a violent response. "Recklessness" is also defined in the revised code,[23] and here means that the person must be aware of a substantial risk that the listener will retaliate[24] and the person's conduct must be clearly blameworthy under the circumstances.

Subparagraph (a)(2)(D) prohibits public fighting after receiving a law enforcement officer order to stop. The term "fighting" is not statutorily defined, and is not restricted to the infliction of bodily injury required for assault offenses[25] or offensive touching as is required for offensive physical contact.[26] Unlike assault and offensive physical contact, effective consent is not an available defense to public fighting that violates subparagraph (a)(2)(D).[27] The government must prove that the accused received a law enforcement order to stop fighting and that the accused continued or resumed fighting in disregard of that directive. "Knowingly" is a defined term[28] and here means the person must be practically certain that he or she received an order from someone he or she is practically certain is a law enforcement officer.[29] "Law enforcement officer" is a defined term.[30] The order may be personalized to the individual or directed to an entire group, and may be articulated in various ways so long as the meaning is clear. There is no requirement that the police order indicate the reasons for the order to cease. A person must be afforded fair notice and a reasonable opportunity to comply with the law

[18] The intended recipient of the speech may be a particular individual or a large and amorphous group of people near enough to see or hear the speaker.
[19] RCC § 22E-206.
[20] No particular word or image categorically qualifies as fighting words. A word's connotation and denotation may change over time. The offensiveness of a word may depend on the identity of speaker, the audience, or the sensitivity of the moment.
[21] For example, a sign with a swastika, a car decal bearing a Redskins logo, a red hat with the initials "MAGA," or a noose as a prop, could be considered an abusive symbol, depending on the time, place, and manner of their use.
[22] Some gestures (e.g., a raised middle finger) are widely understood to carry a particular verbal meaning. Whether a gesture is abusive and whether provocation is likely depends on the time, place, and manner in which the gesture is used, not the content of the verbal translation alone.
[23] RCC § 22E-206.
[24] Whether a listener is likely to be provoked to immediate, retaliatory criminal harm is a fact-sensitive inquiry.
[25] RCC § 22E-1202.
[26] RCC § 22E-1205.
[27] *See Woods v. United States*, 65 A.3d 667, 669-671 (D.C. 2013) (explaining consent is no defense to an assault that occurs in a public place because a public assault is a crime against the public generally); *see also* D.C. Code § 22-1301 (criminalizing affrays).
[28] RCC § 22E-206.
[29] A person who does not know the speaker is a law enforcement officer or who does not know the order is directed to them does not commit disorderly conduct by public fighting.
[30] RCC § 22E-701.

enforcement order to stop fighting.[31] Where a person is uncertain as to whether they can safely comply with the order, a justification defense also may apply.

Subsection (b) establishes three exclusions from liability for the revised disorderly conduct offense.

Paragraph (b)(1) cross-references the U.S. Constitution, the District's First Amendment Assemblies Act, codified in Title 5 of the D.C. Code, and the District's Open Meetings Act. This conflict-of-laws provision is intended to encourage readers to consider what First Amendment polices, if any, are implicated by prosecutions of the offense and makes clear that this language leaves all rights conferred under these Acts unchanged. Not all conduct involved in the offense, of course, will implicate First Amendment rights.

Paragraphs (b)(2) and (b)(3) categorically exclude as a basis for disorderly conduct liability behaviors that frighten, offend, or provoke a law enforcement officer in the course of his or her official duties.

Subsection (c) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (d) provides the penalty for the offense. [RESERVED.]

Subsection (e) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised disorderly conduct statute changes current District law[32] in two main ways.*

First, the revised statute specifies that conduct that frightens, offends, or provokes a law enforcement officer can never be the basis for disorderly conduct.[33] Subsection (a) of the current disorderly conduct statute punishes three basic types of misconduct in public: causing fear of crime,[34] inciting crime,[35] and provoking crime.[36] Only the third type of conduct, criminalized by paragraph (a)(3) of the statute, explicitly excludes from liability language or gestures directed at a law enforcement officer while acting in his or her official capacity. Conduct criminalized under subsections (a)(1) and (a)(2) of the current statute does not provide an exception for conduct directed at law enforcement officers.[37] In contrast, the RCC codifies an exception to liability for engaging in conduct

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[31] *See* RCC § 22E-203 (requiring physical capacity to perform a required legal duty); *Conley v. United States*, 79 A.3d 270, 292-293 (D.C. 2013) (explaining voluntariness requires a reasonable opportunity to comply with a legal duty); *Lambert v. People of the State of California*, 355 U.S. 225, 229 (1957) (reversing a conviction where, on first becoming aware of her duty, the appellant had no opportunity to comply with the law and avoid its penalty.) *see also Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006) (requiring an opportunity to comply with a dispersal order); *Dellums v. Powell*, 566 F.2d 167, 181 n.31 (D.C. Cir. 1977); *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 126 n.5 (D.C. Cir. 1977).

[32] The current disorderly conduct statute, D.C. Code § 22-1321, was revised in 2011 to significantly change the scope and language.

[33] RCC §§ 22E-4201(b)(2) and (b)(3).

[34] D.C. Code §22-1321(a)(1).

[35] D.C. Code §22-1321(a)(2).

[36] D.C. Code §22-1321(a)(3).

[37] To the extent that the current subsections (a)(1) and (a)(2) of the disorderly conduct statute, which do not explicitly exclude behavior directed at a law enforcement officer, include conduct also addressed by subsection (a)(3), the three provisions are in apparent conflict. For example, consider an actor, with a group of like-minded companions nearby, shouts racial slurs and gestures with his middle finger at an on-duty law enforcement officer, deserves to be taught a lesson. Depending on the facts, such conduct may

other than speech that causes a law enforcement officer to reasonably believe that he or she is likely to suffer an immediate criminal harm involving bodily injury, taking of property, or damage to property. Unlike other citizens, law enforcement officers regularly confront alarming behavior, are specially trained to resist provocation and determine what behavior is criminal or an attempted crime, and have the power to arrest where they reasonably believe a crime or attempted crime is occurring. Consequently, it is not necessary to criminalize conduct that falls short of such an attempted crime, and that is merely alarming to the law enforcement officer. On the other hand, when a person's conduct indicates that they are about to assault a law enforcement officer or harm the officer's property, a more serious punishment than disorderly conduct is warranted. This revision may better reflect recent Council determinations about the proper scope of the assault on a police officer statute,[38] and the Council's rationale for the current disorderly statute's exception[39] for fighting words directed at a law enforcement officer. This change improves the clarity, consistency, and proportionality of the offense.

Second, the revised disorderly conduct statute limits liability for consensual public fighting to continuing or resuming such conduct after a law enforcement order to cease. The current D.C. Code codifies a penalty for committing an "affray,"[40] however, no elements of the offense are codified.[41] There are no published cases where an individual has been convicted under the codified 'affray' statute in the District, however, a District court opinion from the mid-1800s references the fact that a common law affray occurs when two persons fight in public.[42] Dicta in District assault case law has stated that a public assault is punishable to the extent that it breaches public peace and order,[43] perhaps indirectly referring to the crime of affrays. In contrast, the revised disorderly conduct statute specifically punishes participating in public fighting only after a law enforcement officer has ordered the fight to end. This change eliminates liability for mutually-consensual horseplay or low-level fighting that does not involve significant

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satisfy the objective elements of subsection (a)(1) (causing the officer to be in reasonable fear he is about to be assaulted), subsection (a)(2) (provoking others to attack the officer), and (a)(3) (provoking immediate physical retaliation, although only subsection (a)(3) says that it cannot be applied to an on-duty officer.

[38] *See generally* Report on Bill 21-360, "Neighborhood Engagement Achieves Results Act of 2015," Council of the District of Columbia Committee on Public Safety and the Judiciary (January 28, 2016).

[39] *See* Report on Bill 18-425, "Disorderly Conduct Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (November 19, 2010) at Page 8 ("[T]he crime of using abusive or offensive language must focus on the likelihood of provoking a violent reaction by persons other than a police officer to whom the words were directed, because a police officer is expected to have a greater tolerance for verbal assaults and is especially trained to resist provocation by verbal abuse that might provoke or offend the ordinary citizen." And, "it seems unlikely at best that the use of bad language toward a police officer will provoke immediate retaliation or violence, not by him, but by someone else.").

[40] D.C. Code § 22-1301 provides, "Whoever is convicted of an affray in the District shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both."

[41] The offense is an example of a "common law" offense whose elements are defined wholly by courts in past case opinions rather than in legislative acts.

[42] *Hedgpeth v. Rahim*, 213 F. Supp. 3d 211, 223 (D.D.C. 2016) (citing *United States v. Herbert*, 26 F. Cas. 287, 289, F. Cas. No. 15354a, 2 Hay. & Haz. 210 (D.C. Crim. Ct. 1856) ("In the case of sudden affray, where parties fought on equal terms, that is, at the commencement or onset of the conflict, it matters not who gave the first blow.")

[43] *See Woods v. United States*, 65 A.3d 667, 669-671 (D.C. 2013) (explaining consent is no defense to an assault that occurs in a public place because a public assault is a crime against the public generally).

bodily injury. The RCC disorderly conduct statute, per subparagraph (a)(2)(A) also provides liability for public fighting whenever a person recklessly causes another to reasonably believe that there is likely to be immediate and unlawful bodily injury—covering public fighting that involves infliction of significant bodily injury and non-consensual public fighting.[44] This change clarifies and improves the clarity, consistency, and proportionality of District laws, and reduces unnecessary overlap.

Beyond these changes to current District law, three other aspects of the revised disorderly conduct statute may be viewed as a substantive changes of law.

First, the revised statute specifies a culpable mental state for all offense elements other than the location, which is specified to be a matter of strict liability. The current disorderly conduct statute[45] begins with a prefatory clause "In any place open to the general public, and in the communal areas of multi-unit housing," but does not specify a culpable mental state for that circumstance. District case law does not address the matter. In paragraph (a)(1), the current statute specifies a mental state of "intentionally or recklessly." However, the current statute does not define "recklessly" and does not make clear whether a person must be reckless as to every result and circumstance in paragraph in (a)(1), or the following paragraphs (a)(2) and (3), which do not state any culpable mental states of their own. Again, District case law to date does not address culpable mental states for these provisions. The RCC resolves these ambiguities by clearly specifying the culpable mental states for all elements of the revised offense as being either strict liability (through use of the phrase "in fact") as to the location, or recklessly, purposely, or knowingly as to all other offense elements. These culpable mental state terms are defined in RCC § 22E-206.[46] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[47] However, recklessness is required for assault liability in RCC § 22E-1202, which criminalizes conduct closely related to paragraph (a)(2)(A) in the revise disorderly conduct offense. The heightened culpable mental state of purposely in paragraphs (a)(2)(B)-(a)(2)(C) distinguishes the use of speech which the actor does not know, or knows but does not wish, to be construed as provoking violence. This change improves the clarity, completeness, and the consistency

[44] Some instances of mutual combat are lawful and others are not. RCC § 22E-1202 explains that a person may not consent to significant bodily injury or serious bodily injury or to use of a firearm. "Consent," "significant bodily injury," and "serious bodily injury" are defined in RCC § 22E-701. "Firearm" is defined in D.C. Code § 22-4501(2A).

[45] D.C. Code § 22-1321.

[46] The revised disorderly conduct statute makes clear that the actor must consciously disregard a substantial risk that her conduct will lead an onlooker to reasonably believe one of three harms is likely to immediately occur. The RCC also makes clear that actor must grossly deviate from the standard of care that a reasonable person would observe in the person's situation. Finally, the RCC makes clear that a person is strictly liable with respect to whether she is located in a place that is open to the general public or is the communal area of multi-unit housing.

[47] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted.)).

of the revised offense, and, to the extent it may require a new culpable mental state as to some of the principal elements of the offense, improves its proportionality.[48]

Second, the revised statute defines the phrase "open to the general public." The current disorderly conduct statute uses this phrase but does not define it, and there are no District of Columbia Court of Appeals ("DCCA") published opinions construing the phrase. The legislative intent behind the phrase is unclear,[49] and case law does not directly address its meaning.[50] To resolve any ambiguity, the RCC states that "open to the general public" means no payment or permission is required to enter. The revised definition effectively excludes public conveyances, private event arenas, schools, and detention facilities from the purview of the disorderly conduct statute. What amounts to disorderly conduct in any of these locations may result in other criminal liability under current law and the RCC,[51] giving law enforcement officers authority to immediately intervene and arrest when necessary to restore public order.[52] This change clarifies and improves the consistency and proportionality of the revised statute, and reduces unnecessary overlap.

Third, the revised statute, in concert with other RCC statutes, eliminates separate, distinct liability for jostling, crowding, and placing a hand near someone's purse or

[48] Were a person strictly liable for conduct that causes a breach of peace per D.C. Code § 22-1321(a)(2) and (a)(3), even mistakes or accidents by a defendant could be the basis of criminal liability for disorderly conduct. For example, a person who reasonably believes themselves to be alone in a park and recites provocative song lyrics containing "fighting words" may be guilty of disorderly conduct.

[49] In an earlier draft of the disorderly conduct legislation, before the Council formed the Disorderly Conduct Arrest Project Subcommittee of the Council for Court Excellence, Bill 18-151 defined "public" as "affecting or likely to affect persons in a place to which the public has access; including but not limited to highways, streets, sidewalks, transportation facilities, schools, places of business or amusement."

[50] The District of Columbia Court of Appeals has not addressed the meaning of the phrase "open to the general public," however, it has required that disorderly conduct occur in a location and under circumstances in which a breach of public peace and tranquility could occur. *See Ramsey v. United States*, 73 A.3d 138, 147 (D.C. 2013) (reversing a conviction for disorderly conduct where the defendant was alleged to have attempted to urinate in a secluded, dark alley, away from any businesses, residences, or people).

[51] Current law separately punishes conduct that is disruptive to riders on public conveyances and authorizes the Washington Metropolitan Area Transit Authority ("WMATA") to refuse service to any rider who violates its rules of conduct. *See* D.C. Code §§ 22-1321(c), 35-252, 35-251, and 35-216. Additionally, any person who remains on a public conveyance without WMATA's effective consent is guilty of trespass and subject to arrest on that basis. *See generally* RCC § 22E-2601. Similarly, a private arena may eject any patron from their premises at any time and failure to leave as directed amounts to a trespass. The Central Detention Facility ("D.C. Jail") and the Central Treatment Facility ("CTF") are empowered to quell any threat of public alarm or breach of peace by immediately separating inmates, placing inmates in protective custody, and placing inmates in disciplinary detention. *See* D.C. Department of Corrections Inmate Handbook 2015-2016. Public and private schools also have authority to remove and suspend rulebreakers. *See* Tex. Penal Code § 42.01 (providing that its disorderly conduct statute categorically "do[es] not apply to a person who, at the time the person engaged in conduct prohibited under the applicable subdivision, was a student younger than 12 years of age, and the prohibited conduct occurred at a public school campus during regular school hours.").

[52] "Disorderly conduct is distinct from many other statutes in that most criminal prohibitions are intended to punish and deter crimes, whereas disorderly conduct is meant to give police the power to defuse a situation that disturbs the public. The goal of restoring public order comes from the concern that citizens who are being bothered or annoyed might choose violent self-help when someone is being loud on the street or otherwise causing a disturbance." Committee on Public Safety and the Judiciary Report on Bill 18-425 at Page 3.

wallet. Subsection (g) of the current disorderly conduct statute provides, "It is unlawful, under circumstances whereby a breach of the peace may be occasioned, to interfere with any person in any public place by jostling against the person, unnecessarily crowding the person, or placing a hand in the proximity of the person's handbag, pocketbook, or wallet." DCCA case law interpreting a prior version of the disorderly conduct statute stated that "jostling against" "contemplates rough physical touching of one individual by another."[53] However, in the RCC, jostling, crowding, and reaching toward a wallet that actually places a person in fear of an immediate unlawful taking[54] is criminalized by the disorderly conduct statute subparagraph (a)(2)(A). Other RCC offenses such as offensive physical contact[55] and attempted theft from a person[56] also criminalize aspects of the current disorderly statute's jostling provision. It is unclear whether the current jostling provision in the D.C. Code covers any further conduct. [57] This change clarifies and reduces unnecessary overlap in the revised offenses.

Fourth, the revised statute more precisely defines committing disorderly conduct by means of incitement to violence. Paragraph (a)(2) of the current disorderly conduct statute explicitly provides that it is unlawful to, "Incite or provoke violence where there is a likelihood that such violence will ensue." [58] The term "incite" is not defined by in the statute, and case law has not interpreted the term. Legislative history provides no indication of the term's intended meaning.[59] "Incites," however, is also predicate conduct in the current D.C. Code rioting statute.[60] To resolve ambiguities about the scope and meaning of disorderly conduct by incitement, subparagraph (a)(2)(B) of the revised statute punishes a person who "[p]urposely commands, requests, or tries to persuade any person present to cause immediate criminal harm involving bodily injury, taking of property, or damage to property, reckless as to the fact that the harm is likely to

[53] *Matter of A. B.*, 395 A.2d 59, 62 (D.C. 1978).

[54] The revised statute may be narrower than the current jostling provision in D.C. Code § 22-1321(g). Although the statutory language requires "circumstances whereby a breach of peace may be occasioned," the DCCA recently explained that this provision also reaches instances in which the victim is unaware of the offensive behavior. *See Solon v. United States*, 196 A.3d 1283, 1288 (D.C. 2018) (citing Report on Bill 18-425, "Disorderly Conduct Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (November 19, 2010) at Page 9).

[55] RCC § 22E-1205;

[56] RCC § 22E-2101; RCC § 22E-301.

[57] Although the statutory language requires "circumstances whereby a breach of peace may be occasioned," legislative history cited in dicta by the DCCA suggests that this provision also reaches instances in which the victim is unaware of the offensive behavior. *See Solon v. United States*, 196 A.3d 1283, 1288 (D.C. 2018) (citing Report on Bill 18-425, "Disorderly Conduct Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (November 19, 2010) at Page 9).

[58] D.C. Code § 22-1321(a)(2).

[59] Legislative adoption of the "incite" language in subsection (a)(2) of the current disorderly statute occurred as part of the Council's 2011 amendments that were in significant part based on recommendations by the Council for Court Excellence (CCE) and included language identical to the current subsection (a)(2). *See* Revising the District of Columbia Disorderly Conduct Statutes: A Report and Proposed Legislation Prepared by The Disorderly Conduct Arrest Project Subcommittee of the Council for Court Excellence (October 14, 2010) ("CCE Report") at Page 16. The CCE recommendations did not provide an explanation for the meaning or significance of the "incite" language in their recommendation beyond a general statement that that and other language was a reformulation of the "catchall" provision in the disorderly conduct statute prior to 2011, which referred to "acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others." CCE Report at 9.

[60] D.C. Code § 22-1322(c).

occur." Similar language appears in the provision governing liability for criminal solicitation in the general part of the revised code.[61] The terms "bodily injury," "property," and "reckless" each have standardized definitions in RCC § 22E-701. This change improves the clarity and consistency of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

First, the revised statute replaces the words "reasonable fear" with "reasonably believe" that that there will be immediate and unlawful harm. The current disorderly conduct statute states that it is unlawful for a person to "cause another person to be in reasonable fear" of specified harms that generally appear to entail immediate acts.[62] The statute does not define the term "fear." A recent DCCA opinion held that the statute "requires proof that the defendant's charged conduct placed another person in fear of harm to his or her person."[63] The revised disorderly conduct statute specifies that the observer must reasonably believe that they will suffer an immediate and unlawful harm. This word choice clarifies that it is the observer's reasoned judgment, not their emotion that matters as to liability. It also clarifies, through the requirement of immediacy, that the harm must be imminent.

Second, the revised statute explicitly distinguishes between speech and non-speech conduct, consistent with standard definitions that apply throughout the RCC. Current D.C. Code § 22-1321(a) uses the verb "act" in paragraph (1), "[i]ncite or provoke" in paragraph (2), and "[d]irect abusive or offensive language" in paragraph (3). The D.C. Code does not define the word "act" in the disorderly conduct statute or provide a general definition. District case law has not addressed the issue. The RCC uses standardized definitions of "act"[64] and "speech,"[65] which provide that an act includes verbal speech, and that speech includes certain non-verbal conduct. Consistent with these definitions, and to clarify that the intended meaning of paragraph (a)(1) of the current disorderly statute is intended to not include verbal speech, the revised statute uses different terminology. The revised statute replaces the word "act" with the phrase "conduct other than speech"[66] in subparagraph (a)(2)(A) and uses the defined term "speech" in subparagraph (a)(2)(C).

Third, the revised statute clarifies that conduct that raises concerns about self-injury,[67] other than provoking an injury to oneself by abusive language, is not disorderly conduct. The current disorderly conduct statute states that it is unlawful for a person to "intentionally or recklessly act in such a manner as to cause another person to be in reasonable fear that *a person* or property in *a person*'s immediate possession is likely to be harmed or taken" (emphasis added).[68] The DCCA recently interpreted this language

[61] RCC § 22E-302.
[62] D.C. Code § 22-1321(a)(1).
[63] *Solon v. United States*, 196 A.3d 1283, 1288 (D.C. 2018).
[64] RCC § 22E-202 ("'Act' means a bodily movement.").
[65] RCC § 22E-701 ("'Speech' means oral or written language, symbols, or gestures.").
[66] RCC § 22E-4201(a)(2)(A).
[67] Examples include a person angrily kicking the fender of their broken-down car which is parked on the street, and a skate-boarder doing jaw-dropping tricks at a public park.
[68] D.C. Code §22-1321(a)(1).

as requiring that the conduct cause fear of harm to the observer's own person.[69] The RCC accordingly clarifies that conduct raising concerns solely about self-injury, other than provoking an injury to oneself by abusive language, is not a basis for disorderly conduct liability.[70]

Fourth, the revised statute replaces the phrase "abusive or offensive" with the term "abusive," which has the same general meaning.[71]

[69] *Solon v. United States*, 196 A.3d 1283, 1288 (D.C. 2018).

[70] There is separate authority for an officer to detain and transport for emergency medical care any person believed to be mentally ill and likely to injure herself. *See* D.C. Code § 21-521.

[71] *See* Merriam-Webster Online Dictionary at https://www.merriam-webster.com/dictionary/abusive (defining "abusive" as "harsh and insulting").

RCC § 22E-4202. Public Nuisance.

Explanatory Note. *This section establishes the public nuisance offense for the Revised Criminal Code (RCC). The offense proscribes a broad range of conduct that deliberately disturbs others and is not protected by the First Amendment or District law relating to freedom of assembly. The revised offense replaces subsections (b), (c), (c-1), (d), and (e) of D.C. Code § 22-1321 (Disorderly Conduct).*[1]

Subsection (a) requires that there be a significant interruption to others' activities.[2] This interruption must be committed purposely, a term defined in RCC § 22E-206. The accused must consciously desire that his or her conduct cause a significant interruption of specified activity.[3] Determination of whether a particular interruption is "significant" is an objective, fact-sensitive inquiry that, in part, must take into account the time, place, and manner of the conduct, as well as account public norms about what kinds of behavior should reasonably be expected and tolerated.[4]

Paragraphs (a)(1)-(4) list four specific types of nuisance that are prohibited. Paragraph (a)(1) replaces D.C. Code § 22-1321(b) and prohibits the disruption of a lawful religious service, funeral, or wedding.[5] The culpable mental state of "purposely" applies to the fact that the event is a lawful religious service, funeral, or wedding, requiring that it be the actor's conscious object to interrupt such an event. The event must occur in a location that is "open to the general public," a defined term that excludes locations that require payment or special permission to enter.[6] The term "in fact" specifies that the accused is strictly liable with respect to whether the event is in a public place.[7] The accused's conduct must have the intent and effect of interrupting the event, not merely upsetting participants and onlookers.[8]

Paragraph (a)(2) replaces D.C. Code § 22-1321(c-1) and prohibits interference with the orderly conduct of a District or federal public body's meeting. The culpable

[1] Subsections (a) and (g) of D.C. Code § 22-1321 are replaced wholly or in part by RCC § 22E-4201 (Disorderly Conduct). [Subsection (f) of D.C. Code § 22-1321 concerning stealthily looking into a dwelling where there is an expectation of privacy has not yet been addressed in the RCC.]

[2] As the Council observed during its recent rewrite of the disorderly conduct statute, "Freedom of speech permits loud and annoying language, which some people might find 'threatening' or 'abusive,' so more is required. The speech should have *both* the 'intent and effect' of impeding or disrupting a gathering. In this regard, 'disturbing' is too subjective." *See* Report on Bill 18-425, "Disorderly Conduct Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (November 19, 2010) at Page 8.

[3] Persisting in disruptive conduct after receiving a law enforcement officer's warning may be evidence of that person's purposeful conduct.

[4] For example, loud church bells at 12:00 p.m. may be reasonable, whereas knocking on a private door at 1:00 a.m. may not be.

[5] In the current D.C. Code disorderly conduct statute, subsection (b) prohibits impeding "a lawful public gathering, or of a congregation of people engaged in any religious service or in worship, a funeral, or similar proceeding." Legislative history indicates this provision was intended to broaden an 1892 law titled "Disturbing Religious Congregation" beyond churches to include other worship services and funerals. *See* Report on Bill 18-425, "Disorderly Conduct Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (November 19, 2010) at Page 8.

[6] RCC § 22E-701.

[7] RCC § 22E-207.

[8] *See Snyder v. Phelps*, 562 U.S. 443, 445 (2011) (upholding First Amendment protections where there was no indication that the picketing interfered with the funeral service itself.)

mental state of "purposely" applies to the fact that the event is a public body meeting, requiring that it be the actor's conscious object to interrupt such an event. RCC § 22E-701 provides that the terms "public body" and "meeting" are defined in the District's Open Meeting Act,[9] which includes hearings of record and excludes chance or social meetings of councilmembers.[10]

Paragraph (a)(3) replaces D.C. Code § 22-1321(d) and prohibits causing a significant interruption of any person's quiet enjoyment of his or her residence between 10:00 p.m. and 7:00 a.m., and continuing or resuming such conduct after receiving oral or written notice to stop such conduct. An interruption of quiet enjoyment means a significant interference with the in-home activities of a person of ordinary sensitivity.[11] The intrusion may be a noise, smell, light, disturbing image or otherwise.[12] The culpable mental state of "purposely" applies to the fact that the effect of the conduct is a disturbance of a person's quiet enjoyment of their residence from 10:00 p.m. to 7:00 a.m.[13] The "purposely" culpable mental state requirement also applies to the fact that the accused continued or resumed the conduct after previously receiving notice, directly or indirectly, to cease the conduct. The person must be afforded a reasonable opportunity to comply with the notice to cease.[14] Where a person is uncertain as to whether they can safely comply with the notice, a justification defense may apply.

Paragraph (a)(4) replaces D.C. Code § 22-1321(c) and prohibits interruption of any person's lawful use of a public conveyance. RCC § 22E-701 defines a public conveyance as any government-operated air, land, or water vehicle used for the transportation of persons, including but not limited to any airplane, train, bus, or boat. Such interruption may consist of diverting a passenger's pathway or the pathway of the vehicle. The culpable mental state of "purposely" applies to the fact that the actor is interrupting another's lawful use of a public conveyance. Conduct intended to generally

[9] D.C. Code § 2-574.

[10] Legislative adoption of the "public building" language in subsection (c-1) of the current disorderly statute occurred as part of the Council's 2011 amendments that were in significant part based on recommendations by the Council for Court Excellence (CCE). *See* Revising the District of Columbia Disorderly Conduct Statutes: A Report and Proposed Legislation Prepared by The Disorderly Conduct Arrest Project Subcommittee of the Council for Court Excellence (October 14, 2010) ("CCE Report"). While D.C. Code § 22-1321 does not define a "public building," the CCE recommendations encouraged the Council to enact a provision that forbids disruption of the D.C. Council or other public meetings, comparable to D.C. Code §10-503.15, which prohibits the disruption of Congress. CCE Report at Page 11.

[11] What is reasonable, depends on the time, place, and manner of the activity. For example, at midnight on New Year's Day it may be reasonable to blare noisemakers for several seconds, but unreasonable to do so for several minutes.

[12] Intrusions into the enjoyment of one's home may be appropriately regulated without offending the First Amendment, under the captive audience doctrine. *See Rowan v. Post Office Dept.*, 397 U.S. 728, 736-738 (1970); *Frisby v. Schultz*, 487 U.S. 474, 484 (1988).

[13] Loud noise that recklessly or negligently disturbs others, or occurs at different hours or in different locations, may be punished under 20 DCMR § 2701.

[14] *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).

disrupt traffic in which a public conveyance operates is insufficient,[15] rather the conscious object of the actor must be to interrupt the use of the complainant's particular public conveyance.

Subsection (b) clarifies that the statute excludes constitutionally protected activity from the revised statute's reach and cross-references the U.S. Constitution, the District's First Amendment Assemblies Act, and the District's Open Meetings Act. This conflict-of-laws provision is intended to encourage readers to consider what First Amendment polices, if any, are implicated by prosecutions of the offense and makes clear that the revised statute leaves all rights conferred under these Acts unchanged. Not all conduct involved in the offense, of course, will implicate First Amendment rights. However, even with requirements that the actor purposely interrupt lawful activities, the actor's speech may be protected by the First Amendment, particularly if it concerns public issues.[16]

Subsection (c) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (d) provides the penalty for the offense. [RESERVED.]

Subsection (e) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised public nuisance statute changes current District law in three mean ways.*

First, the revised public nuisance statute potentially includes any type of offensive conduct, not just noise, that disturbs a person in his or her residence at night. The D.C. Code disorderly conduct statute currently makes it unlawful for a person to make an unreasonably loud noise between 10:00 p.m. and 7:00 a.m. that is likely to annoy or disturb one or more other persons in their residences.[17] In contrast, the revised statute includes all nuisances that cause a significant interruption to any person's quiet enjoyment of his or her residence at night, including noises, smells, and bright lights. This change clarifies the statute and eliminates an unnecessary gap in the law.

Second, the revised statute limits the residential intrusion provision to interactions that follow a notice to cease the interruption. The D.C. Code disorderly conduct statute currently does not limit liability for disturbing noises to situations where the accused has received notice to cease the disturbance, and it appears that a single loud noise "that is likely to annoy" may constitute a violation under the current statute. There is no case law on point. By contrast, the revised statute requires proof of prior notice to the actor to stop the conduct, followed by continuance or resumption of the conduct. Notice to cease makes future disturbances into an act of ignoring the victim's directive to be left alone and invading the victim's privacy. Having prior notice does not necessarily mean that continuance or resumption of the disruption is done with the purpose of disrupting the complainant, but it will typically show that the conduct is at least knowingly done with

[15] Such conduct may be punished as Blocking a Public Way, under RCC § 22E-4203.

[16] Speech on public issues occupies the "highest rung of the hierarchy of First Amendment values" and is entitled to special protection. *Connick v. Myers*, 461 U.S. 138, 145, (1983); *NAACP* v. *Claiborne Hardware Co*., 458 U.S. 886, 913 (1982); *Carey* v. *Brown*, 447 U.S. 455, 467 (1980). Additionally, public spaces occupy a "special position in terms of First Amendment protection." *Snyder v. Phelp*s, 562 U.S. 443, 456, (2011) (citing *United States v. Grace*, 461 U.S. 171, 180 (1983)).

[17] D.C. Code § 22-1321(d).

that effect. The revised statute more narrowly criminalizes behavior that is calculated to torment the complainant without reaching other legitimate or protected conduct.[18] This change improves the proportionality and, perhaps, the constitutionality of the revised statute.

Third, the revised public nuisance statute eliminates urinating and defecating in a public place as a distinct basis of criminal liability. Current District statutory law explicitly punishes public urination or defecation as a form of disorderly conduct[19] and as defacing property.[20] Legislative history indicates that when the Council revised the disorderly conduct statute in 2011, it retained a provision separately criminalizing public urination at subsection (e) only because the executive did not appear to have an adequate process for civil infraction enforcement.[21] In contrast, the RCC does not specifically criminalize urination or defecation. In the RCC there may still be liability for such conduct insofar as it causes property damage,[22] causes another person to reasonably believe that the conduct will cause property damage,[23] or involves publicly exposing genitalia.[24] Persons experiencing homelessness and mental illness may be disproportionately affected by criminal sanctions for defecation and urination,[25] and other, non-criminal remedies may address the problem as, or more, effectively. This change improves the proportionality of the revised offense.

Beyond these three changes to current District law, three additional aspects of the revised public nuisance statute may be viewed as substantive changes in law.

First, the revised statute specifies "purposely" as the required culpable mental state as to causing a significant interruption of lawful activity. Three of the four relevant subsections of the current disorderly conduct statute, D.C. Code § 22-1321, that are replaced by the revised public nuisance statute require that the accused act "with the intent and effect of impeding or disrupting" lawful activity.[26] However, the meaning of

[18] The "mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 414 (1992) (White, Blackmun, O'Connor & Stevens, JJ., concurring). There are many instances when one may communicate with another with the intention of causing a slight annoyance in order to emphasize an idea or opinion, or to prompt a desired course of action that one is legitimately entitled to seek. *See State v. Brobst*, 151 N.H. 420, 423 (2004); *People v. Klick*, 66 Ill. 2d 269, 273 (1977).

[19] D.C. Code § 22-1321(e).

[20] D.C. Code § 22-3312.01 (making it unlawful to "place filth or excrement of any kind…upon…[a]ny structure of any kind or any movable property"); *see Scott v. United States*, 878 A.2d 486 (D.C. 2005).

[21] See Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-425 at Page 9 (stating, "The committee agrees that public urination would be better handled as a civil infraction punishable by a ticket and a fine.")

[22] RCC § 22E-2503(c)(5) would punish public urination and defecation as fourth degree criminal damage to property to the extent it causes a permanent, observable or measurable diminution in value to public or private property—however urination and defecation are not specifically referenced in the statute.

[23] *See* RCC § 22E-4201, Disorderly Conduct.

[24] It is also unlawful "for a person, in public, to make an obscene or indecent exposure of his or her genitalia or anus." D.C. Code § 22-1312.

[25] In 2011, Metropolitan Police Department statistics indicated that a large number of the 300-400 persons arrested for public urination each year were not homeless, however, a concern remains that persons experiencing homelessness are impacted disproportionately. *See* CCE Report at 12.

[26] D.C. Code §§ 22-1321(b), concerning worshippers; subsection (c), concerning public conveyances; and subsection (c-1), concerning public buildings.

acting "with intent" is not defined by the statute. The fourth relevant subsection of the current disorderly conduct statute, D.C. Code § 22-1321, that is replaced by the revised public nuisance statute does not specify any culpable mental state.[27] There is no relevant case law on the culpable mental states for any of these provisions.[28] To resolve this ambiguity, the RCC public nuisance offense requires proof that the defendant acted purposely, a defined term in the RCC that requires that it be the conscious object of an actor to cause a significant interruption.[29] A purposeful culpable mental state distinguishes interruptions to lawful activities that are deliberate and in committed in bad faith, from other common interruptions of such activities. This change clarifies and improves the consistency and proportionality of the revised statute.

Second, the revised statute replaces the phrase "lawful public gathering, or of a congregation of people engaged in any religious service or in worship, a funeral, or similar proceeding"[30] with "lawful religious service, funeral, or wedding, that is in a location that, in fact, is open to the general public." The current disorderly conduct statute does not define the term "public gathering," and there is no case law on point. The legislative history of D.C. Code § 22-1321(b) states that the Council intended to broaden an 1892 law titled "Disturbing Religious Congregation" so that it is "applicable to any religious service or proceeding, or any similar gathering engaged in worship, including a funeral."[31] The legislative history does not provide any examples of gatherings other than worship services that it intended to include. To resolve ambiguity about the scope of a "lawful public gathering," the revised statute includes only religious services, and funerals and weddings—which may be religious or secular—provided that they occur in a location open to the public.[32] A broad construction of a "lawful public gathering" would potentially reach any gathering of people[33] and may be vulnerable to challenges for vagueness or overbreadth.[34] This change clarifies the revised statute and may ensure its constitutionality.

Third, the revised statute replaces the phrase "disrupting the orderly conduct of business in that public building"[35] with significant interruption of "[t]he orderly conduct of a meeting by a District or federal public body" and the inclusion in the statute of cross-references to specific definitions of "public body" and "meeting" in the D.C. Code. The terms "orderly conduct," "business," and "public building" are not defined in the current disorderly conduct statute or in District case law. However, legislative history indicates this provision was intended to forbid disruption of the D.C. Council or other public meetings, in a manner comparable to D.C. Code §10-503.15, which prohibits the

[27] D.C. Code § 22-1321(d), concerning disturbance of persons in their residences.
[28] Since the disorderly conduct statute was revised in 2011 to significantly change its scope and language, the D.C. Court of Appeals ("DCCA") has yet to publish an opinion interpreting the statute.
[29] RCC § 22E-206.
[30] D.C. Code § 22-1321(b).
[31] *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.
[32] If a person disrupts a religious service, funeral, or wedding in a private place, that conduct may be punishable as a trespass. RCC § 22E-2601.
[33] For example, players in a game in a public park, a gathering of acquaintances at a street corner, or a couple on a sidewalk might all reasonably fall within the ambit of a broad construction of "a public gathering."
[34] Consider, for example, a counter-protest that aims to disrupt a lawful public demonstration.
[35] D.C. Code § 22-1321(c-1).

disruption of Congress.[36] To resolve ambiguities about the scope of this provision, the revised statute clarifies that it is the nature of the meeting as one of a public decision-making body that is controlling, and not the ownership or operation of the building. The revised statute incorporates the definition of a public body meeting from the District's Open Meetings Act[37] to clarify what types of governmental decision-making bodies are included, be they federal or District. This change improves the clarity of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

The RCC criminalizes public nuisances in a stand-alone offense. Under current District law, conduct constituting a public nuisance is criminalized in the disorderly conduct statute,[38] along with crimes such as stealthily looking into a dwelling where there is an expectation of privacy and engaging in conduct that puts someone in reasonable fear a crime is to occur. The RCC separately groups and subjects to the same punishment public nuisance-type offenses.

[36] CCE Report at Page 11.
[37] D.C. Code § 2-574.
[38] D.C. Code § 22-1321.

RCC § 22E-4203. Blocking a Public Way.

Explanatory Note. *This section establishes the blocking a public way for the Revised Criminal Code (RCC). The offense proscribes knowingly engaging in conduct that renders impassable, without unreasonable hazard, public ways after receiving a law enforcement order to stop such conduct. The revised Blocking a Public Way offense and revised Unlawful Demonstration offense[1] together replace the current District offense of Crowding, obstructing, or incommoding.[2] The revised blocking a public way offense also replaces the crime of Obstructing a Bridge Connecting Virginia to the District of Columbia[3] and, in conjunction with other RCC provisions, also replaces several older District offenses.[4]*

Paragraph (a)(1) specifies that a person's conduct must block a street, sidewalk, bridge, path, entrance, exit, or passageway.[5] The term "blocks" is defined in RCC § 22E-701 to mean "render impassable without unreasonable hazard to any person."[6] The revised offense does not include minor incommoding that poses no risk to passers-by.[7] However, a person is liable under the revised statute for conduct that, but for the intervention of a law enforcement officer, would render the public way impassable without unreasonable hazard.[8] Because the definition refers to "render impassable," no proof that a person actually attempted to make use of the public way and was unable to do so is required.[9] Paragraph (a)(1) also specifies the culpable mental state for subsection (a) to be knowledge, a term defined at RCC § 22E-206 and here requiring that the defendant must at least be aware to a practical certainty that his or her conduct "blocks" a street, sidewalk, bridge, etc.

Paragraph (a)(2) specifies that the area the person is blocking must be on land or in a building that is owned by a government,[10] government agency,[11] or government-owned corporation.[12] This includes passageways through or within a park or

[1] RCC § 22E-4204.
[2] D.C. Code § 22-1307.
[3] D.C. Code § 22-1323.
[4] Specifically, D.C. Code § 22-3320 (Obstructing public road) is replaced by this revised statute and RCC § 22E-2403 (criminal damage to property); D.C. Code § 22-3321 (Obstructing public highway) is entirely replaced by this revised statute; D.C. Code § 22-3319 (Placing obstructions on or displacement of railway tracks) is replaced by this revised statute, and RCC § 22E-2403 (criminal damage to property); and D.C. Code § 22-1318 (driving or riding on footways in public grounds) is replaced by this revised statute.
[5] The words "street" and "path" broadly encompass all roads, trails, tunnels, alleys, boulevards and avenues.
[6] For example, a person blocking a sidewalk such that pedestrians have to walk around onto a busy street in order to pass likely is an offense.
[7] For example, a person standing or sitting on part of a sidewalk that pedestrians have to step around likely is not committing an offense.
[8] For example, a person lying down and blocking two lanes of a highway, forcing police to redirect traffic around the person to avoid an unreasonable hazard, likely is an offense.
[9] For example, if a group of persons blocked off a street that was not currently in use by cars or pedestrians, and refused to move after receiving a police order to do so, these persons would be guilty of completed blocking a public way.
[10] E.g., District of Columbia, federal government.
[11] E.g., Washington Metropolitan Area Transit Authority.
[12] E.g., Amtrak.

reservation.[13] Per the rule of construction in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2), requiring the defendant to be at least aware to a practical certainty that the location is a public space.

Paragraph (a)(3) requires the government to prove that the accused received a lawful law enforcement order to stop blocking and that the accused disregarded that directive. Per the rule of construction in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to most elements in paragraph (a)(3). "Knowingly" is a defined term[14] and here means the person must be practically certain that he or she received an order from someone he or she is practically certain is a law enforcement officer.[15] "Law enforcement officer" is a defined term.[16] The order may be personalized to the individual or directed to an entire group, and may be articulated in various ways so long as the meaning is clear. There is no requirement that the police order indicate the reasons for the order. The person must be afforded fair notice and a reasonable opportunity to comply with the law enforcement order to stop blocking.[17] Where a person is uncertain as to whether they can safely comply with the order, a justification defense may apply. The accused must also be practically certain that his or her action constitutes a continuance or resumption of the blocking conduct that was the object of the law enforcement officer order. The order itself must be lawful.[18] "In fact," a defined term,[19] is used to indicate that there is no culpable mental state requirement as to whether the order is lawful.[20]

Subsection (b) cross-references the U.S. Constitution, the District's First Amendment Assemblies Act, and the District's Open Meetings Act. This conflict-of-laws provision is intended to encourage readers to consider what First Amendment polices, if any, are implicated by prosecutions of the offense and makes clear that the revised statute leaves all rights conferred under these Acts unchanged. Not all conduct involved in the offense, of course, will implicate First Amendment rights.

Subsection (c) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (d) provides the penalty for the offense. [RESERVED.]

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[13] D.C. Code § 22-1307(a)(1)(D).

[14] RCC § 22E-206.

[15] A person who does not know the speaker is a law enforcement officer or who does not know the order is directed to them does not commit blocking a public way.

[16] RCC § 22E-701.

[17] *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).

[18] Where a law enforcement officer infringes on a person's freedom of movement without requisite cause or authority, in violation of any federal or District law, the person has not committed a blocking offense.

[19] RCC § 22E-207.

[20] Consider, for example, a construction team or a group of organized protesters that (incorrectly) believes it has a valid permit to block a particular street. Such a group is subject to criminal liability for blocking. Such conduct also may subject to arrest pursuant to 18 DCMR § 2000.2 (Failure to Obey a Lawful Order of a Police Officer) or 24 DCMR § 2100 (Crowd and Traffic Control).

Subsection (e) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised blocking a public way statute changes current District law in three main ways.*

First, the revised statute does not prohibit blocking use of or passage through a public conveyance. In addition to public land and buildings, the current D.C. Code § 22-1307(a)(1)(C) refers to "The use of or passage through any…public conveyance." The term "public conveyance" is not defined, and there is no case law on point. The District's disorderly conduct statute contains a similar provision relating to public conveyances.[21] In contrast, the RCC punishes purposely interrupting a person's lawful use of a public conveyance as a public nuisance crime.[22] This change clarifies and eliminates unnecessary overlap between revised offenses.

Second, the revised statute applies only to land or buildings owned by a government, government agency, or government-owned corporation. The current crowding, obstructing, or incommoding statute is unclear as to whether the streets, sidewalks, etc.,[23] or entrances to buildings[24] covered by the statute must be on publicly owned property. However, while noting that it would be possible to construe the statute as covering only public locations where an unlawful entry charge could not be brought and recognizing the absence of any legislative history,[25] the DCCA has upheld a conviction for blocking an area "inside a private inclosure on a private driveway leading to the door of a private building."[26] In contrast, the RCC blocking a public way statute excludes conduct on or in all privately owned land and buildings. Unwanted entries onto private property remain separately criminalized as trespass.[27] The revised statute's phrase "owned by a government, government agency, or government-owned corporation" makes clear that land or buildings owned by the Washington Metropolitan Area Transit Authority, Amtrak, and similar locations are within the scope of the revised statute. This change clarifies and reduces unnecessary overlap between revised offenses.

Third, the revised statute repeals and replaces the archaic and unused offense of Driving or riding on footways in public grounds[28] and several other older District offenses.[29] Since this statute was codified in 1892, modes of transportation have

[21] D.C. Code § 22-1321(c) ("It is unlawful for a person to engage in loud, threatening, or abusive language, or disruptive conduct with the intent and effect of impeding or disrupting the lawful use of a public conveyance by one or more other persons.").
[22] RCC § 22E-4202.
[23] D.C. Code § 22-1307(a)(1)(A).
[24] D.C. Code § 22-1307(a)(1)(B).
[25] *Morgan v. District of Columbia*, 476 A.2d 1128, 1130 (D.C. 1984).
[26] *Id*.
[27] RCC § 22E-2601.
[28] D.C. Code § 22-1318 ("If any person shall drive or lead any horse, mule, or other animal, or any cart, wagon, or other carriage whatever on any of the paved or graveled footways in and on any of the public grounds belonging to the United States within the District of Columbia, or shall ride thereon, except at the intersection of streets, alleys, and avenues, each and every such offender shall forfeit and pay for each offense a sum not less than $1 nor more than $5.").
[29] Specifically, D.C. Code § 22-3320 (Obstructing public road) is replaced by this revised statute and RCC § 22E-2403 (criminal damage to property); D.C. Code § 22-3321 (Obstructing public highway) is entirely replaced by this revised statute; and D.C. Code § 22-3319 (Placing obstructions on or displacement of railway tracks) is replaced by this revised statute, and RCC § 22E-2403 (criminal damage to property).

drastically change and the District now regulates licensure, traffic, and safety through other mechanisms. Statistics indicate that the statute has not been charged in recent years and the penalty—$1-5—indicates that it has not been a practical deterrent in decades. In contrast, the revised statute provides a clear, consistent way to address misuse of public ways. This change clarifies the revised statute.

Beyond these three substantive changes to current District law, two other aspects of the revised blocking a public way statute may constitute substantive changes of law.

First, the revised statute specifies that knowledge is the mental state that applies to the elements in paragraphs (a)(1)-(a)(3). No mental state is specified in the current D.C. Code § 22-1307 statute with respect to any elements. Case law indicates some kind of intent is necessary, though the precise kind of intent is unclear.[30] In one case, the District of Columbia Court of Appeals ("DCCA") has recognized that a reasonable mistake defense may apply to crowding, obstructing, or incommoding.[31] The Obstructing bridges connecting D.C. and Virginia statute[32] specifies a culpable mental state of "knowingly and willfully" but does not require a prior law enforcement order to cease obstructing a bridge. To resolve this ambiguity, the revised statute clearly specifies a culpable mental state of "knowingly." Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[33] Given that the current and revised statutes require a warning from a law enforcement officer to the defendant, the defendant will typically have actual knowledge that he or she is blocking a public way. This change improves the clarity, consistency, and completeness of the revised statute.

Second, through its use of the definition of "block," the revised blocking a public way offense specifies that the standard for determining prohibited conduct is whether it makes the street, sidewalk, etc. "impassable without unreasonable hazard to any person." The current statute is silent as to the meaning of the verbs "crowd, obstruct, or incommode"[34] used to indicate the prohibited behavior. No case law has defined these words either, although the fact patterns in cases are generally consistent with the revised definition of "blocks."[35] To resolve this ambiguity, the revised statute codifies a standard

[30] The DCCA has stated that the offense is one of "general intent" which it noted is frequently defined to require "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984). Under the RCC all physical acts must be voluntary per RCC § 22E-203, but neither the *Morgan* court nor any other DCCA rulings specifically address in detail the culpable mental state required for particular elements in the current crowding, obstructing, or incommoding statute.

[31] *Morgan v. District of Columbia*, 476 A.2d 1128, 1133 (D.C. 1984).

[32] D.C. Code § 22-1323.

[33] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted.)"). See also *Carrell v. United States*, 165 A.3d 314, 323 n. 22 (D.C. 2017) (analogizing the difference between "general intent" and "specific intent" as recognized in Supreme Court case law to the difference between "knowledge" and "purpose," respectively.

[34] D.C. Code § 22-1307.

[35] For example, the DCCA affirmed a conviction where protestors blocked the front of the Rayburn congressional office building and "the trial judge found that, 'while not 100 percent blocked, [the building entrance] was significantly impeded or incommoded' because 'people had to pick their way around individuals lying on the ground in sheets,' some 'less than two or three feet…from the entryway.'" *Tetaz v.*

definition of what constitutes blocking. The requirement that the accused's conduct render the sidewalk, etc. "impassable without unreasonable hazard to any person" does not provide liability for mere loitering, where a person can still navigate around the accused without undue risk. This change improves the clarity of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

First, the revised statute, in combination with unlawful demonstration, RCC § 22E-4204, divides and replaces the current District offense of crowding, obstructing, or incommoding.[36] The revised blocking a public way offense effectively replaces subsection (a) of the current law and the revised unlawful demonstration offense replaces subsection (b). This change logically reorganizes the statutes, given that each provision describes markedly different conduct.

Second, the revised statute adds an explicit cross-reference in subsection (b) to the First Amendment Assemblies Act of 2004 (FAAA), a statutory regime codified in Title 5,[37] as well as the U.S. Constitution and the District's Open Meetings Act. Part of the FAAA, D.C. Code § 5-331.05(d), describes situations where an assembly "does not constitute an offense." The reference to the FAAA gives clearer notice that the FAAA may narrow conduct otherwise covered by the revised unlawful demonstration offense.

Third, the revised statute prohibits blocking a street, sidewalk, bridge, path, entrance, exit, or passageway. Current D.C. § 22-1307(a) makes it unlawful to block (A) The use of any street, avenue, alley, road, highway, or sidewalk; (B) The entrance of any public or private building or enclosure; (C) The use of or passage through any public building or public conveyance; (D) The passage through or within any park or reservation. These terms are not defined by statute or in case law. The Obstructing bridges connecting D.C. and Virginia statute[38] refers only to "any bridge connecting the District of Columbia and the Commonwealth of Virginia." The revised statute simplifies the list of covered locations to a street, sidewalk, bridge, path, entrance, exit, or passageway. The common meanings of these undefined terms are intended, and they should be construed broadly.

District of Columbia, 976 A.2d 907, 911 (D.C. 2009). Such facts would likely constitute blocking under revised statute because the entryway was rendered impassable without unreasonable hazard.

[36] D.C. Code § 22-1307.

[37] D.C. Code § 5-331.01 *et seq*. D.C. Code § 5-331.05(a) states that "It shall not be an offense to assemble or parade on a District street, sidewalk, or other public way, or in a District park, without having provided notice or obtained an approved assembly plan." However, this broad exception is limited by D.C. Code § 5-331.05(a), which provides that a plan is required unless certain exceptions are made. D.C. Code § 5-331.05(d) provides the exceptions, which include situations where:

> "(1) The assembly will take place on public sidewalks and crosswalks and will not prevent other pedestrians from using the sidewalks and crosswalks;
>
> (2) The person or group reasonably anticipates that fewer than 50 persons will participate in the assembly, and the assembly will not occur on a District street; or
>
> (3) The assembly is for the purpose of an immediate and spontaneous expression of views in response to a public event."

[38] D.C. Code § 22-1323.

Fourth, the revised offense blocking a public way offense merges in the existing District offense for obstructing bridges connecting D.C. and Virginia statute.[39] A separate statute regarding bridges to Virginia is unnecessary. The revised statute specifically lists bridges as one of the covered locations, and the revised statute is intended to cover bridges to the same extent as the prior statute.[40]

[39] D.C. Code § 22-1323 ("Effective with respect to conduct occurring on or after August 5, 1997, whoever in the District of Columbia knowingly and willfully obstructs any bridge connecting the District of Columbia and the Commonwealth of Virginia: (1) Shall be fined not less than $1,000 and not more than $5,000, and in addition may be imprisoned not more than 30 days; or (2) If applicable, shall be subject to prosecution by the District of Columbia under the provisions of District law and regulation amended by the Safe Streets Anti-Prostitution Amendment Act of 1996.").

[40] Notably, unlike the revised Blocking a Public Way offense, current D.C. Code § 22-1323 does not require a lawful law enforcement order. Additionally, current law authorizes a fine of $5,000, making it a jury-demandable offense. D.C. Code § 16-705(b)(1)(A).

RCC § 22E-4204. Unlawful Demonstration.

Explanatory Note. *This section establishes the unlawful demonstration offense for the Revised Criminal Code (RCC). The offense proscribes knowingly engaging in conduct that constitutes a demonstration, in locations where demonstration is prohibited by law, after receiving a law enforcement order to stop such conduct. The revised Unlawful Demonstration offense and revised Blocking a Public Way offense[1] together replace the current District offense of Crowding, obstructing, or incommoding.[2]*

Paragraph (a)(1) describes the conduct required for the offense: engaging in a demonstration. The term "demonstration" is defined in RCC § 22E-701 and means marching, congregating, standing, sitting, lying down, parading, demonstrating, or patrolling by one or more persons, with or without signs, for the purpose of persuading one or more individuals, or the public, or to protest some action, attitude, or belief. Paragraph (a)(1) also specifies that the person must act "knowingly," a term that is defined in RCC § 22E-206 and here requires that the defendant at least be aware to a practical certainty that his or her conduct constitutes a demonstration.

Paragraph (a)(2) requires that the defendant engage in a demonstration in a place where such demonstration is otherwise unlawful. Thus, if a civil or criminal statute specifically prohibits a demonstration inside the United States Capitol[3] or the Supreme Court,[4] a person may commit the revised unlawful demonstration offense by engaging in a demonstration in that location. However, there is no liability for unlawful demonstration unless some other law prohibits demonstration in that location.[5] Per the rule of construction in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2), here requiring the defendant at least to be aware to a practical certainty that the location is one where demonstration is otherwise unlawful.

Paragraph (a)(3) requires the government to prove that the accused received a law enforcement order to stop demonstrating and that the accused disregarded that directive. Per the rule of construction in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(3). "Knowingly" is a defined term[6] and here means the person must be practically certain that he or she received an order from someone he or she is practically certain is a law enforcement officer.[7] "Law enforcement officer" is a defined term.[8] The order may be personalized to the individual or directed to an entire group, and may be articulated in various ways so long as the meaning is clear. There is no requirement that the police order indicate the reasons for the order. The

[1] RCC § 22E-4203.
[2] D.C. Code § 22-1307.
[3] D.C. Code § 10-503.16.
[4] 40 U.S.C. § 6135.
[5] For example, absent any law prohibiting demonstration on a particular sidewalk, an advocacy group does not commit unlawful demonstration by standing on that sidewalk and soliciting petition signatures or donations. Similarly a group of laborers who are picketing on a sidewalk does not commit unlawful demonstration absent a law prohibiting demonstration in that location. Notably, a person may be liable under RCC § 22E-4203, blocking a public way, for related conduct.
[6] RCC § 22E-206.
[7] A person who does not know the speaker is a law enforcement officer or who does not know the order is directed to them does not commit blocking a public way.
[8] RCC § 22E-701.

person must be afforded fair notice and a reasonable opportunity to comply with the law enforcement order to stop demonstrating.[9] Where a person is uncertain as to whether they can safely comply with the order, a justification defense may apply. The accused must also be practically certain that his or her action constitutes a continuance or resumption of the demonstrating conduct that was the object of the law enforcement officer order

Subsection (b) cross-references the U.S. Constitution, the District's First Amendment Assemblies Act, and the District's Open Meetings Act. This conflict-of-laws provision is intended to encourage readers to consider what First Amendment polices, if any, are implicated by prosecutions of the offense and makes clear that this language leaves the Acts unchanged. Not all conduct involved in the offense, of course, will implicate First Amendment rights.

Subsection (c) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (d) provides a jury trial for defendants charged with unlawful demonstration or attempted unlawful demonstration. Inclusion of a jury trial right is intended to ensure that the First Amendment rights of demonstrators are not infringed. The District has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve exercise of civil liberties.[10]

Subsection (e) provides the penalties for the offense. [RESERVED.]

Subsection (f) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised unlawful demonstration statute changes existing District law in one main way.*

The revised statute specifies that a person has a right to demand a jury trial for a charge of unlawful demonstration. Currently, the offense has no specific provision providing for a jury trial, and an offense punishable by a maximum of 90 days imprisonment and a $500 fine otherwise is not a jury demandable offense under the D.C. Code.[11] In contrast, through subsection (d), the revised offense specifically provides a right for the defendant to demand a jury trial, regardless of the imprisonment penalty. In the District, crimes involving First Amendment implications are typically afforded a right to a jury trial, regardless of the low-level penalty.[12] This change improves the clarity and proportionality of the revised offense.

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[9] *See* RCC § 22E-203 (requiring physical capacity to perform a required legal duty); *Conley v. United States*, 79 A.3d 270, 292-293 (D.C. 2013) (explaining voluntariness requires a reasonable opportunity to comply with a legal duty); *Lambert v. People of the State of California*, 355 U.S. 225, 229 (1957) (reversing a conviction where, on first becoming aware of her duty, the appellant had no opportunity to comply with the law and avoid its penalty.) *see also Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006) (requiring an opportunity to comply with a dispersal order); *Dellums v. Powell*, 566 F.2d 167, 181 n.31 (D.C. Cir. 1977); *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 126 n.5 (D.C. Cir. 1977).

[10] *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.").

[11] D.C. Code § 16-705.

[12] *E.g.*, Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 11 (amending unlawful entry, D.C. Code § 22-3302). When considering whether to offer a jury trial for unlawful entry, the Judiciary Committee recently reasoned that "because unlawful entry is frequently charged against civil

Beyond this substantive change to current District law, one other aspect of the revised unlawful demonstration statute may constitute a substantive change of law.

First, the revised statute clarifies that a culpable mental state of "knowingly" applies to all elements of the offense, except strict liability is required as to the fact that demonstration in the location is otherwise unlawful under District of Columbia or federal law. The current statute is silent as to culpable mental state elements. There is no case law on the unlawful demonstration portion of the crowding, obstructing, or incommoding offense.[13] To resolve this ambiguity, the revised statute specifies a knowledge culpable mental state requirement to most elements, except it applies strict liability to the unlawfulness of demonstrating in the particular location. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[14] Given that the current and revised statute require a warning from a law enforcement officer to the defendant, a defendant will typically have actual knowledge that he or she is demonstrating in an area where demonstration is not permitted. However, given that failure to obey a lawful law enforcement order likely already involves prohibited conduct,[15] strict liability is imposed as to the additional fact of the location being barred from demonstration under another law. This change improves the clarity and completeness of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

First, the revised statute, in combination with blocking a public way, RCC § 22E-4203, divides and replaces the current District offense of crowding, obstructing, or incommoding.[16] The revised blocking a public way offense effectively replaces subsection (a) of the current law and the revised unlawful demonstration offense replaces subsection (b). This logically reorganizes the offense, given that each provision describes markedly different conduct.

Second, the revised statute adds an explicit cross-reference in subsection (b) to the First Amendment Assemblies Act of 2004 (FAAA), a statutory regime codified in Title 5,[17] as well as the U.S. Constitution and the District's Open Meetings Act. Part of the

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demonstrators, the Committee rejected the provision in bill [sic] making this a nonjury demandable crime (180 days rather than six months)."

[13] D.C. Code § 22-1307(b). Note that this portion of the statute is new, having been introduced as legislation in as part of the omnibus Criminal Code Amendments Act of 2012 at the suggestion of the United States Attorney. Report on Bill 19-645, the "Criminal Code Amendments Act of 2012," Council of the District of Columbia Committee on the Judiciary (December 1, 2012).

[14] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted.)").

[15] *See* 18 DCMR § 2000.2 and RCC § 22E-4203.

[16] D.C. Code § 22-1307.

[17] D.C. Code § 5-331.01 *et seq*. D.C. Code § 5-331.05(a) states that "It shall not be an offense to assemble or parade on a District street, sidewalk, or other public way, or in a District park, without having provided notice or obtained an approved assembly plan." However, this broad exception is limited by D.C. Code § 5-331.05(a), which provides that a plan is required unless certain exceptions are made. D.C. Code § 5-331.05(d) provides the exceptions, which include situations where:

FAAA, D.C. Code § 5-331.05(d), describes situations where an assembly "does not constitute an offense." The reference to the FAAA gives clearer notice that the FAAA may narrow conduct otherwise covered by the revised unlawful demonstration offense.

RCC § 22E-4301. Rioting.

Explanatory Note. *This section establishes the rioting offense for the Revised Criminal Code (RCC). The offense proscribes knowingly participating in a group of eight or more people who are each personally engaging in a criminal harm involving injury, property loss, or property damage. The revised offense replaces D.C. Code § 22-1322 (Rioting or inciting to riot).*

Paragraph (a)(1) requires that the accused act "knowingly," a defined term,[18] which here means the person must be practically certain that he or she is personally attempting or committing a District crime involving bodily injury, taking of property, or damage to property.[19] A person who is engaging in conduct that is merely obnoxious, disruptive, or provocative is not liable for rioting.[20] "Bodily injury" is defined in RCC § 22E-701 and means physical pain, illness, or any impairment of physical condition. "Property" is defined in RCC § 22E-701 and means "anything of value." Conduct that threatens a non-criminal harm or a harm not involving bodily injury, taking of property, or damage to property[21] is not a predicate for rioting liability.

Paragraph (a)(2) requires proof that seven or more persons are also engaged in riotous conduct at the same time, in the same place. The riotous conduct of other persons need not be the precise type of conduct the actor is engaged in, but must also be criminal harm involving bodily injury, taking of property, or damage to property.[22] The revised statute does not require that the eight people act in concert with one another[23] or organize

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"(1) The assembly will take place on public sidewalks and crosswalks and will not prevent other pedestrians from using the sidewalks and crosswalks;

(2) The person or group reasonably anticipates that fewer than 50 persons will participate in the assembly, and the assembly will not occur on a District street; or

(3) The assembly is for the purpose of an immediate and spontaneous expression of views in response to a public event."

[18] RCC § 22E-206.

[19] RCC offenses that involve bodily injury, loss of property, or damage to property include: Assault (RCC § 22E-1202), Robbery (RCC § 22E-1201), Murder (RCC § 22E-1101), Theft (RCC § 22E-2101), Arson (RCC § 22E-2501), Criminal Damage to Property (RCC § 22E-2503), and Criminal Graffiti (RCC § 22E-2504).

[20] The RCC does not outlaw "all 'offensive conduct' that disturbs 'any neighborhood or person.'" *See Cohen v. California*, 403 U.S. 15, 22 (1971); *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508-09 (1969)("[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression…[T]o justify prohibition of a particular expression of opinion, [the State] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.").

[21] For example, the RCC criminal threats statute is not included in the scope of the revised rioting statute.

[22] For example, a person may engage in rioting by spray painting graffiti on a building while a dozen others are breaking windows and assaulting a security guard nearby.

[23] The revised code does not incorporate the common law requirement that persons act "with intent mutually to assist each other against any who shall oppose them." *Riot*, Black's Law Dictionary (2nd Ed.).

together in advance.[24] However, the others' conduct must be in a location where the actor can see or hear their activities.[25] Paragraph (a)(2) also requires a culpable mental state of recklessness, a term defined in RCC § 22E-206, which here means the accused must disregard a substantial risk that seven or more persons are engaged in riotous conduct nearby. A person who is merely present in or near a riot is not criminally liable under the revised rioting statute,[26] nor is a person engaged in First Amendment activities or seeking to prevent criminal activities liable.[27]

Subsection (b) excludes constitutionally protected activity from the revised statute's reach and cross-references the U.S. Constitution, the District's First Amendment Assemblies Act, and the District's Open Meetings Act. This conflict-of-laws provision is intended to encourage readers to consider what First Amendment polices, if any, are implicated by prosecutions of the offense and makes clear that the revised statute leaves all rights conferred under these Acts unchanged. Not all conduct involved in the offense, of course, will implicate First Amendment rights.

Subsection (c) specifies that there is no attempt liability for the rioting offense as a whole. However, attempts to commit specified District crimes are part of the element specified in paragraph (a)(1).

[Subsection (d) provides a jury trial for defendants charged with rioting. Inclusion of a jury trial right is intended to ensure that the First Amendment rights of demonstrators are not infringed. The District has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve exercise of civil liberties.[28]]

Subsection (e) provides the penalty for this offense. [RESERVED.]

Subsection (f) cross-references applicable definitions in the RCC.

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[24] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("It is not necessary for the members of the assemblage to have acted pursuant to an agreement or plan, either made in advance or made at the time, or for the members to concentrate their conduct on a single piece of property or one or more particular persons. The Defendant does not have to personally know or be acquainted with the other members of the assemblage. The other members of the assemblage need not be identified by name or their precise number established by the evidence.").

[25] Distances may vary widely, depending on facts including crowd density, noise, and height. *See United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("In determining whether there was an assemblage, you may take into account only what was taking place in the general vicinity where the Defendant is claimed to have engaged in the public disturbance. You may consider only the acts, shouts and noise of individuals engaged in tumultuous and violent conduct within the general awareness of the Defendant, that is, the activities which on the evidence you find he could reasonably have been expected to see or to hear at or about the time he engaged in the public disturbance if, in fact, you determine he did so engage.").

[26] S*ee United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("The mere accidental presence of the Defendant among persons engaged in such a public disturbance, however, without more, does not establish willful conduct or involvement.").

[27] For example, the following persons are not liable under the RCC rioting statute: a journalist who is present to observe and report on riotous activities; a demonstrator (or counter-demonstrator) who decides to peacefully remain at a particular location in protest; a community leader who acts as a "counterrioter" and attempts to calm the crowd; or a local resident using public ways to leave and return home through a group engaged in riotous activity.

[28] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 7 ("Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties.").

Relation to Current District Law. *The revised rioting statute changes current District law in four main ways.*

First, the revised rioting statute has only one gradation that addresses attempted and completed criminal harms involving bodily injury, taking of property, or damage to property. The current rioting statute addresses a "public disturbance" that involves "tumultuous and violent conduct" and is divided into two sentencing gradations.[29] The lower grade consists of such conduct that merely "creates grave danger of damage or injury to property or persons" or incites persons to such risk-creating behavior.[30] Limited case law indicates that this lower grade does not include "minor breaches of the peace," but instead reaches "frightening group behavior" and "will usually be accompanied by the use of actual force or violence against property or persons."[31] The higher grade consists of inciting such conduct that actually causes "serious bodily harm or there is property damage in excess of $5,000."[32] The current statute's higher gradation has a maximum penalty twenty-times that of the lower gradation.[33] In contrast, the revised statute consists of one penalty gradation based on the attempt or commission of actual criminal harms involving bodily injury, taking of property, or damage to property. Revising the statute to require the attempt or commission of actual harms by the actor more clearly distinguishes rioting liability from minor breaches of the peace by a group, and, unlike the current statute, does not base the degree of punishment on the extent of others' misconduct.[34] Or, in the case of police-monitored crowds, such conduct may violate the RCC failure to disperse offense.[35] This change improves the clarity, consistency, and proportionality of the revised statute.

Second, the revised statute requires eight people to form riot. The District's current rioting statute states that a riot is a "public disturbance involving an assemblage of 5 or more persons..."[36] Legislative history indicates that the threshold of five people was a subjective judgment based, in significant part, on administrative considerations that it is more convenient to prosecute five or more defendants together for the composite offense of rioting than to prosecute them separately for the underlying assault and

[29] D.C. Code § 22-1322(a).
[30] D.C. Code §§ 22-1322(b) and (c).
[31] *United States v. Matthews*, 419 F.2d 1177, 1184-85 (1969) ("The conduct involved must be something more than mere loud noise-making or minor breaches of the peace. The offense requires a condition that has aroused or is apt to arouse public alarm or public apprehension where it is occurring. It involves frightening group behavior. Tumultuous and violent conduct will usually be accompanied by the use of actual force or violence against property or persons. At the very least it must be such conduct as has a clear and apparent tendency to cause force or violence to erupt and thus create a grave danger of damage or injury to property or persons.").
[32] D.C. Code § 22-1322(d).
[33] The maximum imprisonment penalty for violations of subsection (b) and (c) is 180 days, compared to a 10-year maximum for a violation of subsection (d).
[34] The felony gradation in subsection (c) of the current rioting statute does not specify any culpable mental state as to the amount of overall injury resulting from the riot. Strict liability for the results of the riot would mean that a person would be liable even if a factfinder found that the defendant could not and should not have been expected to know that the bad results could occur—the defendant is liable even for unforeseeable accidents that may arise from the unanticipated actions of others in the disorderly group.
[35] RCC § 22E-4302.
[36] D.C. Code § 22-1322(a).

property offenses.[37] In contrast, the revised statute raises the number of people that must be involved in riotous conduct to eight. This number excludes many common types of group misconduct from being categorized as a riot,[38] focusing the offense on large-scale events that may give rise to a mob mentality and overwhelm the ability of a few law enforcement officers to control the scene. This change improves the proportionality of the revised offense and reduces an unnecessary overlap between the composite offense of rioting and common occurrences of predicate offenses.

Third, the revised statute eliminates incitement as a distinct basis for rioting liability.[39] Subsection (c) of the current rioting statute separately criminalizes behavior that "incites or urges other persons to engage in a riot," and subsection (d) imposes heightened liability for conduct that "incited or urged others to engage in the riot" and serious bodily harm or property damage in excess of $5,000 resulted.[40] The terms "incite" and "urge" are not defined in the statute or in case law.[41] Legislative history suggests that Congress' targeting of incitement as a form of rioting may have been based on an assumption about the operation of race riots in the 1960s—subsequently deemed erroneous—that they were premeditated and orchestrated.[42] Regardless, legislative history suggests that both "incite" and "urge" were understood as terms "nearly synonymous with 'abet'" and refer to words or actions that "set in motion a riotous situation."[43] In contrast, under the revised statute, a person who "incites" or "encourages" rioting is only liable if his or her conduct suffices to meet requirements for

[37] *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967 (Fred M. Vinson, Jr., Assistant Attorney General, Criminal Division, Department of Justice: "There are statutes in the states going as high as ten people. There is one statute that may go as high as 20 people. The New York statute is four people. Several statutes are five people. It was our subjective judgment that five or more people might rise to the dignity of a riot. Certainly fewer people than that can cause great trouble. However, fewer people than that causing trouble are much easier to handle, prosecutively, with regard to substantive offenses."); *see also United States v. Bridgeman*, 523 F.2d 1099, 1113 (D.C. Cir. 1975) (finding that the District's rioting statute was a codification of common law rioting except for its requirement of 5 participants).

[38] Common examples include a three-versus-three, mutually-agreed upon street fight and a five-co-defendant robbery.

[39] Speech that incites violence as punished as disorderly conduct. RCC § 22E-4001(a)(2)(B). Abusive speech that is likely to provoke violence is punished as disorderly conduct. RCC § 22E-4001(a)(2)(C).

[40] D.C. Code § 22-1322(c).

[41] *But see United States v. Jeffries*, 45 F.R.D. 110, 117 (D.D.C. 1968) ("In the District of Columbia riot statute speech is only regulated under (b) where it is so closely brigaded with illegal action as to be an inseparable part of it.") (citing *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General of Com. of Massachusetts*, 383 U.S. 413, 426 (1966) (J. Douglas concurring)).

[42] In support of the Anti-Riot Act, Rep. Joel Broyhill testified that recent District riots were premeditated, proclaiming, "These outbreaks of lawlessness that have become a scourge throughout this nation are not spontaneous in their origin. They are conceived in the twisted minds of the hate-mongers, a trained cadre of professional agitators who operate in open defiance of law, order, and decency…They plot the destruction…with zeal and devotion to stealth and secrecy." *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Page 7. However, in 1968, President Johnson's "Kerner Commission" completed an in-depth study of riots in ten American cities. One of the commission's key findings was that "The urban disorders of the summer of 1967 were not caused by, nor were they the consequence of any organized plan or 'conspiracy.'" National Advisory Commission on Civil Disorders Report, February 29, 1968, at Page 4.

[43] *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Pages 23-25.

liability as an accomplice[44] or is part of a criminal conspiracy.[45] The revised statute relies on general provisions regarding accomplice and conspiracy liability to more precisely establish the limits of what instances of "incitement" or "urging" are criminal, and to provide a proportionate penalty for acting as an accomplice or co-conspirator. This change improves the clarity, consistency, and proportionality of the revised offense.

Fourth, the revised offense bars any attempt liability. Under current law, rioting or inciting to riot is subject to the general attempt statute.[46] In contrast, under the revised offense, even if a person satisfies the required elements for attempt liability under RCC § 22E-301 as to rioting, that person has committed no offense under the revised code. Completed rioting is already an inchoate crime, closely related to predicate offenses involving bodily injury, taking of property, and damage to property, for which the RCC provides separate liability. This change improves the proportionality of the revised statute.

Beyond these changes to current District law, one other aspect of the revised rioting statute may be viewed as a substantive change of law.

The revised statute does not require that rioting occur in a public location. The current rioting statute defines rioting as a "public disturbance," but does not explain whether the term "public" refers to the character of the location of the riot or to the persons whose tranquility is disturbed. There is no case law on point.[47] In contrast, the revised statute provides that where eight or more people are simultaneously engaging in conduct that causes injury or damage, that group conduct amounts to a riot, irrespective of where it occurs. Such disturbances, whether in a sports arena or Congress,[48] run a similar risk of escalating into mob-like action. This change clarifies the revised statute and eliminates an unnecessary gap in liability.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

First, the revised statute clarifies that an unlawful taking of property may be a predicate for rioting liability. The current rioting statute[49] criminalizes "tumultuous or violent conduct or the threat thereof [that] creates grave danger of damage or injury to property or persons." District case law has established that this reference to "injury to property" includes "either actual physical damage to property or the taking of another's

[44] *See* RCC § 22E-210.
[45] *See* RCC § 22E-303.
[46] D.C. Code § 22-1803 ("Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both.").
[47] *But see, e.g., Ramsey v. United States*, 73 A.3d 138, 147 (D.C. 2013) (reversing a conviction for disorderly conduct, with an element that location of the offense be open to the general public, where the defendant was alleged to have attempted to urinate in a secluded, dark alley, away from any businesses, residences, or people).
[48] *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/).
[49] DC Code § 22-1322.

property without the consent of the owner."[50] The revised rioting statute specifically refers to conduct that not only involves unlawful "damage" to property but also unlawful "taking" of property. This change clarifies the revised statute.

Second, the revised rioting statute replaces the archaic term "assemblage" with a reference to other persons being in a location where the actor can perceive them at the time of the target conduct, and requires a culpable mental state of recklessness as to their activities. The current law defines a riot as an "assemblage of 5 or more persons,"[51] but does not define "assemblage." District case law, however, has held that an "assemblage" refers to a group of people in close physical proximity to the defendant such that the person could "could reasonably have been expected to see or to hear" their action.[52] The revised statute codifies and clarifies this requirement as to others nearby activities by using the standard culpable mental state definition of "reckless." The actor need not be practically certain as to the scope and nature of others' activities, but must be aware of a substantial risk as to the others' numbers and conduct. No special connection or common purpose is required of the other persons engaged in unlawful conduct. This change clarifies and improves the consistency of the revised statute.

Third, the revised statute requires a culpable mental state of knowledge for an actor engaging in the riotous conduct. The current rioting statute specifies that a person must "willfully" engage in, incite, or urge a riot,[53] however, the current statute does not define "willfully." District case law states that "willfulness" is required of each of the other riot participants also.[54] The RCC clarifies this culpable mental state requirement as to riotous activities by using the standard definition of knowledge[55] as the culpable mental state for paragraph (a)(1). Applying a knowledge culpable mental state requirement to interpret statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[56] This change clarifies and improves the consistency of the revised statute.

Fourth, the revised rioting offense explicitly excludes protected activity from liability. The current rioting statute does not reference any protections for freedom of expression or assembly. Legislative history suggests the First Amendment was not a significant consideration for at least some of the law's original Congressional

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[50] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969).
[51] D.C. Code § 22-1322(a).
[52] *See United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("In determining whether there was an assemblage, you may take into account only what was taking place in the general vicinity where the Defendant is claimed to have engaged in the public disturbance. You may consider only the acts, shouts and noise of individuals engaged in tumultuous and violent conduct within the general awareness of the Defendant, that is, the activities which on the evidence you find he could reasonably have been expected to see or to hear at or about the time he engaged in the public disturbance if, in fact, you determine he did so engage.").
[53] D.C. Code § 22-1322.
[54] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("[Willfully] means the Defendant and at least four members of the assemblage participated in the public disturbance on purpose, that is, that each knowingly and intentionally engaged in tumultuous and violent conduct consciously, voluntarily and not inadvertently or accidentally.").
[55] RCC § 22E-206.
[56] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (a defendant generally must "know the facts that make his conduct fit the definition of the offense," even if he does not know that those facts give rise to a crime. (Internal citation omitted)).

supporters.[57] The RCC rioting statute aims to avoid constitutional vagueness challenges and, through subsection (b) of the revised statute, give notice of free speech considerations. This change clarifies the revised statute.

RCC § 22E-4302. Failure to Disperse.

Explanatory Note. *This section establishes the new failure to disperse offense for the Revised Criminal Code (RCC). The offense does not exist under current District law but is closely related to conduct already punished in D.C. Code § 22-1322 (Rioting or inciting to riot) and 18 DCMR § 2000.2 (Failure to obey a lawful police order).*[58]

Paragraph (a)(1) requires that the accused act "knowingly," a term defined in RCC § 22E-206, that here means a person must be practically certain that he or she received a dispersal order from someone he or she is practically certain is a law enforcement officer.[59] "Law enforcement officer" is a defined term.[60] The order may be personalized to the individual or directed to an entire group, and may be articulated in various ways so long as the meaning is clear. There is no requirement that the police order indicate the reasons for the dispersal order. The person must be afforded fair notice and a reasonable opportunity to comply with the law enforcement order to disperse from the scene.[61] Where a person is uncertain as to whether they can safely comply with the dispersal order, a justification defense may apply.

Paragraph (a)(2) requires proof that eight or more persons are engaged in riotous conduct at the same time, in the same place. The riotous conduct of other persons need not be identical, but each person's conduct must be criminal harm involving bodily injury, taking of property, or damage to property.[62] The revised statute does not require that the eight people act in concert with one another[63] or organize together in advance.[64]

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[57] In support of the current rioting law, Rep. Joel Broyhill argued, "Those who incite others to violence should be punished whether or not their freedom of speech is involved." *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Page 9. This position is directly at odds with the First Amendment to the United States Constitution and with the District's First Amendment Assemblies Act of 2004. D.C. Code § 5-331.01. The revised statute more precisely recognizes that freedom of expression and assembly do not extend to all language or to all assemblies.

[58] The failure to disperse offense does not replace or subsume the existing regulation in 18 DCMR § 2000.2.

[59] A person who does not know the speaker is a law enforcement officer or who does not know the order is directed to them does not commit failure to disperse.

[60] RCC § 22E-701.

[61] *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).

[62] For example, a person may engage in rioting by spray painting graffiti on a building while a dozen others are breaking windows and assaulting a security guard nearby.

[63] The revised code does not incorporate the common law requirement that persons act "with intent mutually to assist each other against any who shall oppose them." *Riot*, Black's Law Dictionary (2nd Ed.).

However, the others' conduct must be in a location where the actor can see or hear their activities.[65] Paragraph (a)(2) also requires a culpable mental state of recklessness, a term defined in RCC § 22E-206, which here means the accused must disregard a substantial risk that eight or more persons are engaged in riotous conduct nearby.

Paragraph (a)(3) requires that the presence of the person substantially impairs the ability of a law enforcement officer to stop the riotous conduct. The impairment must be substantial, not trivial, and is a highly fact-specific assessment.[66] The term 'in fact' here means that no culpable mental state is required as to the need for the order to disperse, but the objective fact still must be proven that the actor's presence substantially impairs the ability of a law enforcement officer to stop the conduct. False assertions that an actor must disperse because they are substantially impairing the law enforcement response would not satisfy this element of the failure to disperse offense.

Subsection (b) cross-references the U.S. Constitution, the District's First Amendment Assemblies Act, and the District's Open Meetings Act. This conflict-of-laws provision is intended to encourage readers to consider what First Amendment polices, if any, are implicated by prosecutions of the offense and makes clear that this language leaves the Acts unchanged. Not all conduct involved in the offense, of course, will implicate First Amendment rights.

[Subsection (c) provides a jury trial for defendants charged with failure to disperse or attempted failure to disperse. Inclusion of a jury trial right is intended to ensure that the First Amendment rights of demonstrators are not infringed. The District has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve exercise of civil liberties.[67]]

Subsection (d) provides the penalties for the offense. [RESERVED.]

Subsection (e) cross-references applicable definitions in the RCC.

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[64] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("It is not necessary for the members of the assemblage to have acted pursuant to an agreement or plan, either made in advance or made at the time, or for the members to concentrate their conduct on a single piece of property or one or more particular persons. The Defendant does not have to personally know or be acquainted with the other members of the assemblage. The other members of the assemblage need not be identified by name or their precise number established by the evidence.").

[65] Distances may vary widely, depending on facts including crowd density, noise, and height. *See United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("In determining whether there was an assemblage, you may take into account only what was taking place in the general vicinity where the Defendant is claimed to have engaged in the public disturbance. You may consider only the acts, shouts and noise of individuals engaged in tumultuous and violent conduct within the general awareness of the Defendant, that is, the activities which on the evidence you find he could reasonably have been expected to see or to hear at or about the time he engaged in the public disturbance if, in fact, you determine he did so engage.").

[66] For example, the need for a law enforcement officer to walk around a peaceable demonstrator in order to reach the place where the group disorderly conduct is occurring would not, alone, amount to substantial impairment. On the other hand, peaceful demonstrators linking arms in a manner that blocks police access to a site where rioters are engaged in setting fire to a building may amount to substantial impairment. Relevant considerations may include: the delay in response time to the arson due to the demonstrators' continued presence, the potential severity of the arson, and the vulnerability of the demonstrators to unintended harm if there is resistance by those committing arson to the course of a law enforcement response.

[67] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 7 ("Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties.").

Relation to Current District Law. *Failure to disperse is a new offense and, in that sense, all aspects of the crime are substantive changes to District law. However, as compared to the District's current rioting*[68] *and failure to obey a lawful police order*[69] *laws, four aspects of the revised offense may constitute substantive changes of law.*

First, the RCC failure to disperse statute specifies that a culpable mental state of knowing is required for failing to disperse. The current D.C. Code does not include a failure to disperse offense but it does punish rioting[70] which requires "willful" conduct. A District municipal regulation criminalizes failure to obey a lawful police order,[71] and case law holds that a knowing refusal to obey a lawful order is sufficient for liability.[72] The RCC clearly specifies that knowledge, defined in RCC § 22E-206, is the applicable mental state. The focus of the offense is the person's response to a law enforcement order. Applying a knowledge culpable mental state requirement to interpret statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[73] This change improves the clarity and the consistency of the revised offense, and, to the extent it may require a new culpable mental state as to some of the principal elements of the offense, improves its proportionality.[74]

Second, the revised statute specifies that no culpable mental state needs to be proven as to the substantial impairment to law enforcement resulting from the person's failure to disperse. The current District regulation in 18 DCMR § 2000.2 is silent as to the culpable mental state, if any, required for this element of the offense. Case law interpreting 18 DCMR § 2000.2 suggests that a person need not believe or agree that an order is lawful before being required to obey it.[75] The RCC clearly specifies that no culpable mental state is required as to this element. The focus of the revised offense is the person's response to a law enforcement order and, in some situations, a person in a crowd may not know that their continued presence in the crowd substantially impairs law enforcement's ability to respond. Applying strict liability to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[76] This change improves the clarity and consistency of the revised offense.

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[68] D.C. Code § 22-1322.
[69] 18 DCMR § 2000.2.
[70] D.C. Code § 22-1322.
[71] 18 DCMR § 2000.2.
[72] *Karriem v. District of Columbia*, 717 A.2d 317, 322 (D.C. 1998) ("According to his own testimony, Karriem *knowingly* refused to comply with lawful police orders. That refusal provided an objective basis for the police officers' probable cause determination, and thus as a matter of law their arrest of Mr. Karriem was valid.") (emphasis added).
[73] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).
[74] Were a person strictly liable for conduct that causes liability under 18 DCMR § 2000.2, even mistakes or accidents by a defendant could be the basis of criminal liability for failing to obey a lawful police order. For example, a person who starts to disperse but twists their ankle and cannot move further without severe pain would be liable.
[75] *Karriem v. District of Columbia*, 717 A.2d 317, 322 (D.C. 1998).
[76] *Elonis v. United States*, 135 S. Ct. 2001, 2010 (2015)("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, (2000) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)).

Third, the revised statute specifies that a reckless culpable mental state must be proven as to the existence of riotous activity nearby. This culpable mental state of recklessness as to the criminal conduct being attempted or committed in the area perceptible to the actor distinguishes the culpability of an actor for the crime of failure to disperse as compared to the civil penalties for failure to obey a law enforcement officer's order per 18 DCMR § 2000.2 (Failure to obey a lawful police order). This change improves the consistency and proportionality of the revised offenses.

Fourth, the revised offense requires eight or more actors be engaged in riotous activity for an actor to be liable for failure to disperse liability. Current District law defines a riot as five or more people engaged in "tumultuous and violent conduct,"[77] in part because it is more convenient to prosecute five or more defendants together for the composite offense of rioting than to prosecute them separately for the underlying assault and property offenses.[78] However, there are many instances in which a group of five disorderly persons may not rise to the level of a riot.[79] This change reduces unnecessary overlap between the composite offense of rioting and the underlying substantive offenses.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

The revised offense requires proof that the person's continued presence substantially impairs the ability of a law enforcement officer to stop the riotous conduct of others nearby. In such circumstances, a law enforcement order to disperse is a "lawful" order under current District law. Under current law, a refusal to follow a necessary[80] and lawful[81] move-on order may subject a person to arrest in a variety of circumstances.[82] Crowd control measures in current law are designed to ensure law enforcement has adequate authority to immediately intervene when necessary to restore public order.[83] The revised offense merely clarifies the particular circumstances in which a law enforcement dispersal order is valid.

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[77] D.C. Code § 22-1322.

[78] *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967 (Fred M. Vinson, Jr., Assistant Attorney General, Criminal Division, Department of Justice: "There are statutes in the states going as high as ten people. There is one statute that may go as high as 20 people. The New York statute is four people. Several statutes are five people. It was our subjective judgment that five or more people might rise to the dignity of a riot. Certainly fewer people than that can cause great trouble. However, fewer people than that causing trouble are much easier to handle, prosecutively, with regard to substantive offenses.").

[79] Examples include a three-versus-three, mutually-agreed upon street fight and a five-co-defendant robbery.

[80] *See Bolz v. District of Columbia*, 149 A.3d 1130, 1137 (D.C. 2016).

[81] *See Streit v. District of Columbia*, 26 A.3d 315, 319 (D.C. 2011).

[82] *See, e.g.*, 18 DCMR § 2000.2 (Failure to Obey a Lawful Order of a Police Officer); 24 DCMR § 2100 (Crowd and Traffic Control); D.C. Code § 22-1307 (Crowding, obstructing, or incommoding); D.C. Code § 22-1314.02 (Prohibited acts); D.C. Code § 22-1321 (Obstructing bridges connecting D.C. and Virginia); D.C. Code § 22-2752 (Engaging in an unlawful protest targeting a residence); D.C. Code § 22-3302 (Unlawful entry on property); D.C. Code § 22-3321 (obstructing public highway).

[83] "The goal of restoring public order comes from the concern that citizens who are being bothered or annoyed might choose violent self-help when someone is being loud on the street or otherwise causing a disturbance." Report on Bill 18-425, "Disorderly Conduct Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (November 19, 2010) at Page 3.